

# YEARBOOK

Volume XLII: 2011



UNITED NATIONS

UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW

YEARBOOK

Volume XLII: 2011



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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.

Changes of and additions to wording that appeared in earlier drafts of conventions, model laws and other legal texts are in italics, except in the case of headings to articles, which are in italics as a matter of style.

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## INTRODUCTION

This is the forty-second volume in the series of *Yearbooks* of the United Nations Commission on International Trade Law (UNCITRAL).<sup>1</sup>

The present volume consists of three parts. Part one contains the Commission's report on the work of its forty-fourth session, which was held in Vienna, from 27 June - 8 July 2011, 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 forty-fourth 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 prepared for the Working Groups.

Part three contains summary records, the bibliography of recent writings related to the Commission's work, a list of documents before the forty-fourth session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook*.

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<sup>1</sup> To 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. or document symbol</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

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication Sales No. or document symbol</i>
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
XXIV	1993	E.94.V.16
XXV	1994	E.95.V.20
XXVI	1995	E.96.V.8
XXVII	1996	E.98.V.7
XXVIII	1997	E.99.V.6
XXIX	1998	E.99.V.12
XXX	1999	E.00.V.9
XXXI	2000	E.02.V.3
XXXII	2001	E.04.V.4
XXXIII	2002	E.05.V.13
XXXIV	2003	E.06.V.14
XXXV	2004	E.08.V.8
XXXVI	2005	E.10.V.4
XXXVII	2006	A/CN.9/SER.A/2006
XXXVIII	2007	A/CN.9/SER.A/2007
XXXIX	2008	A/CN.9/SER.A/2008
XL	2009	A/CN.9/SER.A/2009
XLI	2010	A/CN.9/SER.A/2010

*Part One*

REPORT OF THE COMMISSION  
ON ITS ANNUAL SESSION  
AND COMMENTS AND ACTION THEREON



# THE FORTY-FOURTH SESSION (2011)

## A. Report of the United Nations Commission on International Trade Law on its forty-fourth session (Vienna, 27 June-8 July 2011) (A/66/17)

[Original: English]

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## **I. Introduction**

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-fourth session of the Commission, held in Vienna from 27 June to 8 July 2011.
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.

## **II. Organization of the session**

### **A. Opening of the session**

3. The forty-fourth session of the Commission was opened on 27 June 2011.

### **B. Membership and attendance**

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 22 May 2007, on 3 November 2009 and on 15 April 2010, 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:<sup>1</sup> Algeria (2016), Argentina (2016), Armenia (2013), Australia (2016), Austria (2016), Bahrain (2013), Benin (2013), Bolivia (Plurinational State of) (2013), Botswana (2016), Brazil (2016), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2016), Czech Republic (2013), Egypt (2013), El Salvador (2013), Fiji (2016), France (2013), Gabon (2016), Georgia (2015), Germany (2013), Greece (2013), Honduras (2013), India (2016), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2013), Jordan (2016), Kenya (2016), Latvia (2013), Malaysia (2013), Malta (2013), Mauritius (2016), Mexico (2013), Morocco (2013), Namibia (2013), Nigeria (2016), Norway (2013), Pakistan (2016), Paraguay (2016), Philippines (2016), Poland (2012), Republic of Korea (2013),

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<sup>1</sup> Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 30 were elected by the Assembly at its sixty-first session, on 22 May 2007 (decision 61/417), 28 were elected by the Assembly at its sixty-fourth session, on 3 November 2009 and two were elected by the Assembly at its sixty-fourth session, on 15 April 2010. By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election. The following six States members elected by the Assembly on 3 November 2009 agreed to alternate their membership among themselves until 2016 as follows: Belarus (2010-2011, 2013-2016), Czech Republic (2010-2013, 2015-2016), Poland (2010-2012, 2014-2016), Ukraine (2010-2014), Georgia (2011-2015) and Croatia (2012-2016).

Russian Federation (2013), Senegal (2013), Singapore (2013), South Africa (2013), Spain (2016), Sri Lanka (2013), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2016) and Venezuela (Bolivarian Republic of) (2016).

5. With the exception of Armenia, Bahrain, Benin, Botswana, Fiji, Gabon, Georgia, Greece, Latvia, Malta, Morocco, Pakistan, Senegal, South Africa and Uganda, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Afghanistan, Angola, Belarus, Belgium, Costa Rica, Croatia, Cuba, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, Guatemala, Indonesia, Iraq, Kuwait, Panama, Peru, Portugal, Qatar, San Marino, Saudi Arabia, Slovakia, Slovenia, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Uruguay and Yemen.

7. The session was also attended by observers from Palestine and the European Union.

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

(a) *United Nations system*: United Nations Conference on Trade and Development (UNCTAD), United Nations Economic Commission for Europe and the World Bank;

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization, Inter-Parliamentary Assembly of the Eurasian Economic Community, International Development Law Organization, International Institute for the Unification of Private Law (Unidroit), Organization for Security and Cooperation in Europe (OSCE) and the World Customs Organization;

(c) *Invited non-governmental organizations*: Asociación Americana de Derecho Internacional Privado, Association droit et méditerranée (Jurimed), China International Economic and Trade Arbitration Commission, Comité Maritime International, European Company Lawyers Association, Forum for International Conciliation and Arbitration, International Air Transport Association, International Chamber of Commerce, International Credit Insurance and Surety Association, International Law Institute, Moot Alumni Association and New York State Bar Association.

9. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial to the quality of texts formulated by the Commission, which requested the Secretariat to continue to invite such organizations to its sessions.

### C. Election of officers

10. The Commission elected the following officers:

*Chair:* Salim MOOLLAN (Mauritius)

*Vice-Chairs:* Marek JEZEWSKI (Poland)  
Carlos SÁNCHEZ MEJORADA Y VELASCO (Mexico)  
Tore WIWEN-NILSSON (Sweden) (elected in his personal capacity)

*Rapporteur:* Mr. Kah Wei CHONG (Singapore)

### D. Agenda

11. The agenda of the session, as adopted by the Commission at its 925th meeting, on 27 June 2011, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of the UNCITRAL Model Law on Public Procurement.
5. Finalization and adoption of judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency.
6. Arbitration and conciliation:
  - (a) Progress reports of Working Group II; and
  - (b) Mediation in the context of settlement of investor-State disputes.
7. Online dispute resolution: progress reports of Working Group III.
8. Insolvency law: progress report of Working Group V.
9. Security interests: progress reports of Working Group VI.
10. Current and possible future work in the area of electronic commerce.
11. Possible future work in the area of microfinance.
12. Endorsement of texts of other organizations: 2010 revision of the Uniform Rules for Demand Guarantees published by the International Chamber of Commerce.
13. Monitoring implementation of the New York Convention.
14. Technical assistance to law reform.
15. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts.
16. Status and promotion of UNCITRAL legal texts.

17. Coordination and cooperation:
  - (a) General;
  - (b) Coordination in the field of security interests;
  - (c) Reports of other international organizations;
  - (d) International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups.
18. Role of UNCITRAL in promoting the rule of law at the national and international levels.
19. International commercial arbitration moot competitions.
20. Relevant General Assembly resolutions.
21. Other business.
22. Date and place of future meetings.
23. Adoption of the report of the Commission.

#### **E. Adoption of the report**

12. At its 941st and 942nd meetings, on 8 July 2011, the Commission adopted the present report by consensus.

### **III. Finalization and adoption of the UNCITRAL Model Law on Public Procurement**

#### **A. Introduction**

13. The Commission recalled its previous discussions on the UNCITRAL Model Law on Procurement of Goods, Construction and Services<sup>2</sup> of 1994 and its decision to entrust the drafting of proposals for revision of the 1994 Model Law to Working Group I (Procurement).<sup>3</sup> The Commission noted that the Working Group had begun its work on the revision at its sixth session, held in Vienna from 30 August to 3 September 2004, and completed its work at its nineteenth session, held in Vienna from 1 to 5 November 2010. At its twentieth session, held in New York from 14 to 18 March 2011, the Working Group had commenced work on the preparation of a revised Guide to Enactment.<sup>4</sup>

14. The Commission had before it at the current session: (a) the draft revised text of the Model Law on Public Procurement resulting from the nineteenth session of

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<sup>2</sup> United Nations publication, Sales No. E.98.V.13.

<sup>3</sup> *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 81 and 82.

<sup>4</sup> For the reports of the Working Group on the work of its sixth to twentieth sessions, see A/CN.9/568, A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640, A/CN.9/648, A/CN.9/664, A/CN.9/668, A/CN.9/672, A/CN.9/687, A/CN.9/690, A/CN.9/713 and A/CN.9/718, respectively.

the Working Group, with an accompanying note by the Secretariat (A/CN.9/729 and Add.1-8); (b) a compilation of comments from Governments on that draft Model Law received by the Secretariat before the forty-fourth session of the Commission (A/CN.9/730 and Add.1 and 2); (c) a working draft of the Guide to Enactment to accompany the draft Model Law (A/CN.9/731 and Add.1-9 and A/CN.9/WG.I/WP.77 and Add.1-9); and (d) the reports on the nineteenth and twentieth sessions of the Working Group (A/CN.9/713 and A/CN.9/718).

15. The Commission proceeded with the consideration of the draft Model Law. The Commission noted that the working draft of the Guide to Enactment was not to be considered during the session but was to be used only for reference to assist the Commission in consideration of the provisions of the draft Model Law. The Commission agreed to consider substantive issues first and drafting issues thereafter.

## **B. Consideration of the draft UNCITRAL Model Law on Public Procurement**

16. It was agreed that references throughout the Model Law to “the member of the public”, the “general public” and the like should be replaced with references to “any person”.

### **Preamble**

*Subparagraph (b): the phrase “regardless of nationality”*

17. Concern was expressed about the wording of the subparagraph in that it did not reflect the primary purpose of public procurement in many developing countries: to promote development of the domestic market and to encourage participation in the procurement proceedings of national suppliers or contractors. It was noted that the Guide explained the flexibility of the Model Law in that regard.

*Subparagraph (d): the term “equitable”*

18. It was proposed to change the term “equitable” to “equal”. It was explained that the term “equitable” encompassed the same concept as “fair”, which was already in the subparagraph and different in substance from the term “equal”. Concern was also expressed that the term “equitable” was open to different interpretations and possible misuse, such as favouritism, and that difficulties would be encountered in the enforcement of the concept of “equity” (from which the principle “equitable treatment” derived).

19. Opposition was expressed to changing the term as it appeared in the draft and in the 1994 text, in particular because the term “equitable” was considered to be more flexible and already encompassed the principle of “equal treatment”. Concern was also expressed that a greater number of challenges might ensue from suppliers or contractors claiming that they were treated unequally. Other delegations urged flexibility as regards the use of either term, on the condition that the Guide would explain that participants in procurement proceedings ought to be treated equally in identical situations but might be treated differently in different circumstances.

20. The Commission agreed to refer in the subparagraph to “fair, equal and equitable treatment” of all suppliers and contractors and explain in the Guide the meaning of that phrase.

## **Chapter I. General provisions**

### *Article 2*

21. The understanding was that all definitions in the article would be listed in alphabetical order in all language versions of the final text.

22. It was agreed that the beginning of definition (e) should read “‘framework agreement procedure’ means a procedure”.

23. It was further agreed that the article should contain new definitions of “pre-qualification” and “pre-selection”, which would read as follows: “‘Pre-qualification’ means the procedure set out in article 17 to identify, prior to solicitation, suppliers or contractors that are qualified;” and “‘Pre-selection’ means the procedure set out in article 48 (3) to identify, prior to solicitation, a limited number of suppliers or contractors that best meet the qualification criteria for the procurement concerned.”

24. It was proposed and agreed to delete the words in parentheses (“the ‘subject matter of the procurement’”) in definition (h). While the broadly held view was that there should be a definition of the subject matter of the procurement, which should be drafted so as to allow the appropriate use of the term throughout the Model Law, views varied on the wording. The proposal was made that such a definition should draw on article 36, subparagraph (b), with the addition of the words “if appropriate” after the word “including”.

25. The alternative view was expressed that no such definition should be included, since the term was to be defined in each procurement, not in the law. It was believed that the subject matter of a procurement was a question of fact which could not easily fall under a generic definition and that it was therefore better to leave such a definition open and to include the discussion on that subject in the Guide.

26. The Commission deferred its decision on the proposal to a later stage.

27. After subsequent discussion, it was agreed that no definition of the subject matter of the procurement should be included in the Model Law. It was understood that the Guide would explain the term “subject matter of the procurement” used throughout the Model Law, including by drawing on provisions of article 36, subparagraph (b), or by stating that the “subject matter of the procurement” was what the procuring entity described as such at the outset of the procurement proceedings.

28. The Commission agreed that definition (o), “solicitation”, should be expanded to refer to an invitation to tender, present submissions or participate in request-for-proposals proceedings or an electronic reverse auction but should not cover invitations for pre-qualification or for pre-selection.

### *Article 5, paragraph 1*

29. The Commission agreed to delete the following words: “Except as provided for in paragraph (2) of this article, the text of”. It was the understanding that the

Guide would clarify that paragraph 1 dealt with legal texts that did not encompass any internal documents (not being of general application) or case law (being covered by paragraph 2 of the article).

*Article 8, paragraph 4*

30. A query was raised as to whether the phrase “reasons and circumstances” referred to factual and legal justifications for the decision of the procuring entity. The discussion of that term in the Working Group was recalled, and it was noted that the decision of the Working Group to use that term should not be reopened.

31. It was agreed that the current wording would be retained, with the Guide explaining that in some jurisdictions the procuring entity would need to substantiate the reasons and circumstances with legal justifications, which would be reflected in relevant domestic enactments as necessary.

*Article 9, paragraphs 2 (f) and 8 (a)*

32. It was agreed that consistency between paragraphs 2 (f) and 8 (a) as regards references to “false statements” and “misrepresentations” should be ensured. It was agreed to add a reference to “misrepresentation” in paragraph 8 (a).

*Article 9, paragraph 8 (b)*

33. Views differed on whether the phrase “may disqualify” should be replaced with “shall disqualify”. One view was that the procuring entity ought to be required to disqualify suppliers or contractors if they presented materially inaccurate or materially incomplete information; the other view was that such flexibility should be preserved, in particular to allow for clarifying whether an error or omission was deliberate or a simple mistake. Concerns were raised about the negative impact of automatic disqualification on competition and an increased number of challenges if the proposed change was introduced.

34. The Commission agreed that the term “materially inaccurate or materially incomplete” should be clarified in all language versions and the concept explained in the Guide. The need for a clarification procedure in the context of ascertainment of the qualifications of suppliers or contractors (similar to the one that existed in the context of abnormally low submissions under article 19 and in tendering proceedings under article 42 was considered in that context. (For further consideration of this issue, see paras. 48-53 below.)

35. Accordingly, the Commission agreed to retain the wording of article 9, paragraph 8 (b).

*Article 10*

36. It was agreed that paragraph 1 should be redrafted as follows: “(a) The pre-qualification or pre-selection documents, if any, shall set out a description of the subject matter of the procurement; (b) The procuring entity shall set out in the solicitation documents the detailed description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be



applied.” It was proposed that the Guide would highlight that paragraphs 1 (a) and 2 (a) of article 29 catered for situations in which there was no such detailed description.

37. It was further agreed to make the following changes: in paragraph 3 the words “including concerning” should be deleted, and paragraph 3 should read as follows: “(3) The description of the subject matter of the procurement may include, inter alia, specifications, plans, drawings, designs, requirements, testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology.”; the beginning of paragraph 4 should read “To the extent practicable, the description of the subject matter”; and the phrase “the relevant technical, quality and performance characteristics” should be used in paragraph 4 and elsewhere in the text of the Model Law as appropriate.

38. It was proposed that the second sentence in paragraph 4 should also prohibit the use of “specific production methods” in descriptions, so as to avoid the use of discriminatory requirements for prescribed methods in order to favour certain suppliers.

39. Views varied as regards the proposal. It was suggested that, if the reference to “specific production methods” were included, the accompanying Guide text should state as follows: “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.”

40. The proposal was subsequently withdrawn. It was noted in particular that the original wording as appeared in the draft and in the 1994 text was traced back to the wording of equivalent provisions of the 1994 Agreement on Government Procurement of the World Trade Organization (WTO)<sup>5</sup> and that in some procurement methods specification of the production method was essential for ensuring quality.

41. The Commission agreed that the Guide text would discuss the risks of discrimination where specific production methods were mentioned by drawing attention to the prohibition against discriminatory treatment in paragraph 2 of article 10.

#### *Article 11*

42. It was proposed that the phrase in paragraph 3 “and expressed in monetary terms” should be replaced with “and/or expressed in monetary terms”, since it would not always be possible to express all evaluation criteria in monetary terms. The understanding of some delegations was that the words “to the extent practicable”, if applied to all three requirements in the provision (that the evaluation criteria must be objective, quantifiable and expressed in monetary terms), would achieve the same result as the proposed redraft. Concern was expressed, however, that such a caveat should not apply to evaluation criteria in electronic reverse auctions where it was required that all evaluation criteria should be quantifiable and expressed in monetary terms for such auctions to be held. (The relevant provision

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<sup>5</sup> Agreement on Government Procurement, article VI, para. 3; available from [www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm).

requiring a formula in electronic reverse auctions would be explained in the Guide.) The Commission deferred its decision on the wording of the article to a later stage.

43. After subsequent discussion, it was agreed that: paragraph 2 chapeau and subparagraph (a) should read as follows: “The evaluation criteria relating to the subject matter of the procurement may include: (a) Price”; paragraph 3 should be redrafted as follows: “To the extent practicable, all non-price evaluation criteria shall be objective, quantifiable and expressed in monetary terms,” with the Guide explaining that the expression “in monetary terms” would not be applicable to all cases; in paragraph 4 (b), after the words “domestically produced goods,” the words “or any other preference” should be added; paragraph 5 (b) should be redrafted as follows: “All evaluation criteria established pursuant to this article, including price as modified by any preference;” and paragraph 5 (c) should be redrafted as follows: “The relative weights of all evaluation criteria, except where the procurement is conducted under article 48, in which case the procuring entity may list all evaluation criteria in descending order of importance.”

#### *Article 13*

44. It was agreed that the wording of the article should not change but that the Guide should discuss the options in the text regarding the languages to be used in the pre-qualification, pre-selection and solicitation documents.

#### *Article 14*

45. It was agreed to add in paragraph 1 the word “in” before the words “the pre-qualification or pre-selection documents”.

46. It was understood that any changes made to the solicitation, pre-qualification or pre-selection documents in accordance with article 14 would be material and therefore covered by paragraph 3 of article 15; the link between the provisions would be highlighted in the Guide.

#### *Article 15, paragraph 1*

47. It was agreed to replace the phrase “such time as will” with the phrase “a time period that will” in the third sentence.

#### *New article 15 bis on clarification of qualification information and of submissions*

48. The attention of the Commission was drawn to the provisions in document A/CN.9/730 on clarification of qualification data and submissions. The Commission considered whether a generic article on clarification of qualification data and submissions should be added in chapter I of the Model Law or whether the subject should be dealt with in all relevant articles. While some delegations preferred the former approach, others preferred the latter, in particular because it allowed adapting provisions on clarification to suit the various procedures, taking into account, in particular, points of time when the need to request clarification might arise.

49. In discussion of articles 45 and 46, the point was made that any provisions providing for the right of the procuring entity to seek clarification should be coupled with a prohibition against entering into negotiations during such clarification

procedures. It was noted that such a prohibition would be in addition to the prohibition of negotiations included in the context of some methods of procurement, such as under article 45.

50. It was also pointed out that certain paragraphs of article 46 illustrated the varying points of time in request-for-proposals-without-negotiation proceedings at which the procuring entity might wish to ask for clarification. It was noted that the generic article on clarification of qualification data and submissions should take into account that such points of time would vary depending on procurement methods and when qualifications were assessed.

51. It was subsequently agreed that paragraph 1 of article 42 should be used as a basis for drafting a generic article on clarification of qualification data and submissions to be included in chapter I. It was also agreed that that generic article would in addition reflect: (a) that the procedure involved a clarification procedure, and not negotiations; and (b) that a complete record of the exchange of all information during the clarification procedure ought to be included in the record of the procurement proceedings under article 24. The Commission agreed to consider the draft provision at a later stage.

52. Later in the session, it was agreed to include the following new article in the Model Law:

**“Article 15 bis. Clarification of qualification information and of submissions**

1. At any stage of the procurement proceedings, the procuring entity may ask a supplier or contractor for clarifications of its qualification information or of its submission, in order to assist in the ascertainment of qualifications or the examination and evaluation of submissions.
2. The procuring entity shall correct purely arithmetical errors that are discovered during the examination of submissions. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that presented the submission concerned.
3. No substantive change to qualifications information, and no substantive change to a submission (including changes aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive), shall be sought, offered or permitted.
4. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to qualification information or submissions, nor shall any change in price be made, pursuant to a clarification that is sought under this article.
5. Paragraph (4) of this article shall not apply to proposals submitted under article 48, 49, 50 or 51.
6. All communications generated under this article shall be included in the record of the procurement proceedings.”

53. It was understood that the Guide should elaborate on the difference between a change in price and a correction of the price.

*Article 16, paragraph 1 (c)*

54. The need for subparagraph (ii) was questioned given the similar wording in paragraph 1 (b). The Commission deferred the consideration of the wording of paragraph 1 (c) to a later stage.

55. After subsequent discussion, it was agreed to delete subparagraph (ii) and merge subparagraph (i) with the chapeau provisions of subparagraph (c).

*Article 17, paragraph 2*

56. It was proposed that the procurement regulations, not the Law, should identify a publication in which an invitation to pre-qualify should be published. The Commission agreed with the proposed wording to that end in document A/CN.9/730. The understanding was that the same change would be made throughout the Model Law to equivalent provisions.

57. Reflecting that agreement, as well as the agreement reached at the session as regards the revisions to be made in paragraph 2 of article 32 of the draft (see paras. 92-99 below), the Commission agreed to revise paragraph 2 as follows: “(2) If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in the publication identified in the procurement regulations. Unless decided otherwise by the procuring entity in the circumstances referred to in article 32 (4) of this Law, the invitation to pre-qualify shall also be published internationally, so as to be widely accessible to international suppliers or contractors.”

*Article 17, paragraph 3 (b)*

58. The Commission deferred the consideration of a proposal to replace the word “timetable” with the phrase “envisaged or indicative timetable”. The view was expressed that the wording already allowed for sufficient flexibility.

59. After subsequent discussion, it was agreed to replace the phrase “as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services” with the phrase “as the desired or required time for the supply of the goods, for the completion of the construction, or for the provision of the services;”.

*Article 19, paragraphs 1 (c) and 2*

60. It was agreed that subparagraph (c) should be deleted and the following wording should replace paragraph 2: “The decision of the procuring entity to reject a submission in accordance with this article and the reasons for that decision, and all communications with the supplier or contractor under this article shall be included in the record of the procurement proceedings. The decision of the procuring entity and the reasons therefor shall be promptly communicated to the supplier or contractor concerned.” It was the understanding that, as a consequence, changes would be introduced in paragraph 1 as follows: “and” would be added after subparagraph (a), and “and” after subparagraph (b) would be deleted.

*Article 20*

61. Regarding a comment in document A/CN.9/730/Add.1, the prevailing view was that no *de minimis* threshold should be introduced in paragraph 1, in order to be consistent with international anti-corruption regulations that linked, as did paragraph 1 of the draft, the relevant act of the supplier or contractor to its intention to influence an act or decision of the procuring entity. The understanding was that the Guide would explain the relevant issues, with reference to national provisions and practices, and should indicate that even small items could constitute inducements in some circumstances.

62. Regarding another comment in document A/CN.9/730/Add.1, it was agreed that no additional language to clarify the notion of “unfair competitive advantage” in paragraph 1 (b) should be added. Support was expressed for the current approach in the draft Guide encouraging enacting States to consider the issue in the light of the prevailing circumstances (and the use of examples was suggested, such as that a supplier or contractor that had drafted a description should not be permitted to participate because it would have such an unfair advantage, an example also referred to in the 1994 WTO Agreement on Government Procurement. The importance of considering competition issues not only in the context of a particular procurement proceeding but also in the light of the competition policies of States at a macroeconomic level was highlighted.

*Article 21, paragraph 2 (c)*

63. The Commission agreed that the duration of the standstill period was to be established by the procuring entity in the solicitation documents and in accordance with the requirements of the procurement regulations. It was the understanding that the procurement regulations might fix different minimums for different types of procurement and that the Model Law would require the procurement regulations to address the standstill period(s).

*Article 21, paragraph 3 (b)*

64. It was agreed that the paragraph should be replaced with the following wording: “Where the contract price is less than the threshold amount set out in the procurement regulations; or”. It was noted that that change would make the wording consistent with the drafting of the relevant part of paragraph 2 of article 28.

*Article 21, paragraph 7*

65. The proposal was made to include at the end of the last sentence the phrase “unless the extension has been granted to the procuring entity by suppliers or contractors that presented submissions and the entities that provided the tender security.” The Commission noted the related provisions in article 40 of the draft and deferred its decision on the drafting to a later stage.

66. After subsequent discussion, it was ultimately agreed that the following provision (or its equivalent) should be introduced: “unless extended under article 40 (2)”.

*Article 22, paragraph 2*

67. The Commission recalled its decision as regards article paragraph 3 (b) of article 21 (see para. 64 above) and agreed that a similar change would be made in paragraph 2 of article 22.

*Article 23, paragraph 3*

68. Concern was expressed about the reference to solicitation documents in the second sentence of the paragraph. Requiring suppliers or contractor to grant blanket ex ante consent to disclose confidential information during the procurement proceedings was considered to facilitate manipulation by the procuring entity. The Commission agreed to delete the phrase “or permitted in the solicitation documents” and to explain in the Guide that requiring consent to disclose such information should be carefully considered in the light of the potentially anti-competitive effect of doing so.

69. A question was also raised about the intended scope of the second sentence, and it was agreed to revise the draft to make it clear that the provisions applied only in the context of the procurement methods referred to in the first sentence.

70. After subsequent discussion, it was agreed that the paragraph should read as follows: “Any discussions, communications, negotiations and dialogue between the procuring entity and a supplier or contractor pursuant to paragraph 3 of article 47 and to articles 48 to 50 of this Law shall be confidential. Unless required by law or ordered by the [*name of the court or courts*] or the [*name of the relevant organ designated by the enacting State*], no party to any such discussions, communications, negotiations or dialogue shall disclose to any other person any technical, price or other information relating to these discussions, communications, negotiations or dialogue without the consent of the other party.”

*Article 24*

71. It was proposed to add in the first sentence of paragraph 3 after the words “on request” the words “unless such information has not arisen in the procurement proceedings”, with the explanation in the Guide that certain information listed in paragraph 1 of the article would not be available in all procurement proceedings, e.g., if they were cancelled. After discussion, it was decided that this proposal would not be retained.

72. The Commission considered the extent of disclosure of information listed in paragraph 1 (s) and 1 (t) and under paragraphs 3 and 4 (b) of the article and recalled that the aim was to provide for a general principle of transparency, which should be modified only to the extent necessary to prevent future collusion or other risks to competition. The Commission agreed to revise the provisions to ensure an appropriate balance and to consider the drafting at a later stage.

73. In further discussion, the Commission heard proposals to retain paragraph 1 (s) as drafted, to insert the phrase “for each submission” at the beginning of that paragraph and delete the words “of each submission” at the end, and to remove the reference to “the basis for determining the price” from the text.

74. It was subsequently suggested that reference to “the basis for determining the price” might be listed separately under paragraph 1. The importance of retaining

such a reference in paragraph 1 was emphasized in the light of the explanations in the 1994 “Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services”<sup>6</sup> regarding that provision and the importance of such information for the procuring entity, for example in investigating abnormally low submissions. It was further emphasized that this type of information was always commercially sensitive and therefore should not be accessible to competitors.

75. Subject to any further drafting changes to paragraph 1 (s), it was agreed that reference to paragraph 1 (s) would be retained in paragraph 3.

76. Views varied as regards the need to refer in paragraph 3 to cancellation of the procurement. The Commission decided to delete that reference. It was understood that, in the case of cancellation of the procurement, suppliers or contractors would not have an automatic right but rather would need to seek a court order to access the part of the record specified in paragraph 3.

77. After deliberation, the Commission decided to retain paragraph 4 unchanged, noting that it provided essential safeguards against improper disclosure of information contained in the record. Concern was nevertheless expressed about the reference to submission prices in paragraph 4 (b), which, it was suggested, should be reconsidered, taking into account the differences among various procurement methods, some of which, such as tendering, involved the disclosure of tender prices to all suppliers or contractors that submitted tenders. The Commission agreed to consider that point later in the session.

78. After subsequent discussion, it was agreed that the phrase in paragraph 1 (r) “the written procurement contract” should read “a written procurement contract”, that the words “or the basis for determining the price” in paragraph 1 (s) should be deleted and that the words in paragraph 4 (b) “and submission prices” should be deleted.

79. It was proposed that paragraph 3 should read as follows: “Except as disclosed pursuant to article 41 (3) of this Law, the portion of the record referred to in subparagraphs (p) to (t) shall, on request, be made available to suppliers or contractors that presented submissions after the decision on acceptance of the successful submission of the procurement has become known to them, unless the procuring entity determines that disclosure of such information would impede fair competition. Disclosure of the portion of the record referred to in subparagraphs (s) and (t) may be ordered at an earlier stage only by the [*name of the court or courts*] or [*name of the relevant organ designated by the enacting State*].”

80. The inclusion of the words “of the procurement” in the proposal was questioned. It was also suggested that it would be advisable to add a reference to paragraph 1 after the reference to subparagraphs (p) to (t). The need for the phrase “unless the procuring entity determines that disclosure of such information would impede fair competition” was queried in the light of the content of paragraph 4 (a) of the article. The Commission deferred its decision on the proposal to a later stage.

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<sup>6</sup> For the text of the Guide, see document A/CN.9/403, which was reproduced in the *Yearbook of the United Nations Commission on International Trade Law*, vol. XXV: 1994 (United Nations publication, Sales No. E.95.V.20), part three, annex II. The Guide is available in electronic form from the UNCITRAL website at [www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf](http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf).

81. After subsequent discussion, the Commission agreed to replace paragraph 3 with the following wording: “Subject to paragraph (4) of this article, or except as disclosed pursuant to article 41 (3) of this Law, the portion of the record referred to in subparagraphs (p) to (t) of paragraph (1) of this article shall, after the decision on acceptance of the successful submission has become known to them, be made available, on request, to suppliers or contractors that presented submissions.”

82. It was agreed to reflect in the Guide the content of the deleted sentence of paragraph 3 as contained in document A/CN.9/729/Add.2 and that the procuring entity should notify suppliers or contractors of the disclosure of information from the record relevant to them.

#### *Article 25*

83. Concern was expressed about the scope of the article, which dealt only with the conduct of the procuring entity and not with the conduct of suppliers and contractors and was therefore considered to be too narrow. In the light of developments in the regulation of those issues at the national, regional and international levels, it was said to be essential for UNCITRAL to undertake work in that area so that the article could be supplemented by pertinent materials of UNCITRAL on that subject. The Commission agreed to consider the issue at a future session in the context of its consideration of future work of UNCITRAL in the area of public procurement.

### **Chapter II. Methods of procurement and their conditions for use. Solicitation and notices of the procurement**

#### *Article 26*

84. In response to a query as to whether open framework agreements should be listed as a separate procurement method in paragraph 1 of the article, the Commission decided to retain the article unchanged.

#### *Article 29, paragraph 1 (a)*

85. It was proposed that the provision should read: “It is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement in accordance with article 10 of this Law, and the procuring entity assesses that discussions with suppliers or contractors are needed to refine aspects of the description of the subject matter of the procurement and to formulate them with the precision required under article 10 of this Law and in order to allow the procuring entity to obtain the most satisfactory solution to its procurement needs.” Concern was expressed about the wording, since it did not fully reflect the conditions for use of two-stage tendering (in which a detailed description of the subject matter of the procurement might be provided at the outset of the procurement proceedings). The need for alignment of the text with paragraphs 2 and 3 of article 47 was highlighted. The Commission deferred a decision on the proposal to a later stage.

86. In subsequent discussion, it was agreed that the provision as drafted in document A/CN.9/729/Add.3 should be retained with a small drafting change: “The procuring entity assesses that discussions with suppliers or contractors are needed to refine aspects of the description of the subject matter of the procurement and to



formulate them with the detail required under article 10 of this Law, and in order to allow the procuring entity to obtain the most satisfactory solution to its procurement needs.”

*Article 29, paragraph 2 (c)*

87. A query was raised as regards the interaction of paragraph 3 of article 27 and paragraph 2 (c) of article 29. The understanding was that referring only to national security would not be sufficient to fulfil the requirement of paragraph 3 of article 27 in such cases and that more explanation of the reasons and circumstances would be required in the record.

*Article 30, paragraph 1 (a)*

88. The Commission agreed to delete the words “and precise” from the paragraph, as article 10 as amended at the current session (see para. 36 above) referred only to a “detailed” and not to a “precise” description of the subject matter of the procurement.

*Article 31, paragraph 1 (a)*

89. It was suggested that the phrase “on an indefinite basis” should be replaced with the phrase “on an indefinite or repeated basis” or alternatively that the Guide should explain that the term “indefinite” encompassed the concept of repeated purchases. The alternative view was that a resort to framework agreements would always be justified in cases of indefinite demands, which might not necessarily arise on a repeated basis.

90. The Commission agreed to replace the phrase “on an indefinite basis” with the phrase “on an indefinite or repeated basis.” It was also noted that the Guide would include a comment to the effect that indefinite needs would include circumstances in which the framework agreement was used to ensure security of supply.

*Article 32, paragraph 1, and article 33, paragraph 5*

91. The Commission recalled its decision in paragraph 57 above as regards paragraph 2 of article 17 and confirmed its understanding that it would also apply to paragraph 1 of article 32 and paragraph 5 of article 33.

*Article 32, paragraph 2*

92. Concern was expressed about the requirement in the paragraph to publish the invitation in a language customarily used in international trade, as that requirement would impose an unreasonable translation burden on developing countries (whose local languages were not customarily used in international trade). The point was made that the 1994 WTO Agreement on Government Procurement imposed the equivalent requirement only as regards publication of summary information about the procurement and not the solicitation documents. It was clarified that the provisions in the draft referred to the invitation rather than the solicitation documents.

93. The Commission agreed with the proposals that references to the language and any media (such as a newspaper or journal) should be removed from the provision

and that it should instead focus on the goal to be achieved: publication internationally so as to be accessible to international suppliers or contractors. The Commission deferred its consideration of revised wording to a later stage.

94. A representative of a multilateral development bank expressed concern about the proposed changes since they might result in provisions that would be inconsistent with the relevant requirements of the multilateral development banks.

95. After subsequent discussion, the Commission agreed that paragraph 2 should be replaced with the following wording: “The invitation shall also be published internationally, so as to be widely accessible to international suppliers or contractors.”

96. Concern was expressed by the observers from a multilateral development bank and a development assistance organization about the change made to paragraph 2 of article 32 and paragraph 2 of article 17 regarding the language of publication, since the resulting wording, it was said, did not promote the participation of suppliers or contractors regardless of nationality, which was one of the objectives of the Model Law as stated in its preambular subparagraph (b). It was proposed that, if the new wording were to be retained, the Guide should clearly state why the changes were made.

97. The alternate view was expressed that the previous wording implied the use of the English language, which would not be appropriate, and that the revised wording reflected modern practices, such as the use of Internet-based communications.

98. To address the concerns of the observers, it was agreed that the Guide would explain that the revised text was technologically neutral (whereas the previous wording implied the use of paper-based media, by referring to a newspaper or a journal of wide international circulation) and was intended to accommodate modern methods of publication. It was also agreed that the Guide would describe the different ways in which the requirements for international publication could be fulfilled, in particular for those jurisdictions in which electronic publication was not possible, which would include the methods specified in the 1994 text.

99. The Commission agreed that the Guide should: (a) note that the provision would require that the publication be in a language that would in fact make it accessible to all potential suppliers or contractors in the context of the procurement concerned; and (b) alert enacting States that in WTO the provisions on the language of publication of procurement-related information (article XVII of the 1994 Agreement on Government Procurement) were considered to be an important safeguard with respect to achieving transparency and competition.

#### *Article 32, paragraph 4*

100. It was proposed that the words “in view of the low value” should be deleted. Objection was raised to the proposal on the basis that the resulting wording would allow unrestricted use of domestic procurement by the procuring entity. The alternative view was expressed that the provision should be redrafted to reflect that the costs of international publication (e.g. translation) would be disproportionate to the value of the procurement and that this was the reason to allow the procuring entity not to publish internationally.

101. Concern was expressed about the proposed changes. It was recalled that international and regional regulations usually referred to a certain threshold value below which the procurement was considered to be of no interest to international suppliers or contractors.

102. The Commission discussed whether to delete the reference to “low” in the provision to avoid confusion with other provisions of the Model Law that referred to a low value threshold but agreed to retain the current wording, noting that the provision would be explained in the Guide.

*Article 33, paragraph 6*

103. A query was raised as to whether a reference to paragraph 4 (a) of article 29 should be added to the provision. The discussion of that issue in the Working Group was recalled, in particular that the intention of the Working Group had been to exclude references to simple urgency in order to avoid abusive use of competitive negotiations and single-source procurement. It was proposed that, to avoid confusion, the word “urgency” should be replaced with the phrase “catastrophic events”.

104. After discussion, the Commission agreed to add a reference to paragraph 4 (a) of article 29 in the provision.

**Chapter III. Open tendering**

*Article 36, paragraph (c)*

105. It was suggested that the provision should begin with the wording “A summary of”.

106. The Commission agreed that the provision should read as follows: “A summary of the criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, and of any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law.”

*Article 41, paragraph 2*

107. The Commission agreed to replace paragraph 2 with the following wording: “All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to participate in the opening of tenders.” It was the understanding that the Guide would explain that the participation could be physical or virtual, and that both were covered by the provision, consistent with the technologically neutral approach to revising the Model Law.

*Article 42*

108. As a consequence of introducing new article 15 bis (see para. 52 above), the Commission agreed to delete paragraph 1 of article 42, to renumber subsequent paragraphs and to amend cross-references in article 42, including by inserting a cross-reference to the new article in what would become paragraph 2 (b).

**Chapter IV. Procedures for restricted tendering, request for quotations and request for proposals without negotiation***Article 46, paragraph 2 (b)*

109. The Commission agreed that the provision should begin with the words “A detailed description”.

*Article 46, paragraph 4 (d), and article 48, paragraph 5 (d)*

110. The Commission agreed to replace in those paragraphs and in similar instances throughout the Model Law the phrase “formulated or expressed” with the phrase “formulated and expressed”.

**Chapter V. Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement***Article 47, paragraph 4 (b)*

111. The Commission agreed that the provision should prohibit the procuring entity from modifying the subject matter of the procurement, drawing on the same prohibition found in paragraph 9 of article 48. It was agreed that the Guide would explain what would be considered to be a modification of the subject matter of the procurement.

112. Accordingly, the Commission agreed to revise the provision as follows:

“(b) In revising the relevant terms and conditions of the procurement, the procuring entity may not modify the subject matter of the procurement but may refine aspects of the description of the subject matter of the procurement by:

- (i) Deleting or modifying any aspect of the technical or quality characteristics of the subject matter of the procurement initially provided and by adding any new characteristics that conform to the requirements of this Law;
- (ii) Deleting or modifying any criterion for examining or evaluating tenders initially provided, and by adding any new criterion that conforms to the requirements of this Law, to the extent only that the deletion, modification or addition is required as a result of changes made in the technical or quality characteristics of the subject matter of the procurement.”

*Article 47, paragraph 4 (e)*

113. The Commission agreed to update the cross-reference to paragraph 4 (b) of article 42 in the light of the revisions agreed to be made in article 42 (see para. 108 above).

## Chapter VI. Electronic reverse auctions

### *Articles 52 and 53, titles*

114. The Commission agreed that the title of article 52 should read “Electronic reverse auction as a stand-alone method of procurement” and the title of article 53 should read “Electronic reverse auction as a phase preceding the award of the procurement contract”.

### *Article 52, paragraph 1 (c)*

115. A query was raised as regards the reference to the “contract form, if any, to be signed by the parties”. Objection was expressed to deleting the reference in the provision and in other relevant provisions, which were considered essential for transparency reasons; references to the terms and conditions of the procurement contract were not considered sufficient.

116. The Commission agreed to retain the current wording, with the Guide clarifying that it was not contemplated that any contract was to be signed at the outset of procurement proceedings.

### *Article 52, paragraphs 1 (k) and 2*

117. It was agreed that paragraph 1 (k) of article 52 should read: “[k] If any limitation on the number of suppliers or contractors that can be registered for the auction is imposed in accordance with paragraph (2) of this article, the relevant maximum number and the criteria and procedure, in conformity with paragraph (2) of this article, that will be followed in selecting it;]”.

118. It was agreed that the following words should be added at the end of the first sentence of paragraph 2 of article 52: “and shall select the suppliers or contractors to be so registered in a non-discriminatory manner.”

### *Article 52, footnote*

119. It was proposed that paragraph 2 should be accompanied by the same footnote that accompanied paragraph 1 (k). The alternative view was that the footnote should be deleted on the understanding that all provisions of the Model Law were optional for enactment by States. Support was expressed for the latter proposal, as well as for the deletion of other footnotes in the text of the Model Law.

120. The view was expressed that, if the footnote were to be deleted, the provisions of paragraphs 1 (k) and 2 should also be deleted and perhaps placed in the Guide.

121. The Commission decided to retain the text of both paragraphs 1 (k) and 2 in brackets without any accompanying footnotes, but to include an explanation in the Guide of why the provisions appeared in brackets.

122. A general objection was raised to that approach, as well as to putting any text in the Model Law in square brackets or parentheses, except in cases where provisions called for enacting States to insert missing information, such as the name of a competent body. It was pointed out that the explanation in the Guide as regards the enactment of provisions of the Model Law should be sufficient. The alternative view was that it was common to use parentheses, square brackets and footnotes, when required, in UNCITRAL model laws. The Commission deferred its decision as

regards the use of parentheses and square brackets in the text to a later stage. (For further consideration of those issues, see paras. 175-178 below.)

*Article 53, new paragraph 3*

123. The Commission agreed to add the following new paragraph 3: “Where an evaluation of initial bids has taken place, each invitation to the auction shall also be accompanied by the outcome of the evaluation as relevant to the supplier or contractor to which the invitation is addressed.”

**Chapter VII. Framework agreements procedures**

*Article 57*

124. A query was raised as regards the absence of a reference in article 57 to a declaration pursuant to article 8, given that such reference appeared in article 59. It was clarified that, in the context of closed framework agreements, the requirement to include such a reference could already be found in provisions regulating the procurement methods by means of which the closed framework agreement was to be awarded.

125. The Commission agreed that paragraph 2 should start with the following wording: “The provisions of this Law regulating pre-qualification and the contents of ...”.

*Article 58, paragraph 1, new subparagraph (f)*

126. The Commission agreed to add the following subparagraph (f): “The manner in which the procurement contract will be awarded.”

*Article 59*

127. The Commission recalled its decision as regards the footnote and the provisions to which it related in article 52 (see para. 121 above) and confirmed that that decision would also apply to the footnote and the provisions to which it related in article 59.

128. The Commission agreed to revise paragraph 2 as follows: “The procuring entity shall solicit participation in the open framework agreement by causing an invitation to become a party to the open framework agreement to be published following the requirements of article 32 of this Law”; to delete paragraph 3 (c), its provisions being superfluous in the light of paragraph 3 (b), with consequent renumbering of the remaining subparagraphs under paragraph 3 of that article; to replace the phrase in paragraph 3 (e) (ii) “in conformity with this Law” with the phrase “in conformity with paragraph 7 of this article”; and to add the following phrase in the end of the first sentence of paragraph 7: “and shall select the suppliers or contractors to be parties to the open framework agreement in a non-discriminatory manner.”

*Article 61, paragraph 4 (a)*

129. It was proposed that the phrase “or only to each of those parties of the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement” should be deleted. It was explained that the

provision might otherwise lead to misuse, as unlimited discretion was given to the procuring entity to decide which suppliers or contractors parties to the framework agreement were capable of delivering the subject matter of the procurement. The point was made that in non-electronic framework agreements there would not be such a large number of suppliers or contractors parties to the framework agreement that it would become burdensome for the procuring entity to notify all such suppliers or contractors of procurement opportunities and that, in the context of framework agreements maintained electronically, which might have many suppliers parties, electronic means of communication would allow notifying all of them without significant cost and time.

130. The alternative view was that in some jurisdictions suppliers or contractors parties to the framework agreement were required to participate in the competition if they received an invitation from the procuring entity to do so. Reference was also made to the practical use of framework agreements by central purchasing agencies, which might face high costs if required to invite numerous suppliers parties to the framework agreement and to deal with large numbers of submissions from those that were not capable of meeting the procuring entity's needs. It was further explained that, if some suppliers or contractors parties to the framework agreement indicated to the procuring entity from the outset of the procurement proceedings their limited capacity to deliver certain parts of the subject matter of the procurement, it would be inappropriate for the procuring entity to invite them. The point was made that safeguards against abuse should therefore be balanced against the considerations of efficiency and practicality. The Commission deferred its consideration of the issue to a later stage.

131. After subsequent discussion, the following proposal was made for a new subparagraph (a):

“(a) The procuring entity shall issue a written invitation to present submissions simultaneously:

- (i) To each supplier or contractor party to the framework agreement; or
- (ii) Only to each of those parties of the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement, provided that, at the same time, notice of the second-stage competition is given to all parties to the framework agreement so that they have the opportunity to participate in the second-stage competition;”.

132. The view was expressed that subparagraph (ii) was unnecessary, and that only the provisions of the chapeau and subparagraph (i) should be included. In support of that view, it was emphasized that otherwise the provisions would open the door to corruption by giving the procuring entity unlimited discretion in the selection of capable suppliers or contractors.

133. The view prevailed that the wording as proposed in paragraph 131 above achieved the desired compromise by addressing both transparency and efficiency and should therefore be included as a new subparagraph (a).

134. It was agreed that the Guide would note that, in order to prevent the procuring entity from being confronted by a large number of challenges related to its assessment of suppliers' or contractors' capability to supply, the framework

agreement ought to set out clear procedures and criteria that would enable the procuring entity to identify which suppliers or contractors were capable.

135. It was agreed that the means of fulfilling the notice requirement would be explained in the Guide, highlighting various considerations, such as costs and the availability of electronic means of communication, and that the nature of the notice might vary as communication methods improved over time.

#### *Article 62, title*

136. It was proposed that the title of the article should read: “[Possible] Changes during the operation of the framework agreement”. The alternative view was that the title should retain the notion that no material change, in particular to the subject matter of the procurement, should occur during the operation of a framework agreement. The point was made that the title should reflect the content of the article, which did not refer to material change. The discussion of “material change” in the Working Group was recalled, in particular that it had been decided at that time to avoid any reference to such a concept in the Model Law, as it was not easy to define. The alternative view was that “material change” should be understood as any change that would affect the group of competitors that would be interested in participating in any given procurement proceeding, and that this should be consistently understood in the implementation of the Model Law. The Commission deferred its consideration of the title of the article to a later stage.

137. After subsequent discussion, the Commission agreed that the title should read as follows: “Changes during the operation of a framework agreement”.

### **Chapter VIII. Challenges and appeals**

#### *Title*

138. The Commission agreed that the title of the chapter should be: “Challenge proceedings”.

#### *Terminology*

139. It was agreed that the use of terminology should be streamlined throughout the chapter. In particular, the term “reconsideration” should be used in the context of the consideration of complaints by the procuring entity under article 65; the term “review” should be used in the context of the consideration of complaints by the independent body under article 66; and the term “appeal” should be used only in the context of judicial review.

140. It was also pointed out that, to the extent possible, consistency in the references to the group of persons to be notified of the decisions or actions under chapter VIII was desirable. The consideration and decisions of the Working Group as regards different groups of persons to be notified depending on decisions and actions in question were recalled.

#### *Article 63*

141. Strong opposition was expressed to retaining the provisions of article 63 as drafted. Concern was expressed that the article did not provide a clear idea to aggrieved suppliers or contractors as regards their options to challenge and seek



appeal and did not describe the sequence of steps that they could take. It was also observed that the article reflected a parallel system of review, while many jurisdictions followed a hierarchical system of review. It was considered doubtful that, in jurisdictions that would choose to invest in the establishment of an independent administrative body, suppliers or contractors would be allowed to seek recourse, as a general rule rather than as an exception, directly to the courts (i.e. bypassing the administrative body). It was therefore suggested that either the article should be redrafted to provide for several options, without preference being given to any one specific option, that could be considered by the enacting State, or that the article should be deleted altogether. In the latter case, it was suggested, text in square brackets could be inserted in its place inviting enacting States to consider which challenge and appeal system should be put in place in their jurisdiction, considering in particular whether an administrative body existed in their jurisdiction and the efficacy of their court system.

142. In response, doubts were expressed that the Model Law could set out all potential scenarios that might exist in challenge and appeal proceedings under chapter VIII of the draft. It was considered more appropriate to retain the text of article 63 as drafted and to describe all possible scenarios in the Guide. It was observed that the chapter reflected the consensus reached in the Working Group. Support was also expressed for the current approach in drafting chapter VIII, as it ensured, in the view of some delegations, the effectiveness of the review system. Concerns were expressed that requiring remedies to be exhausted in one body before going to the other might lead to negative consequences for both the procuring entity and suppliers or contractors: from the point of view of suppliers or contractors, they might be forced to deal with less efficient or more corrupt bodies before being able to have resort to the most effective body, and that could nullify the effectiveness of the review system; from the point of view of the procuring entity, requiring suppliers or contractors to take steps in sequence might lead to longer suspension periods and bring additional costs to the procurement process.

143. Others urged flexibility as long as the chapter reflected the minimum standards of the challenge and appeal system found in applicable international instruments, such as the United Nations Convention against Corruption<sup>7</sup> and the 1994 WTO Agreement on Government Procurement. It was recalled that the view had been clearly expressed at an earlier session of the Commission that it was not within the scope of the Model Law to dictate to enacting States which review system they should follow. A preference was therefore expressed for leaving all options open for consideration by enacting States.

144. In subsequent discussion, the suggestion was made to split paragraph 1 into two parts: the first dealing with the requirements that suppliers or contractors ought to meet to be able to bring challenges or appeals (that part would continue to reflect in essence article 52 of the 1994 text); and the second dealing with the organization of a challenge and appeal system in an enacting State, including whether it should be parallel or hierarchical. As regards the latter, it was suggested that footnotes 7 and 14 in the current draft could accompany the resulting second part. The need for retaining the second part in the Model Law was questioned. The suggestion was

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<sup>7</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

made to reflect its content in a footnote that would accompany article 63 or be placed in the Guide.

145. In further discussion, it was proposed that the text in paragraph 1 ending with the words “action concerned” should be retained in the Model Law, together with paragraph 2, while the remaining provisions of the article would be deleted. It was understood that the Guide would explain the options available to enacting States, including as regards hierarchical applications and sequencing.

146. After subsequent discussion, the Commission agreed that the title of the article should be “Right to challenge and appeal” and that the article should read as follows:

“1. A supplier or contractor that claims to have suffered or claims that it may suffer loss or injury because of alleged non-compliance of a decision or action of the procuring entity with the provisions of this Law may challenge the decision or action concerned.

2. Challenge proceedings may be made by way of [an application for reconsideration to the procuring entity under article 65 of this Law, an application for review to the [*name of the independent body*] under article 66 of this Law or an appeal to the [*name of the court or courts*].]”

147. In subsequent discussion, it was agreed that paragraph 2 of article 63 as proposed in paragraph 146 above should also contain a reference to applications to courts so as to allow a first-instance review by the courts of decisions or actions taken by the procuring entity in the procurement proceedings.

148. It was agreed that the Guide should include provisions along the following lines, subject to clarification of the terminology: “The enacting State may add provisions addressing the sequence of applications, if desired, and to allow an independent body or court to hear an appeal from an application for review; the application for reconsideration can be followed by an application for review or for judicial review, according to the domestic enactment of the Model Law.”

149. The point was made that, if paragraph 2 as contained in document A/CN.9/729/Add.8 were to be deleted, article 69 should remain in the text. (For further consideration of that point and the Commission’s decision to add a new paragraph 3 to article 63, see paras. 171-174 below.)

#### *Article 64, paragraph 1, and article 65, paragraph 3*

150. Concerns were raised about the impact of the above provisions on the entry into force of the procurement contract, in particular that they might involve lengthy delays to the procurement at issue. The consideration in the Working Group of policy issues underlying the drafting of chapter VIII was recalled.

151. A query was raised as regards a particular step or steps intended to be covered by the term “enter into a procurement contract” in paragraph 1 of article 64, whether the intention was to cover only the dispatch of the notice of acceptance of the successful submission or to cover also the request or receipt of approval from a competent body and the signature of the procurement contract. It was proposed that the drafting of paragraph 1 of article should be clarified in that respect, for example by stating that the “procuring entity shall not take any action to bring the contract

into force”, to encompass all actions leading to the entry into force of the procurement contract under article 21 of the draft. The Commission deferred its decision on the final wording of those provisions to a later stage. (For the decision on the final wording of article 64, see para. 152 below.)

#### *Article 64*

152. The Commission agreed that the title of the article should be: “Effect of a challenge” and that paragraphs 1 and 2 of the article should read as follows:

“1. The procuring entity shall not take any step that would bring a procurement contract or framework agreement in the procurement proceedings concerned into force:

(a) Where it receives an application for reconsideration within the time-limits specified in article 65 (2); or

(b) Where it receives notice of an application for review from the [*name of the independent body*] under article 66 (5)(b); or

(c) Where it receives notice of an application or of an appeal from the [*name of the court or courts*].

2. The prohibition referred to in paragraph (1) shall lapse ... working days (*the enacting State specifies the period*) after the decision of the procuring entity, the [*name of the independent body*] or the [*name of the court or courts*] has been communicated to the applicant or appellant, as the case may be, to the procuring entity, where applicable, and to all other participants in the challenge proceedings.”

153. It was agreed that the Guide would explain the term “participants in the challenge proceedings” and would note that enacting States might choose to use another term to refer to the entities that would have the requisite interest to take part in the proceedings.

154. The Commission agreed to delete the words “or appeal” and “or appellant, as the case may be” in paragraph 3 (b) of the article.

#### *Article 65, paragraphs 4 and 7*

155. It was agreed that the following provisions should appear in square brackets in both paragraphs as follows: “[in the [*name of the independent body*] under article 66 of this Law or in the [*name of the court or courts*]]”.

#### *Article 66*

156. It was agreed that:

(a) Reference to “appeal(s)” and “appellant, as the case may be” should be deleted in the title and throughout the article;

(b) Paragraph 1 should read: “A supplier or contractor may apply to the [*name of the independent body*] for review of a decision or an action taken by the procuring entity in the procurement proceedings, or of the failure of the procuring entity to take a decision under article 65 of this Law within the time limits prescribed in that article”; and

(c) The following words should be deleted in paragraph 2 (d): “Appeals against decisions of the procuring entity taken under article 65 of this Law, or” and that the word “appellant” would be replaced with the word “applicant”.

157. It was suggested that paragraphs 4 and 5 were excessively detailed and that some provisions therein could be deleted. The need to retain the provisions addressing “urgent public interest considerations” was emphasized, however.

158. The Commission agreed to retain paragraphs 4 and 5 with the following wording added at the end of paragraph 5 (a): “in accordance with paragraphs (3) and (4) of this article.”

159. The proposal was made to redraft paragraph 8, which currently implied a physical transfer by the procuring entity of the relevant documents to the independent body. It was explained that it might not be possible to implement such an obligation where classified information was concerned or when a large volume of information was involved. It was therefore proposed that the provision should read: “The procuring entity shall provide the [*name of the independent body*] with all documents or grant access to all documents related to the procurement.”

160. The opposing view was that the proposed changes might put the independent body in a disadvantaged and inappropriate position since they implied that the independent body would be required physically to visit the procuring entity’s premises and to request access to the documents. According to that view, the provisions in the draft were considered appropriate. A further view was that the provisions might be redrafted in broader terms to refer, for example, to the obligation of the procuring entity to provide documents to the independent body in a manner that ensured effective access by the independent body to all documents.

161. It was suggested that the drafting of the opening phrase in English could be clarified to make it clear that reference was being made to the appeal by the supplier or contractor, not the independent body.

162. The Commission deferred its decision on the wording of paragraph 8 to a later stage.

163. After subsequent discussion, it was agreed that paragraph 8 should read as follows: “Promptly upon receipt of a notice under paragraph (5) (b) of this article, the procuring entity shall provide the [*name of the independent body*] with effective access to all documents relating to the procurement proceedings in its possession, in a manner appropriate to the circumstances.” It was agreed that the Guide should explain how access (physical or virtual) to documents could be granted in practice and that the relevant documents could be provided in steps. (For example, a list of all documents could be provided to the independent body first so that the independent body could identify those documents relevant to the proceedings before it.)

164. Concerns were raised as regards the use of the adjectives “lawful” and “unlawful” in paragraph 9. The use of alternative qualifying terms, such as “in violation of law” or “deemed/found/decided to be unlawful/lawful”, was proposed. The Commission deferred its decision on the wording to a later stage.

165. After subsequent discussion, it was agreed that subparagraphs (a) to (e) and (h) of paragraph 9 should read:

“(a) Prohibit the procuring entity from acting, taking a decision or following a procedure that is not in compliance with the provisions of this Law;

(b) Require the procuring entity that has acted or proceeded in a manner that is not in compliance with the provisions of this Law, to act, take a decision or to proceed in a manner that is in compliance with the provisions of this Law;

[(c) Overturn in whole or in part an act or a decision of the procuring entity that is not in compliance with the provisions of this Law [other than any act or decision bringing the procurement contract or the framework agreement into force];

(d) Revise a decision by the procuring entity that is not in compliance with the provisions of this Law [other than any act or decision bringing the procurement contract or the framework agreement into force];

(d bis) Confirm a decision of the procuring entity;

(e) Overturn the award of a procurement contract or a framework agreement that has entered into force in a manner that is not in compliance with the provisions of this Law and, if notice of the award of the procurement contract or the framework agreement has been published, order the publication of notice of the overturning of the award;]

...

(h) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting an application as a result of an act or decision of, or procedure followed by, the procuring entity in the procurement proceedings, which is not in compliance with the provisions of this Law, and for any loss or damages suffered[, which shall be limited to costs for the preparation of the submission, or the costs relating to the application, or both];  
or “

166. It was agreed that in paragraph 10 the words “challenge or appeal proceedings” should be replaced with the words “application for review”.

#### *Article 67*

167. The Commission agreed to delete references to “appeal” in the title and throughout the article and to delete in paragraph 3 the words “relevant challenge or appeal”. It also agreed to add the words “duly notified of the proceedings” after the words “a supplier or contractor” at the beginning of the second sentence of paragraph 1.

168. A query was raised as regards the reference to “any governmental authority” in the text. The understanding was that this reference would be explained in the Guide.

*Article 68*

169. It was proposed to reflect in the article that restricted access to classified information might be possible. The understanding was that no changes to that end in the article were needed.

170. The Commission agreed to delete references to “appeal” in the title and in the article.

*Article 69 and consequent changes in article 63 (addition of a new paragraph 3)*

171. A query was raised as to whether article 69 was needed. The broadly held view was that retaining a reference to judicial review in chapter VIII, either in article 69 or by expanding article 63, was essential. The Commission deferred its decision on that issue to a later stage.

172. In further discussion, the view was expressed that article 69 should be deleted. The deletion of that article was supported on the condition that additional wording would be included in article 63, as a new paragraph 3, reflecting the need under international instruments for an enacting State to have a two-stage appeal system. Such additional wording, it was said, would draw on paragraph 2 of draft article 63 in document A/CN.9/729/Add.8 and could read: “A supplier or contractor may appeal any decision taken in challenge proceedings in [*name of the court or courts*].”

173. Concern was expressed about the proposed wording since it implied requirements for appeals against court judgements, which were considered to be outside the scope of the Model Law.

174. After discussion, it was agreed that article 69 would be deleted and a new paragraph 3 would be included in article 63 that would read: “A supplier or contractor may appeal any decision taken in challenge proceedings under article 65 or 66 of this Law in [*name of the court or courts*].”

*Footnotes, the use of parentheses and square brackets*

175. The view was expressed that some footnotes in chapter VIII should be deleted. The Commission recalled its earlier considerations as regards the desirability of including any footnotes in the Model Law (see paras. 119-122 above) and decided to defer its consideration of the issue as a whole to a later stage of the session.

176. After subsequent discussion, it was agreed that all footnotes currently in chapter VIII should be removed, that their contents should be reflected in the Guide and that a new footnote to the title to the chapter would be inserted to direct enacting States to consider the various options for the text that were explained in the Guide.

177. It was agreed that all other footnotes in the draft revised text of the Model Law, other than those expressly agreed to be deleted during the current session of the Commission, were to be retained in the text of the Model Law.

178. It was also agreed that parentheses were to be used when necessary for grammatical reasons, while square brackets were to be used where it was necessary to signal to enacting States that the text was optional. In the latter case, it was pointed out, the square brackets were intended to draw the attention of States to the

particular considerations discussed in the Guide that might affect their decisions on how to enact the text.

#### *Finalization of the Model Law*

179. The Commission authorized the Secretariat to prepare the final text of the Model Law by incorporating changes agreed to be made at the session to document A/CN.9/729 and its addenda, renumbering the articles as a result of the introduction of new article 15 bis, amending cross-references and making other necessary editorial changes throughout the Model Law.

#### *General comments*

180. While acknowledging the efforts made to prepare the revised Model Law, a view was expressed that some of its provisions focused excessively on the use of public procurement as a tool for promotion of international trade. According to that view, public procurement in many developing countries was used as a tool for building local capacities, developing local small and medium-sized enterprises and implementing other socio-economic and environmental policies of States. The Commission was urged to take into account the social and economic realities of various countries in preparing the Guide and to avoid indicating that the text should be directly implemented into domestic legislation without amendment to take account of such matters.

### **C. Preparation of a Guide to Enactment to the revised Model Law**

181. The importance of a Guide to Enactment to the revised Model Law as an indispensable accompaniment to that Model Law was stressed. Recalling that the Guide was expected to contain recommendations to enacting States on how to implement the Model Law, it was understood that the Guide should be approved by the Commission at its next session. It was therefore agreed that work on finalizing the Guide should be undertaken in as efficient and practical manner as possible. Views varied, however, on whether the Working Group should reconvene to finalize the Guide. The view of some delegations was that this was not necessary; the core policy issues had been agreed and reflected in the Model Law, so the Secretariat, in consultation with experts, would be able to finalize the Guide. In support of that view, it was stated that: (a) the final Guide should be presented by the Secretariat for adoption of the Commission at its forty-fifth session, in 2012; (b) a sufficient number of days should be allocated to the Commission for that purpose; and (c) if any session of the Working Group were to be held before the Commission's forty-fifth session, only one session, preferably in the spring of 2012, should be held. Another view was that, in the light of budgetary uncertainties, a Working Group session before the Commission's session in 2012 would be undesirable. Alternatives to Working Group sessions were considered, such as meetings of a working party, informal meetings before the Commission session or expert group meetings in the manner usually convened by the Secretariat.

182. The alternative view was that it was essential for the Working Group to continue working on the Guide, particularly as a number of policy issues (some of which might be difficult to resolve) had been referred to the Guide for elaboration.

The involvement of all delegations in resolving them was considered important. Support was therefore expressed for holding at least one session of the Working Group before the next session of the Commission. It was added that the draft Guide was a long document, which the Commission would not be in a position during its session to consider in sufficient detail in full in order to ensure the quality of the text.

183. The differences between formal intergovernmental sessions and informal expert group meetings convened by the Secretariat, from budgetary and other perspectives, were recalled. Informal alternatives to a session of the Working Group alone were not considered viable, in part because the expectation was that the Guide would be finalized in a formal intergovernmental setting. It was emphasized that experts at expert group meetings acted in their individual capacity rather than as representatives of Governments; since the Guide was expected to be an UNCITRAL document, it was considered essential that all States had a chance to participate. In addition, concerns were expressed that availability of resources for interpretation and translation in all six official United Nations languages in the context of informal meetings, unlike formal intergovernmental sessions, could not be ensured. It was considered essential that the text of the Guide should be made available in all official languages of the United Nations well before the session of the Commission for comment by States and interested organizations.

184. The Commission preliminarily agreed that holding one session of the Working Group before the next session of the Commission, in either late autumn 2011 or early 2012, would be appropriate; the final decision on that issue was deferred, however, until the Commission had a chance to consider all issues related to future meetings of UNCITRAL. (For further consideration of the issue, see paras. 334-350 below.) The Secretariat was instructed to advance work on the Guide as much as possible for that session of the Working Group, through informal consultations with experts. The prevailing view was that, during the preparation of the revised Model Law, in-person expert group meetings had proved to be more efficient than teleconferences or exchanges of comments and documents.

185. It was proposed that the Commission should consider at a later session whether some topics addressed in the Guide (such as defence procurement) and other issues that might be of interest to users or in certain regions could be discussed in detail in supporting papers, rather than in the Guide.

186. In response to a query on how to ensure that the Guide would be a living document, the suggestion was made that it could be updated electronically on the UNCITRAL website. The need for regular contacts by the Secretariat with experts to monitor developments in the regulation of public procurement was emphasized. It was suggested that the Commission might receive periodic reports of the Secretariat with the relevant information and proposals and that it would be for the Commission to authorize making the proposed changes in the Guide. The significant expertise that had been built up in the preparation of the revised Model Law and a revised Guide could be harnessed through such a mechanism without the need to engage a working group.

187. The creation of a blog on the “UNCITRAL Model Procurement Law”, and the principles of operation of that blog, were announced. The goal was to create an open



platform for the exchange of comments on the implementation of the revised Model Law and the use of its Guide.

#### **D. Promotion of the revised Model Law**

188. The Commission heard an oral report from the Secretariat on its efforts to promote the work of UNCITRAL in the area of public procurement and the instruments resulting from that work. It was reported that the main activities were through conferences and publications and technical assistance projects. A joint project with the European Bank for Reconstruction and Development and OSCE for countries of the Commonwealth of Independent States and Mongolia that was intended to start in September 2011 was cited as an example. The project, it was explained, had as its goal the promotion and use of the revised Model Law in those countries, some of which had based their procurement law on the 1994 text.

189. The need for States to take a more active role in promoting the use of the revised Model Law and its effective implementation and uniform interpretation, in particular through the donor agencies of States, was stressed, also given resource constraints in the Secretariat for such work. In that regard, reference was made to the CLOUT (case law on UNCITRAL texts) system for collecting and disseminating information about UNCITRAL texts (see paras. 271-274 below), which did not currently contain reported case law on UNCITRAL texts in the area of public procurement. Information about enactment of UNCITRAL instruments in that area was also lacking as a result of the absence of reports from States to the Commission. Inherent differences with respect to monitoring the enactment of UNCITRAL texts in the area of public procurement, including because enactments were generally adapted to suit local circumstances, were recalled. It was generally agreed that coordination among the various procurement reform agencies and other mechanisms to promote effective implementation and uniform interpretation of the revised Model Law should be considered. The benefits of those approaches for achieving a greater harmonization of public procurement laws in various jurisdictions were highlighted.

#### **E. Future work in the area of public procurement**

190. The Commission considered the desirability of work in the area of public-private partnerships and privately financed infrastructure projects. The Commission recalled its instruments on privately financed infrastructure projects and heard a view that those instruments might need to be updated in the light of the work accomplished in the area of public procurement. In the view of some delegations, however, the issue should be considered in the broader context of the future work programme of UNCITRAL as a whole and in the light of financial and human resource constraints faced by UNCITRAL and its secretariat so as to prioritize the work in various fields appropriately.

191. The Commission requested the Secretariat to prepare a study on possible future work of UNCITRAL in the area of public-private partnerships and privately financed infrastructure projects for consideration by the Commission at a future

session. It was noted that this topic could include many aspects, of which public procurement was only one.

## F. Adoption of the UNCITRAL Model Law on Public Procurement

192. The Commission, after consideration of the text of the draft UNCITRAL Model Law on Public Procurement and other procurement-related topics, adopted the following decision at its 933rd meeting, on 1 July 2011:

*“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 significant portion of public expenditure in most States,*

*“Recalling the adoption of its Model Law on Procurement of Goods, Construction and Services at its twenty-seventh session, in 1994,<sup>8</sup>*

*“Observing that the 1994 Model Law, which has become an important international benchmark in procurement law reform, contains procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process,*

*“Observing also that, despite the widely recognized value of the 1994 Model Law, new issues and practices have arisen since its adoption that have justified revision of the text,*

*“Recalling that, at its thirty-seventh session, in 2004, it agreed that the 1994 Model Law would benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications in public procurement, and the experience gained in the use of the 1994 Model Law as a basis for law reform, taking care, however, not to depart from the basic principles behind it and not to modify the provisions whose usefulness had been proven,<sup>9</sup>*

*“Recalling also that at that session it decided to entrust the drafting of proposals for the revision of the 1994 Model Law to its Working Group I (Procurement), which was given a flexible mandate to identify the issues to be addressed in its considerations,<sup>10</sup>*

*“Expressing appreciation to the Working Group for having prepared the draft UNCITRAL Model Law on Public Procurement,*

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<sup>8</sup> *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1)*, para. 97.

<sup>9</sup> *Ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 81.

<sup>10</sup> *Ibid.*, para. 82.

“*Noting* that the revisions to the 1994 Model Law were the subject of due deliberation and extensive consultations with Governments and interested international organizations, and thus it can be expected that the revised Model Law, to be called ‘the UNCITRAL Model Law on Public Procurement’, would be acceptable to States with different legal, social and economic systems,

“*Noting also* that the revised Model Law is expected to contribute significantly to the establishment of a harmonized and modern legal framework for public procurement that promotes economy, efficiency and competition in procurement and at the same time fosters integrity, confidence, fairness and transparency in the procurement process,

“*Being convinced* that the revised Model Law will significantly assist all States, in particular developing countries and States whose economies are in transition, in enhancing their existing procurement laws and formulating procurement laws where none presently exist, and will lead to the development of harmonious international economic relations and increased economic development,

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

“2. *Requests* the Secretary-General to disseminate broadly, including through electronic means, the text of the UNCITRAL Model Law on Public Procurement to Governments and other interested bodies;

“3. *Recommends* that all States use the UNCITRAL Model Law on Public Procurement in assessing their public procurement legal regime and give favourable consideration to the UNCITRAL Model Law on Public Procurement when they enact or revise their laws;

“4. *Requests* all States to support the promotion and implementation of the UNCITRAL Model Law on Public Procurement;

“5. *Calls for* closer cooperation and coordination among the Commission and other international organs and organizations, including regional organizations, active in the field of procurement law reform, in order to avoid undesirable duplication of efforts and inconsistent, incoherent or conflicting results in the modernization and harmonization of public procurement law;

“6. *Endorses* the efforts and initiatives of the Commission’s secretariat aimed at increasing coordination of, and cooperation on, legal activities concerned with public procurement reform.”

#### **IV. Finalization and adoption of judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency**

193. The Commission noted that Working Group V (Insolvency Law) had considered at its thirty-ninth session, held in Vienna from 6 to 10 December 2010, a draft text of the judicial materials on the Model Law (A/CN.9/WG.V/WP.97 and Add.1 and 2), which responded to a mandate given to the Secretariat by the Commission and was developed in consultation with judges and insolvency experts (A/CN.9/715, paras. 110-116). The Commission further noted that the draft text had

been considered at the Ninth Multinational Judicial Colloquium, held in Singapore on 12 and 13 March 2011 (see paras. 220-221 below)<sup>11</sup> and that, pursuant to the Working Group's request (A/CN.9/715, para. 116), it had been circulated to Governments for comment in February 2011.

194. The draft judicial materials were revised on the basis of the decisions made by the Working Group at its thirty-ninth session, the comments received from Governments and those made at the judicial colloquium.

195. The Commission had before it the revised version of the draft judicial materials (A/CN.9/732 and Add.1-3), the comments from Governments (A/CN.9/733 and Add.1) and the report of the thirty-ninth session of the Working Group (A/CN.9/715). The Commission heard an oral introduction to the draft text.

196. The Commission expressed its appreciation for the draft judicial materials and emphasized their usefulness for practitioners and judges, as well as creditors and other stakeholders in insolvency proceedings, particularly in the context of the current financial crisis. In that regard, the judicial materials were viewed as very timely. The Commission also expressed its appreciation for the incorporation of the suggestions made by Governments following circulation of the draft judicial materials and agreed that the document should be entitled "The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective".

197. The Commission also agreed that, in order to recognize the significant contribution of Justice Paul Heath of the High Court of New Zealand in preparing the first draft of the judicial materials and contributing to its further development, an appropriate acknowledgement should be included in a preface that would be prepared by the Secretariat.

198. At its 934th meeting, on 1 July 2011, the Commission adopted the following decision:

*The United Nations Commission on International Trade Law,*

*Noting* that increased trade and investment leads to a greater incidence of cases where business is conducted on a global basis and enterprises and individuals have assets and interests in more than one State,

*Noting also* that, where the subjects of insolvency proceedings are debtors with assets in more than one State, there is generally an urgent need for cross-border cooperation in, and coordination of, the supervision and administration of the assets and affairs of those debtors,

*Considering* that cooperation and coordination in cross-border insolvency cases has the potential to significantly improve the chances for rescuing financially troubled debtors,

*Believing* that the UNCITRAL Model Law on Cross-Border Insolvency<sup>12</sup> (the Model Law) contributes significantly to the establishment of a harmonized legal framework for addressing cross-border insolvency and facilitating coordination and cooperation,

<sup>11</sup> The report of the colloquium is available from [www.uncitral.org/pdf/english/news/NinthJC.pdf](http://www.uncitral.org/pdf/english/news/NinthJC.pdf).

<sup>12</sup> United Nations publication, Sales No. E.99.V.3.

*Acknowledging* that familiarity with cross-border cooperation and coordination and the means by which it might be implemented in practice is not widespread,

*Convinced* that providing readily accessible information on the interpretation of and current practice with respect to the Model Law for reference and use by judges in insolvency proceedings has the potential to promote wider use and understanding of the Model Law and facilitate cross-border judicial cooperation and coordination, avoiding unnecessary delay and costs,

1. *Adopts* the UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective, as contained in document A/CN.9/732 and Add.1-3 and authorizes the Secretariat to edit and finalize the text in the light of the deliberations of the Commission;
2. *Requests* the Secretariat to establish a mechanism for updating the Judicial Perspective on an ongoing basis in the same flexible manner as it was developed, ensuring that its neutral tone is maintained and that it continues to meet its stated purpose;
3. *Requests* the Secretary-General to publish, including electronically, the text of the Judicial Perspective, as updated/amended from time to time in accordance with paragraph 2 of this decision, and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available;
4. *Recommends* that the Judicial Perspective be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings;
5. *Also recommends* that all States continue to consider implementation of the Model Law.

## **V. Arbitration and conciliation**

### **A. Progress reports of Working Group II**

199. At its current session, the Commission had before it the reports of the Working Group on its fifty-third session, held in Vienna from 4 to 8 October 2010 (A/CN.9/712), and on its fifty-fourth session, held in New York from 7 to 11 February 2011 (A/CN.9/717). The Commission commended the Working Group for the progress made regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration and the Secretariat for the quality of the documentation prepared for the Working Group.

200. The Commission noted that the Working Group had considered matters of content, form and applicability of the legal standard on transparency to both future and existing investment treaties. It was confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with great practical interest, taking account of the high number of treaties already concluded. The Commission also

reiterated its commitment expressed at its forty-first session, in 2008, regarding the importance of ensuring transparency in investor-State arbitration.<sup>13</sup>

201. The Commission noted that the Working Group had discussed at its fifty-third session the matter of submissions by third parties (*amicus curiae*) in arbitral proceedings. In that context, the question of intervention in the arbitration by a non-disputing State party to the investment treaty was raised. At that session, the Working Group had agreed to seek guidance from the Commission on whether that topic could be dealt with by the Working Group in the context of its current work (A/CN.9/712, para. 103). That agreement was reiterated by the Working Group at its fifty-fourth session (A/CN.9/717, para. 153). It was explained that, at its fifty-third session, the Working Group had noted that two possible types of *amicus curiae* should be distinguished and perhaps considered differently. The first type could be any third party that would have an interest in contributing to the solution of the dispute. A second type could be another State party to the investment treaty at issue that was not a party to the dispute. It was noted that such a State often had important information to provide, such as information on *travaux préparatoires*, thus preventing one-sided treaty interpretation. It was also noted that an intervention by a non-disputing State party of which the investor was a national could raise issues of diplomatic protection and was to be given careful consideration (A/CN.9/712, para. 49).

202. After discussion, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State party to the investment treaty should be regarded as falling within the mandate of the Working Group. Whether the legal standard on transparency should deal with such a right of intervention and, if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group.

203. With respect to future work in the field of settlement of commercial disputes, the Commission recalled that the issue of arbitrability should be maintained by the Working Group on its agenda, as decided by the Commission at its thirty-ninth session.<sup>14</sup> Further, the Commission heard a suggestion that the issue of confidentiality might need to be further examined. It was said that, where confidentiality was specifically protected under legislation, there was no single approach to the scope of the obligation of confidentiality in terms of the information that was to be treated as confidential, the persons to whom the obligation attached or permissible exceptions to prohibitions on disclosure and communication. The Commission agreed that the options for dealing with confidentiality in commercial arbitration should be considered as a matter for future work of the Working Group.

204. The Commission was informed that recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010,<sup>15</sup> were under preparation by the Secretariat in accordance with the decision of the Commission at its forty-third session, in 2010.<sup>16</sup> It was recalled that the purpose of such

<sup>13</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314.

<sup>14</sup> *Ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), para. 187.

<sup>15</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I.

<sup>16</sup> *Ibid.*, para. 189.

recommendations was to promote the use of the Rules and that arbitral institutions in all parts of the world would be more inclined to accept acting as appointing authorities if they had the benefit of such recommendations. Subject to the availability of resources, the Secretariat was requested to prepare draft recommendations for consideration by the Commission at a future session, preferably as early as 2012.

205. The Commission agreed that the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings<sup>17</sup> needed to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules, as revised in 2010, and entrusted the Secretariat with the preparation of the revised Notes.

206. The Commission heard an oral report on progress regarding the preparation of a guide to enactment and use of the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006.<sup>18</sup> The Commission requested the Secretariat to pursue its efforts towards the preparation of the guide. It was agreed that a more substantive presentation on progress made in the preparation of the guide should be made at a future session of the Commission.

207. Noting the various projects referred to in paragraphs 204-206 above, as well as the preparation of a guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (see paras. 250-252 below), the Commission discussed the priorities to be given to those projects. The Commission agreed on the importance of each of those projects and took note of the fact that, resources permitting, the Secretariat should work as a matter of priority on the preparation of recommendations on the use of the UNCITRAL Arbitration Rules, as revised in 2010, and on revising the UNCITRAL Notes on Organizing Arbitral Proceedings. The elaboration of a guide on the New York Convention (see para. 252 below), which might take longer than the other two projects, was seen as a particularly important goal.

## **B. Mediation in the context of settlement of investor-State disputes**

208. The Commission noted that, following consultations between the secretariats of UNCITRAL and UNCTAD, a proposal had been received by the UNCITRAL secretariat from UNCTAD on the question of mediation in the context of settlement of investor-State disputes (transmitted to the Commission in a note by the Secretariat (A/CN.9/734)).

209. The Commission heard a presentation by the secretariat of UNCTAD on the use of mediation in the context of investor-State dispute settlement. The work of UNCTAD on international investment law was said to pursue the overall objective of harnessing foreign investment as a tool for sustainable development. It was said that, in recent years, there had been an increasing interest in the possibility of using alternative methods for managing disputes effectively. Effective recourse to mediation or conciliation as part of investor-State dispute settlement mechanisms

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<sup>17</sup> Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), part II.

<sup>18</sup> Ibid., *Fortieth Session, Supplement No. 17* (A/40/17), annex I; and *ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), annex I. For previous discussions on the issue, see *ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), para. 176.

might improve the efficiency of dispute resolution and have several advantages, such as enhancing flexibility, consuming fewer resources and being favourable to the long-term working relationship between the parties, while simultaneously improving good governance and regulatory practices of States.<sup>19</sup> Overall, mediation/conciliation as an alternative approach to international arbitration under investment treaties was said to offer a promising alternative to the settlement of investment disputes through international arbitration; hence various actors should be encouraged to give such methods further consideration.

210. It was said that UNCITRAL had already adopted well-known texts in the field of mediation/conciliation. The 1980 UNCITRAL Conciliation Rules<sup>20</sup> contained a set of rules to be applied by agreement of the parties to conciliation of disputes arising out of, or relating to, a contractual or other legal relationship where the parties were seeking an amicable settlement of their dispute. The UNCITRAL Model Law on International Commercial Conciliation, adopted in 2002,<sup>21</sup> which provided uniform rules in respect of the conciliation process, used a broad notion of the term “conciliation” for referring to proceedings in which a third person or a panel of persons (“the conciliator”) assisted the parties in their attempt to reach an amicable settlement of their dispute. The Model Law on Conciliation addressed procedural aspects of conciliation, including the appointment of conciliators, the commencement and termination of conciliation, the conduct of conciliation, communication between the conciliator and other parties, confidentiality and the admissibility of evidence in other proceedings, as well as post-conciliation issues, such as the conciliator acting as arbitrator and the enforceability of settlement agreements.

211. The Commission considered steps that might need to be taken to foster the use of mediation in the context of investor-State dispute settlement. It was suggested that the UNCITRAL and UNCTAD secretariats should combine forces to increase awareness among the community of States, investors, legal practitioners, and arbitration and international organizations about mediation/conciliation as an alternative approach to investor-State dispute resolution that would complement sustainable and responsible investment.

212. After discussion, the Commission expressed its appreciation to its secretariat for establishing close cooperation with UNCTAD over the previous years. The secretariat was encouraged to continue such cooperation, resources permitting. The Commission agreed that the proposal to foster the use of mediation in the context of investor-State dispute settlement was worthy of further consideration. It was suggested that conciliation/mediation with respect to the settlement of treaty-based investor-State disputes should be considered as a topic for future work by the Working Group.

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<sup>19</sup> *Investor-State Disputes: Prevention and Alternatives to Arbitration*, United Nations publication, Sales No. E.10.II.D.11; available from [www.unctad.org/en/docs/diaeia200911\\_en.pdf](http://www.unctad.org/en/docs/diaeia200911_en.pdf).

<sup>20</sup> *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 106.

<sup>21</sup> United Nations publication, Sales No. E.05.V.4.



## VI. Online dispute resolution: progress reports of Working Group III

213. The Commission recalled its previous discussions of online dispute resolutions.<sup>22</sup> At its current session, the Commission noted that Working Group III (Online Dispute Resolution) had commenced its deliberations on the preparation of legal standards, in particular procedural rules on online dispute resolution for cross-border electronic transactions, at its twenty-second session, held in Vienna from 13 to 17 December 2010, and continued its work at its twenty-third session, held in New York from 23 to 27 May 2011. The Commission also noted that, in addition to the procedural rules, the Working Group had requested the Secretariat, subject to the availability of resources, to prepare documentation for its next session addressing the issues of guidelines for neutrals, guidelines for online dispute resolution providers, substantive legal principles for resolving disputes and a cross-border enforcement mechanism.

214. The Commission expressed its appreciation to the Working Group for the progress made, as reflected in the reports on its twenty-second (A/CN.9/716) and twenty-third sessions (A/CN.9/721) and commended the Secretariat for the working papers and reports prepared for those sessions.

215. The Commission took note of a concern raised that, given that online dispute resolution was a somewhat novel subject for UNCITRAL and that it related at least in part to transactions involving consumers, the Working Group should adopt a prudent approach in its deliberations, bearing in mind the Commission's direction at its forty-third session that the Working Group's work should be carefully designed not to affect the rights of consumers.<sup>23</sup>

216. The view was expressed that the Working Group should bear in mind the need to conduct its work in the most efficient manner, which included prioritizing its tasks and reporting back with a realistic time frame for their completion.

217. Differing views were expressed as to whether the mandate of the Working Group should be interpreted to include consumer-to-consumer transactions. One view was that such a further emphasis on the inclusion of consumer-related transactions might make it more difficult to reach consensus on the work of the Working Group as a whole. Another view was that, in practice, it was often difficult, if not impossible, to determine whether a party to a transaction was a consumer or a business.

218. After discussion, the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including business-to-business and business-to-consumer transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering consumer-to-consumer transactions and to elaborate possible rules governing consumer-to-consumer relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation. The Commission also decided that, in general terms, in the implementation of its

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<sup>22</sup> *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 338 and 341-343; and *ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 252 and 257.

<sup>23</sup> *Ibid. Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 256.

mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its next session.

## **VII. Insolvency law: progress report of Working Group V**

### **A. Progress report of Working Group V**

219. The Commission recalled its previous discussions on activity undertaken by Working Group V (Insolvency Law) on the following two topics: (a) guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests and possible development of a model law or provisions on insolvency law addressing selected international issues, such as jurisdictions, access and recognition, in a manner that would not preclude the development of a convention; and (b) responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases.<sup>24</sup> The Commission expressed its appreciation for the progress made by the Working Group as reflected in the report of its thirty-ninth session, held in Vienna from 6 to 10 December 2010 (A/CN.9/715), and commended the Secretariat for the working papers and reports prepared for that session.

### **B. Ninth Multinational Judicial Colloquium**

220. The Commission heard a brief report on the Ninth Multinational Judicial Colloquium, held in Singapore on 12 and 13 March 2011.<sup>25</sup> The colloquium, organized jointly by UNCITRAL, the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International) and the World Bank, was attended by approximately 80 judges from 44 States, who discussed issues of cross-border insolvency coordination and cooperation, including in the context of enterprise groups, as well as the draft text of the UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective, the preparation of which was widely supported by judges as a valuable source of information on current issues and practice. The colloquium was once again judged by participants to be a very useful event and a welcome opportunity for judges from different jurisdictions to meet and discuss cross-border insolvency-related issues and share their experiences. The Commission noted that a short report on the colloquium had been prepared and made available on the respective websites of the three organizations.

221. The Commission expressed its satisfaction to the Secretariat for organizing the colloquium and requested the Secretariat to continue cooperating actively with INSOL International and the World Bank, with a view to organizing further colloquiums in the future, resources permitting.

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<sup>24</sup> Ibid., para. 259.

<sup>25</sup> The report of the colloquium is available from [www.uncitral.org/pdf/english/news/NinthJC.pdf](http://www.uncitral.org/pdf/english/news/NinthJC.pdf).

### C. World Bank: treatment of natural persons in insolvency

222. The Commission heard an oral presentation from the World Bank on work to be undertaken by its Insolvency and Creditor/Debtor Regimes Task Force to study key regulatory aspects underlying natural person insolvency, the variation in legal treatment under national legal regimes and the implications of those divergences for international collaboration and coordination. One of the lessons from the recent financial crisis, the World Bank advised, was the recognition of the problem of consumer insolvency as a systemic risk and the consequent need for the modernization of domestic laws and institutions to enable jurisdictions to deal effectively and efficiently with the risks of individual overindebtedness. The World Bank emphasized the importance of the participation of UNCITRAL in that work, particularly in the light of the possibility that it might lead to additions to the existing insolvency standard, comprising the recommendations of the UNCITRAL Legislative Guide on Insolvency Law<sup>26</sup> and the World Bank's Principles for Effective Insolvency and Creditor Rights Systems.<sup>27</sup> The Commission encouraged the Secretariat to participate actively in the work of the Task Force and to partner with the World Bank in any further work that might contribute to establishing best practice on that topic.

## VIII. Security interests: progress reports of Working Group VI

223. The Commission recalled its previous discussions on the preparation of a text on the registration of security rights in movable assets.<sup>28</sup> At its current session, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its eighteenth session, held in Vienna from 8 to 12 November 2010, and nineteenth session, held in New York from 11 to 15 April 2011 (A/CN.9/714 and A/CN.9/719, respectively). The Commission noted that, at its eighteenth session, the Working Group had adopted the working assumption that the text it had been entrusted to prepare would take the form of a guide on the implementation of a registry of notices with respect to security rights in movable assets. In addition, the Commission noted that, at that session, the Working Group had generally agreed that the text could include principles, guidelines, commentary and possibly recommendations with respect to registration regulations. Moreover, the Commission noted that the Working Group had agreed that the text should be consistent with the UNCITRAL Legislative Guide on Secured Transactions,<sup>29</sup> at the same time taking into account the approaches taken in modern security rights registration systems, both national and international (A/CN.9/714, para. 13). The Commission also noted that, having agreed that the Secured Transactions Guide was consistent with the guiding principles of UNCITRAL texts on e-commerce, the Working Group considered certain issues arising from the use of electronic communications in security rights registries to ensure that, like the Secured

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<sup>26</sup> United Nations publication, Sales No. E.05.V.10.

<sup>27</sup> Available from [www.worldbank.org](http://www.worldbank.org).

<sup>28</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 265-268.

<sup>29</sup> United Nations publication, Sales No. E.09.V.12.

Transactions Guide, the text on registration would also be consistent with those principles (A/CN.9/714, paras. 34-47).

224. The Commission also noted that, at the nineteenth session of the Working Group, differing views had been expressed as to the form and content of the text to be prepared. One view noted was that the text should be a stand-alone guide that would include an educational part introducing the secured transactions law recommended in the Secured Transactions Guide and a practical part that would include model regulations and commentary thereon. Another view noted was that the text should place more emphasis on model regulations and commentary thereon, which should provide States that had enacted the secured transactions law recommended in the Secured Transactions Guide with practical advice as to the issues to be addressed in the context of the establishment and operation of a general security rights registry (A/CN.9/719, paras. 13-15). The Commission also noted that differing views had also been expressed at that session of the Working Group as to whether the regulations should be formulated as model regulations or as recommendations (A/CN.9/719, para. 46). The Commission further noted that, at its nineteenth session, the Working Group had completed the first reading of the draft Security Rights Registry Guide and draft Model Regulations (A/CN.9/WG.VI/WP.46 and Add.1-3) and had requested the Secretariat to prepare a revised version reflecting the deliberations and decisions of the Working Group (A/CN.9/719, para. 12).

225. The Commission expressed its appreciation to the Working Group for the significant progress achieved in its work and to the Secretariat for the efficient assistance provided to the Working Group. The significance of the work undertaken by Working Group VI was emphasized in particular in view of the efforts currently being undertaken by several States with a view to establishing a general security rights registry and the significant beneficial impact the operation of such a registry would have on the availability and cost of credit. With respect to the form and content of the text to be prepared, it was stated that, following the approach used with respect to the Secured Transactions Guide, the text should be formulated as a guide with commentary and recommendations rather than as a text with model regulations and commentary thereon. In that connection, it was noted that the next version of the text before the Working Group would be formulated in a way that would leave the matter open until the Working Group had made a decision. After discussion, the Commission agreed that, leaving aside the decision on the form and content of the text to be prepared for the Working Group, the mandate of the Working Group did not need to be modified and that, in any case, a final decision would be made by the Commission once the Working Group had completed its work and submitted the text to the Commission.

226. Noting the significant progress made by the Working Group in its work and the guidance urgently needed by a number of States, the Commission requested the Working Group to proceed with its work expeditiously and to try to complete its work, hopefully in time for the text to be submitted to the Commission for final approval and adoption at its forty-fifth session, in 2012.

227. As to the future work of the Working Group, it was generally agreed that it was premature for the Commission to consider the matter and make any decision at the current session. The Commission left it to the Working Group to discuss its possible future work and make proposals to the Commission. In that connection, the

suggestion was made that, after completing its text on registration, the Working Group should embark on a project aimed at converting the recommendations in the Secured Transactions Guide into a model law.

228. The Commission next turned to the question of whether a joint set of principles on effective secured transactions regimes should be prepared in cooperation with the World Bank on the basis of the recommendations of the Secured Transactions Guide. It was noted that, based on the precedent of the coordination between the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes and the UNCITRAL Legislative Guide on Insolvency Law, a draft of those principles could be prepared by the Secretariat in cooperation with the World Bank, through its Legal Vice-Presidency, and outside experts, within existing resources and without utilizing Working Group resources. The Commission welcomed the preparation of such principles. It was widely felt that, as the Secured Transactions Guide became the general reference material in secured transactions law reform efforts, principles reflecting the recommendations of the Secured Transactions Guide would promote law reform based on generally acceptable international standards. After discussion, the Commission requested the Secretariat to proceed with the preparation, in cooperation with the World Bank and outside experts, of a joint set of principles on effective secured transactions regimes. It was agreed that such efforts would be aimed at preparing a text that would be approved by both the Commission and the World Bank and could include consultations and meetings with experts from the public and private sector, within existing resources.

229. The Commission next considered the question of whether efforts should be undertaken with a view to ensuring consistency between a proposed European Union instrument on the law applicable to the third-party effects of assignments of receivables and the United Nations Convention on the Assignment of Receivables in International Trade,<sup>30</sup> which addressed that issue.

230. The Commission noted that the European Commission had adopted a regulation on the law applicable to contractual obligations (Rome I)<sup>31</sup> and that article 14 of the Rome I Regulation dealt with the law applicable to the relationship between an assignor and an assignee under a voluntary assignment or contractual subrogation of a claim and the relationship between the assignee and the debtor in a way that was consistent with the United Nations Assignment Convention and the Secured Transactions Guide. As to the law applicable to the proprietary effects of assignments, the Commission noted that the Rome I Regulation had not addressed the matter and that the European Commission was currently preparing a study.

231. The Commission agreed that a coordinated approach to the matter was in the interest of all States, as otherwise a different conflict-of-laws rule would apply depending on whether a dispute was brought before a court in a European Union member State or not. It was widely felt that such a result would undermine certainty as to the law applicable to the proprietary effects of assignments and create unnecessary obstacles to international receivables financing, which could not be distinguished from regional receivables financing. After discussion, the Commission requested the Secretariat to cooperate closely with the European Commission with a

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<sup>30</sup> General Assembly resolution 56/81, annex.

<sup>31</sup> Regulation (EC) No. 593/2008 of the European Parliament and of the Council of the European Union of 17 June 2008.

view to ensuring a coordinated approach to the matter, taking into account the approach followed in the United Nations Assignment Convention and the Secured Transactions Guide. The Commission also encouraged the European Commission to consider removing any obstacle to wide adoption of the United Nations Assignment Convention and the Secured Transactions Guide by States, including by European Union member States that wished to adopt them on the understanding that a future European Union instrument on the matter might limit their application.

## **IX. Current and possible future work in the area of electronic commerce**

232. The Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions that had taken place at the colloquium on electronic commerce, held in New York from 14 to 16 February 2011.<sup>32</sup> The Commission was informed that the Secretariat received regular requests for expert input from other bodies in the United Nations system, as well as from other intergovernmental organizations, and that some of those requests called for a comprehensive discussion in a specialized forum and might therefore best be addressed in Working Group IV (Electronic Commerce).

233. The Commission took note of the information contained in the note prepared by the Secretariat. Broad consensus was expressed on the desirability of reconvening Working Group IV. In particular, it was noted that the past work of UNCITRAL in the field of electronic commerce offered a particularly significant contribution to the advancement of the use of electronic communications in international trade and that too long a lapse in the meetings of that Working Group might erode that leadership, as well as prevent UNCITRAL from updating and complementing existing legal standards in that rapidly evolving field. The view was also expressed, however, that none of the topics under consideration was ripe for discussion at the working group level and that therefore a decision on future meetings of Working Group IV should be further postponed.

234. The need to give a clear mandate to the Working Group was stressed; however, it was also indicated that many of the topics under consideration were, in practice, intersecting. It was further noted that that was particularly the case for electronic single-window facilities. It was suggested that, time and resources permitting, a reconvened Working Group should consider a recommendation pending in the United Nations Centre for Trade Facilitation and Electronic Business (CEFACT) that raised issues under UNCITRAL instruments.

235. Support was expressed for dealing on a priority basis with legal issues relating to the use of electronic transferable records. In particular, it was recalled that such work would be beneficial not only for the generic promotion of electronic communications in international trade but also for addressing some specific issues such as assisting in the implementation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

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<sup>32</sup> Information about the colloquium is also available from [www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html](http://www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html).

(the Rotterdam Rules).<sup>33</sup> Similarly, it was noted, other areas of the transport business, such as aviation, could benefit directly from the formulation of uniform legal standards in the field. It was also noted that the work regarding electronic transferable records might include certain aspects of the other topics discussed in document A/CN.9/728 and Add.1.

236. Some support was also expressed for dealing with legal issues relating to identity management; however, particular caution was recommended when discussing matters touching upon issues, such as privacy and data protection, that had important regulatory aspects. In that regard, it was added, it might be beneficial to wait for further developments so as to better define the terms of a possible future mandate for the Working Group.

237. The importance of mobile commerce, in particular for those countries where connectivity to the information and communication infrastructure was achieved mostly through mobile devices, was also mentioned. In that respect, it was recalled that most legal issues relating to the use of mobile devices were not different in nature from those posed by the use of other electronic devices. It was further said that, while certain mobile commerce practices might call for further study, caution should be used in order to avoid touching upon, on the one hand, issues relating to consumer protection and, on the other hand, issues relating to privacy and data protection.

238. After discussion, the Commission agreed that Working Group IV (Electronic Commerce) should be convened to undertake work in the field of electronic transferable records.

239. The Commission also agreed that the extension of the mandate of Working Group IV to other topics discussed in document A/CN.9/728 and Add.1 as discrete subjects (as opposed to their incidental relation to electronic transferable records) would be further considered at a future session.

240. With respect to legal issues relating to electronic single-window facilities, the Commission welcomed the ongoing cooperation between the Secretariat and other relevant organizations, including the World Customs Organization, and asked the Secretariat to contribute as appropriate, with a view to discussing relevant matters at the working group level when the progress of joint work offered a sufficient level of detail.

## **X. Possible future work in the area of microfinance**

241. The Commission recalled its previous discussions on possible work in the area of microfinance.<sup>34</sup> At its current session, the Commission had before it a note by the Secretariat containing a summary of the proceedings of and the key issues identified at the international colloquium on microfinance, held in Vienna from 12 to 13 January 2011 (A/CN.9/727). The Commission was informed that at the colloquium it was highlighted that, although there had been initiatives, often successful, in a number of States to address issues surrounding microfinance, there

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<sup>33</sup> General Assembly resolution 63/122, annex.

<sup>34</sup> *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 432 and 433; and *ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 275-276 and 280.

was no coherent set of global legal and regulatory measures that could serve as a standard for States wishing to legislate in accordance with international best practice. As noted by some participants, many States were now struggling to find an appropriate regulatory framework to promote financial inclusion through microfinance institutions. UNCITRAL legislative texts were mentioned as instrumental in strengthening a legislative and regulatory framework that could accommodate the needs of the microfinance industry. Subjects indicated included cross-border funding; secured transactions in microfinance, in order to enhance the availability of credit, in particular to small and medium-sized enterprises or clients that did not have sufficient capital or access to other kinds of credit; use of electronic money (e-money); and dispute resolution mechanisms to address the complaints of microfinance users.

242. It was said that conceiving a favourable legal and regulatory framework for microfinance raised various issues for consideration, which included:

- (a) The nature and quality of the regulatory environment;
- (b) The appropriateness of setting limits on interest rates chargeable on microfinance loans;
- (c) Measures to address the problem of overindebtedness;
- (d) The establishment and regulation of credit bureaux;
- (e) Overcollateralization and the use of collateral with no economic value;
- (f) Abusive collection practices;
- (g) Foreign exchange risk where microfinance institutions obtained loan capital from abroad;
- (h) Facilitating the handling of international remittances of funds by microfinance institutions on a cheaper and more efficient basis;
- (i) E-money, including its status as savings; whether “issuers” of e-money were engaged in banking and hence what type of regulation they were subject to; and the coverage of such funds by deposit insurance schemes;
- (j) Enhancing the predictability of the legal status of transactions conducted with mobile devices (for example, in the area of payment services);
- (k) Facilitating the use of agent banking and other forms of branchless banking as a means to make financial services more accessible;
- (l) Measures to promote financial literacy and increase the protection of clients against abusive or unscrupulous lending practices;
- (m) Provision for fair, rapid, transparent and inexpensive processes for the resolution of disputes arising from microfinance transactions;
- (n) Facilitating the use of, and ensuring transparency in, secured lending to microenterprises and small and medium-sized enterprises.

243. The Commission took note of the Secretariat’s involvement in a United Nations inter-agency mechanism for the promotion of inclusive finance, and of the fact that UNCITRAL was the only participant therein focusing on the legal and regulatory aspects of microfinance. The Secretariat was encouraged to continue its



participation in that initiative and to keep abreast of developing legal and regulatory issues with respect to microfinance in order to contribute to the overall effort.

244. The Commission commended the Secretariat for the work done so far in the field of microfinance and expressed unanimous support for continuing work in that field. It was said that microfinance was an important tool for poverty alleviation and that in some countries it was a significant element of the national economy; hence developing a legislative framework for microfinance would prove extremely useful. It was generally felt that UNCITRAL could make a substantial contribution to that matter, as the existing legislative frameworks were not seen as fully adequate. It was explained that some States had recently adopted legislation in that field, and it was proposed that the experience of such States should be shared with others.

245. It was suggested that the work that could be implemented needed to be focused on certain well-defined matters and that the boundaries of the contemplated work should be further determined. It was therefore proposed to identify areas where specific work could be implemented and where further research would be needed as a result, keeping in mind the scope of the mandate of UNCITRAL and its traditional areas of work. It was also suggested that the relations established between UNCITRAL and international organizations active in the field of microfinance should continue to be developed. In particular, the UNCITRAL secretariat was encouraged to pursue the development of its relations with other United Nations bodies and agencies active in the field, as well as with the group responsible for financial inclusion in the Group of 20 Finance Ministers and Central Bank Governors, namely the Global Partnership for Financial Inclusion. The Secretariat was urged to be cautious with regard to unnecessary overlap or interference with matters of banking regulation, including matters of prudential regulation such as those addressed by the Basel Core Principles for Effective Banking Supervision.<sup>35</sup>

246. After discussion, the Commission agreed to include microfinance as an item for the future work of UNCITRAL and to further consider that matter at its next session, in 2012. In order to assist the Commission in defining the areas where work was needed, the Commission requested the Secretariat to circulate to all States a short questionnaire regarding their experience with the establishment of a legislative and regulatory framework for microfinance, including any obstacles they might have encountered in that regard, for consideration by the Commission at its next session. Further, the Commission agreed that, among the topics identified by the Secretariat and listed in paragraph 242 above, the Secretariat should, resources permitting, undertake research for consideration by the Commission at a later session on the items mentioned in subparagraphs (e), (i), (m) and (n) of paragraph 242. That work should be done bearing in mind the need for States to have in place an effective overall legal and regulatory framework for microfinance. The Secretariat was invited to consider further the areas of secured finance, dispute resolution and electronic commerce, in connection with microfinance. It was emphasized that the Secretariat should take account of work already carried out by other institutions in that field in order to avoid duplication of efforts.

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<sup>35</sup> Available from [www.bis.org/publ/bcbs129.htm](http://www.bis.org/publ/bcbs129.htm).

## **XI. Endorsement of texts of other organizations: 2010 revision of the Uniform Rules for Demand Guarantees published by the International Chamber of Commerce**

247. The International Chamber of Commerce requested the Commission to consider recommending the use of the 2010 revision of the Uniform Rules for Demand Guarantees (URDG 758), as it had done most recently with respect to the 2007 revision of the Chamber's Uniform Customs and Practice for Documentary Credits (UCP 600).<sup>36</sup>

248. The Commission recognized that the Uniform Rules for Demand Guarantees provided a new set of rules applicable to demand guarantees securing monetary and performance obligations in a wide array of international and domestic contracts. It was also noted that the Uniform Rules were fully compatible with the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit<sup>37</sup> prepared by the Commission in 1995 and endorsed by the International Chamber of Commerce in 1999.

249. Taking note of the significant revisions made to the previous version of the Uniform Rules and their usefulness in facilitating international trade, the Commission, at its 937th meeting, on 5 July 2011, agreed to recommend the use of the Uniform Rules in international trade and adopted the following decision:

*The United Nations Commission on International Trade Law,*

*Expressing* its appreciation to the International Chamber of Commerce for transmitting to it the revised text of the Uniform Rules for Demand Guarantees, which was approved by the Executive Board of the International Chamber of Commerce on 3 December 2009, with effect from 1 July 2010,

*Congratulating* the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by making its rules on demand guarantees clearer, more precise and more comprehensive while including innovative features reflecting recent practices,

*Noting* that the Uniform Rules for Demand Guarantees constitute a valuable contribution to the facilitation of international trade,

*Commends* the use of the 2010 revision of the Uniform Rules for Demand Guarantees, as appropriate, in transactions involving demand guarantees.

## **XII. Monitoring implementation of the 1958 New York Convention**

250. The Commission recalled its previous discussions on monitoring implementation of the 1958 New York Convention.<sup>38</sup> At its current session, the

<sup>36</sup> *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 356-357.

<sup>37</sup> United Nations, *Treaty Series*, vol. 2169, No. 38030.

<sup>38</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17)*, paras. 401-404; and *ibid.*, *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 355 and 356.

Commission was informed that the Secretariat was carrying out two complementary projects in that regard.

251. One project related to the publication on the UNCITRAL website of information contributed by States on their legislative implementation of the New York Convention. The Commission expressed its appreciation to States that had already contributed information and urged all States to continue providing the Secretariat with accurate information to ensure that the data published on the UNCITRAL website remained up to date.

252. The other project related to the preparation of a guide on the New York Convention. The Commission was informed that the preparation of the guide was currently being carried out by the Secretariat, in close cooperation with G. Bermann and E. Gaillard, who had established research teams to work on the project. The Commission expressed its appreciation for the steps taken so far and requested the Secretariat to pursue its efforts towards the preparation of the guide on the New York Convention. It was agreed that a more substantive presentation on progress made in the preparation of the guide would be made at a future session of the Commission (see also para. 207 above).

### **XIII. Technical assistance: law reform**

#### **A. General discussion**

253. The Commission had before it a note by the Secretariat (A/CN.9/724) describing the technical cooperation and assistance activities undertaken subsequent to the date of the note on that topic submitted to the Commission at its forty-third session, in 2010 (A/CN.9/695 and Add.1). The Commission stressed the importance of such technical cooperation and assistance and expressed its appreciation for the activities undertaken by the Secretariat referred to in document A/CN.9/724. It was explained that legislative technical assistance, in particular to developing countries, was no less important an activity than the formulation of uniform rules itself. For that reason, the Secretariat was encouraged to continue to provide such assistance to the broadest extent possible and to improve its outreach, in particular to developing countries.

254. The Commission agreed on the need for a comprehensive approach to the furtherance of its mandate, based on a life cycle for uniform legislative texts comprised of four steps: identification of adequate topics of work; preparation of texts; adequate promotion of the adoption and use of those texts; and monitoring their uniform interpretation and application. It was noted that, while UNCITRAL had prepared a number of legislative standards, their rate of adoption varied significantly, and therefore the promotion of the adoption and use of those standards seemed to call for specific attention.

255. The Commission took note of the strategic framework for technical assistance suggested by the Secretariat (A/CN.9/724, paras. 10-48) and endorsed its priority lines of action, which included the following: stressing a regional and subregional approach in order not only to achieve economies of scale but also to complement ongoing regional integration initiatives; promoting the universal adoption of those international trade law texts already enjoying wide acceptance, namely the

New York Convention (a United Nations convention adopted prior to the establishment of the Commission but actively promoted by the Commission) and the United Nations Convention on Contracts for the International Sale of Goods;<sup>39</sup> and making particular efforts to disseminate information on recently adopted texts, with a view, if such texts were treaties, to fostering their early adoption and entry into force. In that respect, the benefits relating to further academic and training activities, in particular for members of the judiciary and of the bar, were illustrated.

256. In relation to the promotion of recently adopted texts, the Commission heard a statement from the Comité Maritime International. The Comité commended UNCITRAL for its work and, in particular, for the preparation of the Rotterdam Rules. The Comité illustrated the number of benefits arising from the adoption of the Rotterdam Rules, which were described as a modern and comprehensive treaty that was able to address the needs of all operators involved in maritime transport. In reiterating its readiness to contribute to the promotion and implementation of the Rotterdam Rules, the Comité stressed the need for an early adherence to the Rotterdam Rules by all States so as to establish that text firmly and as soon as possible as the sole global standard in its field.

257. The desirability of ensuring better communication on the mandate and work of UNCITRAL between the Commission and the Secretariat on the one hand and the Commission and decision makers on trade law reform on the other hand was noted. It was suggested that UNCITRAL delegates and experts might be in a position to further contribute to the mandate of UNCITRAL by assisting in identifying those decision makers in the respective capitals.

258. The Commission noted that the continuing ability to respond to requests from States and regional organizations for technical cooperation and assistance activities was dependent upon the availability of funds to meet associated costs. The Commission further noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited. Accordingly, requests for technical cooperation and assistance activities continued to be very carefully considered, and the number of such activities, which of late had mostly been carried out on a cost-share or no-cost basis, was limited. The Commission requested the Secretariat to continue exploring alternative sources of extrabudgetary funding, in particular by more extensively engaging permanent missions, as well as other possible partners in the public and private sectors.

259. The Commission appealed to all States to assist the Secretariat in identifying sources of available funding in their States or organizations that might partner with UNCITRAL to support technical cooperation and assistance activities to promote the use and adoption of UNCITRAL texts, as well as wider participation in the development of such activities. In particular, the Commission asked the Secretariat to circulate, both formally and informally, a questionnaire to take stock of existing and possible sources of funding for technical cooperation and assistance activities.

260. The Commission also reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions or as specific-purpose contributions, in order to facilitate planning and

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<sup>39</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

enable the Secretariat to meet the increasing number of requests from developing countries and countries with economies in transition for technical cooperation and assistance activities. The Commission expressed its appreciation to Indonesia for contributing to the Trust Fund since the Commission's forty-third session and to organizations that had contributed to the programme by providing funds or by hosting seminars.

261. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission. The Commission expressed its appreciation to Austria for contributing to the UNCITRAL Trust Fund since the Commission's forty-third session, thereby enabling travel assistance to be granted to developing countries that were members of UNCITRAL.

## **B. Establishing a regional presence of UNCITRAL**

262. The Commission recalled that, at its forty-second session, in 2009, it had requested the Secretariat to explore the possibility of establishing a presence in regions or specific countries by, for example, having dedicated staff in United Nations field offices, collaborating with such existing field offices or establishing Commission country offices, with a view to facilitating the provision of technical assistance, in particular to developing countries, with respect to the use and adoption of UNCITRAL texts.<sup>40</sup> The General Assembly, in paragraph 10 (e) of its resolution 64/111, had noted that request.

263. The Commission was informed that the options available for establishing such a presence were limited because the regular budget of the Secretariat did not include funds for such activities and currently available extrabudgetary funds for technical assistance projects were scarce. Therefore, the Secretariat, in a note verbale dated 18 March 2011, had invited Member States of the United Nations to express their interest in establishing UNCITRAL regional centres in different parts of the world. States were asked to consider providing substantive financial contributions and necessary privileges and immunities, as well as office premises and facilities, to enable UNCITRAL regional centres to perform their functions.

264. The Commission was also informed that UNCITRAL regional centres, envisaged as project-based offices, would enhance international trade and development by disseminating international trade norms and standards, in particular those elaborated by UNCITRAL, by providing bilateral and multilateral technical assistance, by undertaking coordination activities with international and regional organizations active in the region and by collecting relevant information about UNCITRAL-related activities, including enactments by States in the region. Regional centres would also function as a channel of communication between States in the region and UNCITRAL. Broad support was expressed for the establishment of regional centres, which was considered a novel yet important step for the Commission in reaching out and providing technical assistance to developing

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<sup>40</sup> *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 363.

countries. Broad support was also expressed for the initiative undertaken by the Secretariat to that end.

265. As to the funding of UNCITRAL regional centres, it was understood that, under the limited resources currently available to the Secretariat, the establishment of a regional presence would have to rely entirely on extrabudgetary sources, including but not limited to voluntary contributions from States. In that context, the concern was raised that, while expansion of technical assistance through the establishment of regional centres would be beneficial to recipient States, it should not entail a burden on the already limited resources of the Secretariat. In response to that concern, it was explained that sources of funding would remain completely separate, since the Secretariat was entirely funded by the regular budget of the United Nations. While the Secretariat staff would obviously need to invest some of its time in establishing and monitoring the activities of the regional centres, including in the training of project personnel, a balanced approach would be taken to ensure that the benefits resulting from the establishment of a regional centre would outweigh any related cost associated with the time spent by the Secretariat staff on such activities. It was also indicated that the Commission would be regularly informed about the activities of regional centres. In that context, it was noted that regional centres would need to engage actively in fund-raising activities so as to maintain a self-sustaining budget.

266. The Commission noted that, as at 24 June 2011, the Dominican Republic, El Salvador, Kenya, Malaysia, the Republic of Korea and Singapore had formally expressed an interest in hosting an UNCITRAL regional centre. It also noted that several other States had expressed their support for the initiative. At the current session, Argentina also expressed an interest in hosting an UNCITRAL regional centre.

267. The Commission was informed of the specific offer received from the Republic of Korea for a pilot project whereby the Government of the Republic of Korea, through its Ministry of Justice and the Incheon Metropolitan City Office, had pledged the following for the establishment and operation of the “UNCITRAL Regional Centre for Asia and the Pacific”:

- An annual financial contribution of \$500,000 to the UNCITRAL Trust Fund for Symposia for an initial five-year period
- Office premises in Incheon, Republic of Korea, and other in-kind contributions, including equipment and furniture
- One loaned, non-reimbursable staff member (a legal expert) to engage in technical cooperation and assistance activities.

268. As Malaysia and Singapore also expressed a general interest in hosting an UNCITRAL regional centre in Asia and the Pacific, the Commission noted the possibility of establishing additional regional centres in that region. In that context, the Secretariat was requested to consult further with the relevant authorities of Malaysia and Singapore to ensure that a comprehensive and integrated approach would be implemented to maximize efficiency in providing technical assistance in Asia and the Pacific.

269. After discussion, the Commission expressed its appreciation to the Secretariat for taking the initiative to establish a regional presence of UNCITRAL and its

gratitude to the Government of the Republic of Korea for its generous contribution to the pilot project. Accordingly, the Commission approved the establishment of an UNCITRAL Regional Centre for Asia and the Pacific in the Republic of Korea, subject to the relevant rules and regulations of the United Nations and the internal approval process in the Office of Legal Affairs.

270. The Secretariat was requested to keep the Commission informed of developments regarding the establishment of UNCITRAL regional centres, including the UNCITRAL Regional Centre for Asia and the Pacific, and in particular their funding and budget situations.

#### **XIV. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts**

271. The Commission considered a note by the Secretariat on the promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts (A/CN.9/726), which provided information on the current status of the CLOUT system and an update on work undertaken by the Secretariat on digests of case law relating to the United Nations Sales Convention and the Model Law on Arbitration. The Commission also drew attention to the resource-intensive nature of such work and the need for further resources to sustain it.

272. The Commission noted with appreciation the continuing work under the CLOUT system. As at 6 May 2011, 107 issues of compiled case-law abstracts from the CLOUT system had been prepared for publication, dealing with 1,055 cases relating mainly to the United Nations Sales Convention and the Model Law on Arbitration. The Commission noted the increase in the number of abstracts on the UNCITRAL Model Law on Cross-Border Insolvency and on the New York Convention, as well as the publication of abstracts related to the Convention on the Limitation Period in the International Sale of Goods.<sup>41</sup> The Commission also noted that a majority of the published abstracts concerned cases from Western European and other States and that the remainder concerned cases from other regions (Asia and the Pacific, Eastern Europe, Africa and Latin America and the Caribbean). A few abstracts referred to International Chamber of Commerce awards. The Commission expressed its appreciation to the national correspondents and other contributors for their work in developing the CLOUT system. The Secretariat was encouraged to continue its efforts to extend the composition and vitality of the network of contributors to the CLOUT system.

273. The Commission was informed that a meeting of national correspondents would be held on 7 July 2011 and that it would discuss, among other issues, the revised digest of case law on the United Nations Sales Convention and the advanced work on the digest on the Model Law on Arbitration.

274. There was broad agreement that the CLOUT system, including the digests, continued to be an important aspect of the work undertaken by UNCITRAL for promoting the awareness, harmonization and uniform interpretation of UNCITRAL

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<sup>41</sup> *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I.

texts. The Commission thanked the Secretariat for its work in that area and expressed its full support for a call for increased resources to support and enlarge that work.

## XV. Status and promotion of UNCITRAL legal texts

275. The Commission considered the status of the conventions and model laws emanating from its work and the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/723) and information obtained by the Secretariat subsequent to the submission of that note. The Commission noted with appreciation the information on the following treaty actions and legislative enactments received since its forty-third session regarding the following instruments:

(a) Convention on the Limitation Period in the International Sale of Goods, as amended, of 1980:<sup>42</sup> accession by the Dominican Republic (21 States parties);

(b) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958:<sup>43</sup> accession by Fiji (145 States parties);

(c) UNCITRAL Model Law on International Commercial Arbitration of 1985, with amendments as adopted in 2006:<sup>44</sup> new legislation based on the Model Law as amended in 2006 had been adopted in Australia (2010), Brunei Darussalam (2010), Costa Rica (2011), Georgia (2009), Malaysia (2005) and Hong Kong, China (2010);

(d) UNCITRAL Model Law on International Commercial Conciliation of 2002:<sup>45</sup> new legislation based on the Model Law had been adopted in Montenegro (2005) and in Canada, in the Province of Ontario (2010);

(e) United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea of 2008:<sup>46</sup> new signatures by the Democratic Republic of the Congo and Luxembourg and ratification by Spain (one State party);

(f) UNCITRAL Model Law on Electronic Commerce of 1996:<sup>47</sup> new legislation based on the Model Law had been adopted in Bahrain (2002), Fiji (2008), Ghana (2008), Paraguay (2010), Qatar (2010), Rwanda (2010), Samoa (2008), Vanuatu (2000) and Zambia (2009);

(g) UNCITRAL Model Law on Electronic Signatures of 2001:<sup>48</sup> new legislation based on the Model Law had been adopted in Ghana (2008), Paraguay (2010), Qatar (2010), Rwanda (2010) and Zambia (2009); legislation influenced by

<sup>42</sup> *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), part I.

<sup>43</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>44</sup> *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I; and *ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

<sup>45</sup> *Ibid.*, *Fifty-seventh Session, Supplement No. 17* (A/57/17), annex I.

<sup>46</sup> General Assembly resolution 63/122, annex. The Convention has not yet entered into force; it requires 20 States parties for entry into force.

<sup>47</sup> *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I.

<sup>48</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II.



the principles on which the Model Law was based had been adopted in Nicaragua (2010).

276. The Commission took note of the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/722) and noted with appreciation the influence of UNCITRAL legislative guides, practice guides and contractual texts. In that context, it was noted that Colombia had passed legislation responding to part three of the UNCITRAL Legislative Guide on Insolvency Law, on the treatment of enterprise groups in insolvency.<sup>49</sup>

## **XVI. Coordination and cooperation**

### **A. General**

277. The Commission had before it a note by the Secretariat (A/CN.9/725) providing information on the activities of other international organizations active in the field of international trade law in which the UNCITRAL secretariat had participated since the last note to the Commission on that topic (A/CN.9/707 and Add.1).<sup>50</sup>

278. The Commission noted with appreciation that, pursuant to General Assembly resolution 65/21,<sup>51</sup> the Secretariat had engaged in a dialogue with a number of organizations, including the European Union, the Hague Conference on Private International Law (the Hague Conference), the Organization for Economic Cooperation and Development, the UNCTAD-led Inter-Agency Cluster on Trade and Productive Capacity of the United Nations System Chief Executives Board for Coordination, Unidroit, the World Bank and the World Intellectual Property Organization. The Secretariat principally participated in expert groups, working groups and plenary meetings of those organizations, with the purpose of sharing information and expertise and avoiding duplication of work in the resultant work products. The Commission noted that that work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel of its secretariat. The Commission reiterated the importance of coordination work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and expressed its support for the use of travel funds for that purpose.

279. By way of example of current efforts at coordination, the Commission took note in particular of the activities involving the Hague Conference and Unidroit.

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<sup>49</sup> Available in pre-release form from [www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html).

<sup>50</sup> The notes by the Secretariat under the present agenda item are prepared pursuant to paragraph 5 (b) of General Assembly resolution 34/142 and in accordance with the mandate of UNCITRAL. In that resolution, the Assembly requested the Secretary-General to place before the Commission, at each of its sessions, a report on the legal activities of the international organs, organizations and bodies concerned with international trade law, together with recommendations as to the steps to be taken by the Commission to fulfil its mandate of coordinating the work of organizations active in the field of international trade law and encouraging cooperation among them.

<sup>51</sup> See para. 7 of the resolution.

## **B. Coordination and cooperation in the field of security interests**

280. The Commission had before it a paper prepared jointly by the Permanent Bureau of the Hague Conference and the secretariats of UNCITRAL and Unidroit with the assistance of outside experts (in particular, Neil Cohen and Steven Weise) and entitled “Comparison and analysis of major features of international instruments relating to secured transactions” (A/CN.9/720). It was noted that the Permanent Bureau of the Hague Conference and the secretariats of UNCITRAL and Unidroit planned to give that paper the widest possible dissemination, including by way of a United Nations sales publication to be issued in line with the relevant United Nations publication rules and the terms agreed upon with the Permanent Bureau of the Hague Conference and the secretariat of Unidroit.

281. The Commission welcomed the paper and expressed its appreciation to its secretariat, the Permanent Bureau of the Hague Conference and the secretariat of Unidroit, as well as to all experts involved in preparing the paper. It was widely felt that the paper was reflective of the kind of cooperation that the Commission had been supporting for years. It was also stated that, by summarizing the scope of application of the various instruments, showing how they could interact with one another and providing a comparative understanding of the basic themes covered by each instrument, the paper would be highly useful in assisting policymakers in States that wished to adopt all of those instruments. It was observed that the paper might pave the way for possible future papers explaining the interrelationship of texts prepared by the three organizations mentioned. In that context, however, it was noted that caution should be exercised to avoid creating uncertainty as to the relationship between the various texts that might be involved.

282. The suggestion was made that, in the context of the discussion of the Unidroit Model Law on Leasing,<sup>52</sup> reference should be made to the 1988 Unidroit Convention on International Financial Leasing<sup>53</sup> and to the fact that there was no overlap between the Unidroit Model Law and the 2001 Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment,<sup>54</sup> as the Unidroit Model Law excluded leasing of large aircraft equipment, unless otherwise agreed by the parties. The suggestion was also made that, in the context of the description of the assets covered by the 2009 Unidroit Convention on Substantive Rules for Intermediated Securities,<sup>55</sup> reference should also be made to certain aspects relating to non-intermediated securities that were also covered.

283. After discussion, subject to addressing the above-mentioned suggestions in cooperation with the secretariat of Unidroit, the Commission approved the paper and requested that it be given the widest possible dissemination, including by way of a United Nations sales publication with proper recognition of the contribution of the Permanent Bureau of the Hague Conference and the secretariat of Unidroit.

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<sup>52</sup> Available from [www.unidroit.org/english/modellaws/2008leasing/main.htm](http://www.unidroit.org/english/modellaws/2008leasing/main.htm).

<sup>53</sup> Available from [www.unidroit.org/english/conventions/1988leasing/main.htm](http://www.unidroit.org/english/conventions/1988leasing/main.htm).

<sup>54</sup> Available from [www.unidroit.org/english/conventions/mobile-equipment/main.htm](http://www.unidroit.org/english/conventions/mobile-equipment/main.htm).

<sup>55</sup> Available from [www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm](http://www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm).

## C. Reports of other international organizations

284. The Commission took note of statements made on behalf of the following international organizations.

### 1. International Institute for the Unification of Private Law (Unidroit)

285. The Commission heard a statement on behalf of Unidroit. Unidroit welcomed the current coordination and cooperation with UNCITRAL and reaffirmed its commitment to cooperating closely with the Commission with a view to ensuring consistency, avoiding overlap and duplication in the work of the two organizations and making the best use of the resources made available by the respective member States. Mention was made of the document on the work of UNCITRAL, Unidroit and the Hague Conference in the area of secured transactions (see paras. 280-283 above) as a concrete joint product of that tripartite collaboration. Unidroit expressed its appreciation to UNCITRAL for having coordinated and sponsored that project and expressed the hope that a series of joint projects could follow.

286. Unidroit reported that:

(a) At the ninetieth session of the Unidroit Governing Council, held in Rome from 9 to 11 May 2011, the Council had adopted by acclamation the third edition of the Unidroit Principles of International Commercial Contracts (to be known as “Unidroit Principles 2010”). The new edition included four new chapters dealing with the unwinding of failed contracts, illegality, plurality of obligors and obligees, and conditional obligations. The Council authorized the publication and promotion of the Unidroit Principles 2010 worldwide and mandated the Unidroit secretariat to take the necessary steps to secure their formal endorsement by UNCITRAL;

(b) Unidroit was preparing the third protocol, dealing with space assets, of the 2001 Convention on International Interests on Mobile Equipment (the “Cape Town Convention”). As at 1 July 2011, there were 46 Contracting States to the Cape Town Convention and 40 Contracting States to the Aircraft Protocol. The Governing Council had authorized the Unidroit secretariat to transmit the text of the draft Protocol to a diplomatic conference for adoption. The Government of Germany had agreed to host such a conference, which would take place in Berlin from 27 February to 9 March 2012;

(c) Publication of the revised final version of the Official Commentary to the 2009 Unidroit Convention on Substantive Rules for Intermediated Securities should occur during the third quarter of 2011. In September 2010, the Unidroit secretariat organized a colloquium on financial markets law, with a view to identifying possible topics suitable for insertion in a future legislative guide on principles and rules that could enhance trading in securities in emerging markets. The presentations made at the colloquium were published in a special issue of the *Uniform Law Review* that had appeared earlier in 2011. Groundwork on the legislative guide on the principles and rules was under way and was expected to be reviewed at the second meeting of the Emerging Markets Committee (tentatively scheduled for 28 and 29 March 2012);

(d) Preparation of uniform principles and rules on the netting of financial instruments had been assigned the highest level of priority. The first meeting of the

study group, composed of regulators, scholars and industry representatives, was held in Rome in April 2011. The next meeting would be held in September 2011;

(e) The Unidroit Governing Council had authorized the Unidroit secretariat to continue its consultations with relevant sectors so as to further develop an understanding of the potential scope and advantages of a possible fourth protocol to the Cape Town Convention, on agricultural, construction and mining equipment. The Unidroit secretariat intended to hold an industry consultation meeting in November 2011;

(f) In agreement with the Unidroit Governing Council, consultations with intergovernmental organizations, in particular the Food and Agriculture Organization of the United Nations and the International Fund for Agricultural Development, in the area of agricultural investment and production were being carried out to better explore synergies and develop joint projects. As follow-up, the Unidroit secretariat intended to organize a colloquium, which would also involve external experts, representatives of Governments of member States and representatives from professional circles, in particular from agribusiness and the finance industry, that were interested in private law issues and agricultural development. The colloquium was tentatively scheduled to be held from 8 to 10 November 2011 and should include a discussion on selection procedures for the award of agricultural projects to potential investors. The participation of UNCITRAL to address that topic would be appreciated;

(g) The Unidroit Governing Council had asked the Unidroit secretariat to conduct informal consultations with Governments and other organizations concerned, with a view to ascertaining the scope and feasibility of a possible international instrument on third-party liability for the malfunctioning of services supported by global navigation satellite systems. The Unidroit secretariat had already held an informal consultation meeting in October 2010, at which participants, while expressing differing views on the topic, had conveyed their general interest in continuing consultations;

(h) At its ninetieth session, the Governing Council requested the Unidroit secretariat to proceed with the convening of a follow-up committee of the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects,<sup>56</sup> which as at 1 July 2011 had 32 contracting States.

## 2. World Bank

287. The Commission heard a statement on behalf of the World Bank, in which appreciation was expressed to UNCITRAL and its secretariat for the continuing cooperation conducted with the World Bank. It was noted that over the past year the work of the World Bank in supporting the modernization of the legal enabling environment for economic growth and trade had been significantly enhanced by the work of UNCITRAL. In particular, the observer for the World Bank highlighted the work being done by the two organizations in establishing uniform legal frameworks for public procurement, arbitration and conciliation, insolvency and security interests. The adoption at the current session of the UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective (see para. 198 above), the

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<sup>56</sup> Available from [www.unidroit.org/english/conventions/1995culturalproperty/main.htm](http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm).

ongoing work on the regulatory environment for registries and the exploratory work regarding the legal environment for microfinance were welcomed. Particular appreciation was expressed for UNCITRAL cooperation in the effort to develop a brief statement of standards for effective secured transactions regimes based on the Secured Transactions Guide and for the support offered to the World Bank Insolvency Task Force, which was beginning to consider the appropriateness and feasibility of identifying common principles across jurisdictions for addressing the problem of individual bankruptcy in the light of the emphasis on broad and inclusive access to finance (see para. 222 above). The World Bank also expressed its appreciation for the readiness of the UNCITRAL secretariat to help identify and marshal technical expertise to support the implementation of the Commission's legislative texts.

**D. International governmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups**

288. The Commission recalled that, at its forty-third session, in 2010, it had adopted the summary of conclusions on UNCITRAL rules of procedure and methods of work.<sup>57</sup> By paragraph 9 of the summary, the Commission had decided to draw up and update as necessary a list of international organizations and non-governmental organizations with which UNCITRAL entertained a long-standing cooperation and which had been invited to Commission sessions.

289. The Commission noted that the lists of intergovernmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups were made available to Member States online. The lists contained the full and abbreviated names of organizations, in English, French and/or Spanish, as appropriate, and provided a link to the websites, if any, of the listed organizations. The Commission further noted that the Secretariat systematically maintained the lists, in particular by including new organizations once it was decided to invite them to sessions of UNCITRAL or to sessions of any UNCITRAL working group.

290. The Commission was informed that since December 2010, when the lists had been first made available to the Member States online, six new non-governmental organizations had been added: Association droit et méditerranée (Jurimed), Fondation pour le droit continental/Civil Law Initiative, International Federation of Purchasing and Supply Management, International Technology Law Association, National Center for Technology and Dispute Resolution and Tehran Regional Arbitration Centre.

291. Concern was expressed by some delegations that they had not received information about the lists and the procedure for obtaining access to them. In response to queries, it was explained that access to the lists was given to all United Nations Member States and that the relevant information had been communicated by the Secretariat to all Member States in a note verbale of 14 December 2010. It was agreed that the relevant information should be circulated again to all Member States. A number of delegations were of the view that it would

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<sup>57</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), annex III.*

be effective also to circulate that information to members of delegations to UNCITRAL.

292. The Secretariat confirmed that the lists contained the names of all organizations currently being invited to sessions of the Commission and its working groups. A suggestion was made that the lists should be made more user-friendly by grouping organizations to indicate the body whose sessions they were invited to attend. The Commission requested the Secretariat to restructure the lists to make it clear which organizations were being invited to which working group and which organizations were being invited to sessions of the Commission.

293. Concern was expressed by some delegations that the States members of the Commission were generally not consulted before new non-governmental organizations were added to the list. In response, the Secretariat observed that, while invitations were issued on behalf of the Commission or the working group, it would be too time-consuming and thus impractical to require that the Secretariat always consult member States before deciding to invite non-governmental organizations to sessions of the Commission or its working groups. It was recalled that there had been extensive discussion of that same issue at the previous four sessions of the Commission.

294. The suggestion was made that the Secretariat should circulate information about new non-governmental organizations that were being considered for invitation by way of a formal communication (i.e. a note verbale to permanent missions or permanent representatives) or an informal communication (e.g. an e-mail to representatives of States attending UNCITRAL sessions) before a working group began work on the newly assigned project. In response, concern was expressed about the practical consequences of the suggestion for the Secretariat, the Commission and its working groups, in particular if an invitation to an organization being objected to by a single State would result in preventing the invitation being issued until after the Commission had considered the matter at its annual session. It was generally agreed that cumbersome consultations by the Secretariat with all States before the decision to extend an invitation to any new non-governmental organization should be avoided.

295. The Secretariat explained the way in which it had proceeded on that matter since the end of the forty-third session of the Commission, in 2010: (a) the Secretariat made the preliminary decision to invite new organizations to sessions, on behalf of the Commission and its working groups; (b) at the same time that the invitation was extended to each such organization, the relevant list of invited organizations accessible to Member States was updated; and (c) the Commission was informed at its annual session of any new organization added to the lists (see para. 290 above). It was noted that, if objections were raised to inviting any new organizations, such objections were expected to be addressed at the session by all member States of the Commission.

296. Some delegations suggested that the Secretariat should specifically draw the attention of States to each time a new organization was added to the list of invitees. After discussion, it was agreed that referring States to the updated lists available online should be sufficient. It was agreed that States should be reminded of the availability of the list as compiled and updated in accordance with paragraphs 292 and 295 above in the standard note verbale circulated to invite Governments to

attend each session of UNCITRAL and its working groups. It was understood that any State willing to record an objection to any new organization being invited could communicate its objection to the Secretariat at any time.

297. A widely supported suggestion was that all documents related to the working methods of UNCITRAL should be made available on a dedicated web page of the UNCITRAL website. The Commission requested the Secretariat to update the website, as appropriate.

298. Another suggestion was that, with a view to increasing awareness of the standard-setting and technical assistance work of the Commission, the Secretariat should investigate the possibility of inviting a small number of prominent specialized law reviews to attend sessions of the Commission or its working groups as observers, on the understanding that those reviews would then disseminate information about new projects and existing standards. After discussion, that suggestion was adopted.

## **XVII. Role of UNCITRAL in promoting the rule of law at the national and international levels**

### **A. Introduction**

299. In paragraph 3 of its resolution 62/70, paragraph 7 of resolution 63/128 and paragraph 9 of resolution 64/116, the General Assembly invited the Commission to comment in its report to the Assembly on its current role in promoting the rule of law. The Commission recalled that it had subsequently transmitted its comments, as requested, in its annual reports to the Assembly.<sup>58</sup>

### **B. Actions as regards relevant General Assembly resolutions at the current session**

300. The Sixth Committee of the General Assembly had reached the understanding that comments related to the sub-topic of “rule of law and transitional justice in conflict and post-conflict situations”, under the agenda item on the rule of law, should address, among other things, the role and future of national and international transitional justice and accountability mechanisms and informal justice systems. The Commission therefore decided that at its current session its comments to the General Assembly would focus on that sub-topic and the issues identified by the Sixth Committee from the perspective of the work of UNCITRAL.

301. The Commission held a panel discussion on that sub-topic, with the participation of UNCITRAL partners active in the implementation of commercial law reforms in the Balkan region. The panellists were requested to provide real-life examples of successful achievements and challenges so that such first-hand information could be relied upon in formulating the Commission’s comments on its

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<sup>58</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 385-386; *ibid.*, *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 412-420; and *ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 313-336.

role in the promotion of the rule of law at the national and international levels in the relevant context to the General Assembly.

**C. Summary of the panel discussion on the role of UNCITRAL in the promotion of the rule of law in conflict and post-conflict societies**

302. The panellists emphasized that UNCITRAL instruments and resources, if properly used, could facilitate and expedite the transition from post-conflict recovery towards a more stable and inclusive economy. They also pointed to the unique nature of UNCITRAL and its expertise: no other organization was better equipped to provide internationally acceptable model laws and rules in the field of commercial law, support for enactments of uniform commercial laws and, especially, much-needed education and training. The point was made by all panellists that UNCITRAL should use the full range of its technical assistance and cooperation activities to assist post-conflict societies by providing technical assistance to organizations and Governments at the earliest possible time.

303. In the cross-border context, it was in particular emphasized that UNCITRAL provided a neutral, impartial and apolitical forum for the discussion of technical legal issues, which often enabled parties in cross-border conflicts to restart a dialogue. The impact of the work of UNCITRAL on facilitating regional economic integration, which was widely considered to be an effective deterrent against conflict (including by preventing post-conflict societies from sliding back into conflict), was also noted.

304. In the internal reconstruction context, the use of UNCITRAL instruments and other resources for local commercial law and institutional reforms was considered essential in order to quickly regain the trust of the international business community and donors, without which no flow of the finances needed for reconstruction was possible. In that context, reference was made in particular to UNCITRAL instruments in the areas of public procurement, commercial dispute settlement and contracts for the international sale of goods. It was reported that the fact that local commercial laws were based on internationally acceptable standards elaborated by UNCITRAL constituted sufficient assurance for investors and donors as regards their quality. The need for the increased involvement of UNCITRAL in assistance with the enactment of laws based on its texts and with their interpretation and application was emphasized. Also stressed was the importance of translating UNCITRAL texts into the local languages of post-conflict societies to ensure better outreach to and understanding by intended end-users.

305. It was a well-known fact, it was said, that the judiciary in many countries, not only in post-conflict societies, was understaffed, experienced backlogs and lacked skilled personnel. It was acknowledged that judicial reform was neither easy nor fast to implement. Arbitration had proved to be a viable alternative for the resolution of disputes in societies, including post-conflict societies, facing problems with the judicial system. It was noted that, since arbitration centres as a rule were created by private initiative and administered privately, they were considerably easier and faster to set up and administer than courts. It was reported that some arbitration centres might in fact already have a grass-roots foundation in traditional



dispute resolution mechanisms. The role of UNCITRAL instruments in facilitating the use of arbitration was emphasized.

306. Aspects of the work of UNCITRAL in the area of mediation and conciliation were also touched upon. The positive impact of mediation and conciliation on the general culture of dispute resolution in post-conflict societies, resulting in parties shifting from the position of adversaries to one of aiming at the amicable settlement of a dispute, was in particular noted. For such a positive change to occur, UNCITRAL instruments in that field alone were not considered sufficient. The active engagement of UNCITRAL and its partners in raising public awareness of such alternative means of dispute resolution, assisting in creating necessary mediation centres and building necessary skills was considered vital.

307. It was felt that, although it was obvious that arbitration and mediation and conciliation as regulated by UNCITRAL instruments were relevant in a commercial relations context, when experience with their use in that context proved to be positive, they also affected the way in which non-commercial disputes were resolved.

308. The role of such UNCITRAL resources as the CLOUT system (see paras. 271-274 above) in the context of the training of judges and judicial reforms was emphasized. Apart from being considered an important tool for facilitating the uniform interpretation and application of international commercial law standards by judges and arbitrators, the CLOUT system, it was reported, had an impact on the quality of judgements and arbitral awards delivered: where judges and arbitrators were aware that their judgements or awards would be used by CLOUT national correspondents for preparing abstracts for the CLOUT system, the quality of the judgements or awards that they delivered improved considerably.

309. The potential of some UNCITRAL instruments, for example in the area of public procurement, to facilitate the reintegration of some groups affected by conflict (such as aggrieved minorities, internally displaced persons, refugees and former combatants) into normal economic activity was noted. Such reintegration, it was explained, could be possible through margin-of-preference mechanisms and set-aside programmes, which, if applied in a transparent and strictly regulated manner, were allowed under UNCITRAL public procurement instruments. The different nature of those instruments compared with other international instruments in that area (such as those formulated under the auspices of WTO or the European Union) that aimed primarily at opening local markets to international competition was noted, in particular that such UNCITRAL instruments were to be used as templates for national public procurement laws and thus balanced the goals of promoting international competition with the need to build local capacities and address other socio-economic policies of the State. By regulating both large- and small-scale procurement, such instruments would prove to be useful in post-conflict reconstruction contexts, where both types of procurement were highly relevant.

310. The impact of UNCITRAL on bringing informal sectors of the economy into the formal sector was emphasized. It was reported that a typical situation in post-conflict societies characterized by mistrust and dysfunctional legal enforcement mechanisms was for parties to commercial transactions to turn to informal ways of doing business (e.g. oral transactions on the spot between partners that knew each other). While that type of transaction could satisfy the daily basic

needs of people, it did not create employment and was not conducive to economic progress. UNCITRAL instruments, in particular in the areas of contracts for the sale of goods and commercial dispute settlement, proved to be useful in creating (or recreating) a favourable legal environment for more regulated contract-based commercial relations, including in a cross-border context.

311. Specific examples of the use of UNCITRAL texts and other forms of UNCITRAL engagement in post-conflict societies were given. It was noted that the UNCITRAL Model Law on International Commercial Arbitration was the model for the Kosovo<sup>59</sup> Law on Arbitration adopted in January 2007. It was reported that the Kosovo Chamber of Commerce and the American Chamber of Commerce in Kosovo had endorsed the Kosovo Arbitration Rules patterned after the UNCITRAL Arbitration Rules and would soon consider the UNCITRAL Conciliation Rules when drafting their procedural rules for commercial mediation and amendments to the Kosovo Law on Mediation. It was noted that UNCITRAL had recently provided the United States Agency for International Development/Kosovo Systems for Enforcing Agreements and Decisions programme in Kosovo with materials used in the training of arbitrators in May and June of 2011.

312. With reference to document A/CN.9/724, which was before the Commission at the current session under agenda item 14 (see para. 253 above), it was noted that some technical assistance and cooperation activities of the UNCITRAL secretariat in recent years had been undertaken in cooperation with regional economic integration organizations that included as members post-conflict countries and had had a direct impact on those countries. For example, activities had been held on a regular basis in States parties to the Dominican Republic-Central America-United States Free Trade Agreement. Those activities were related, *inter alia*, to the adoption of UNCITRAL texts by the Dominican Republic, El Salvador and Honduras. Another example given was the UNCITRAL secretariat's contribution to the work of the East African Community Task Force on Cyberlaws, a joint initiative of the East African Community secretariat and UNCTAD aimed at the adoption of uniform laws on electronic transactions in the member States of the Community, based, *inter alia*, on relevant UNCITRAL texts. It was noted that the UNCITRAL secretariat interacted with the Task Force on a regular basis. The legislation of Rwanda on electronic commerce (Law No. 18/2010 of 12 May 2010 relating to electronic messages, electronic signatures and electronic transactions) was prepared within that framework.

313. It was also reported that the UNCITRAL secretariat participated in the private sector development programme for Iraq, where, under the leadership of the United Nations Industrial Development Organization, support was being provided for the preparation of new Iraqi legislation on, *inter alia*, public procurement and alternative dispute resolution (arbitration and conciliation). That programme was aimed at creating and enabling an effective, coherent and comprehensive framework for private sector development in Iraq. Its goals included the enhancement of the legal and regulatory framework to foster economic growth. In particular, in March and April 2011, technical assistance was provided with regard to the drafting of public procurement legislation.

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<sup>59</sup> All references to Kosovo in the present document should be understood to be in compliance with Security Council resolution 1244 (1999).

314. The Commission noted that the UNCITRAL secretariat had also provided comments and assistance to various international institutions that engaged in technical assistance activities in conflict and post-conflict societies. For example, it had provided comments on laws on mediation to the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) as part of its efforts to promote alternative dispute settlement in the Balkans, as well as to the International Finance Corporation, which provided technical assistance to numerous States in the field of dispute settlement, on various arbitration and mediation laws. The Commission noted with appreciation that the involvement of secretariat members in some of those projects was considered key to their successful conclusion. The UNCITRAL secretariat was also providing technical assistance to the World Bank in an effort to promote the adoption in Africa of the New York Convention.

315. The Commission noted the concern expressed in document A/CN.9/724 that the urgent need to counter global threats had attracted attention on a priority basis and demanded significant resources, to the detriment of other areas of work, including international trade law, whose role as an important development tool was often overlooked. International and internal conflicts had weakened the capacity of affected States, including their ability to engage in trade law reform. That had happened in spite of the fact that trade might provide an important contribution to post-conflict recovery, both by fostering economic development and by building mutual trust.

#### **D. Conclusions**

316. The Commission identified the relevance of its current work, in particular in the fields of arbitration and conciliation, public procurement and security rights registries, and its possible future work in the area of microfinance to post-conflict reconstruction in general and to some of the specific subjects identified by the Sixth Committee under that sub-topic (see para. 300 above).

317. The Commission noted the particular relevance of its instruments and resources for creating an environment conducive to post-conflict reconstruction and preventing societies from sliding back into conflict. Its instruments, if used for the enactment of commercial laws in post-conflict societies, contributed to regaining the trust of the business community and donors that was lost or negatively affected as a result of the conflict. Its programmes and resources were also conducive to organizing institutions that supported economic activity, legal education and skills-building, such as chambers of commerce, bar associations and arbitration centres. Its instruments and resources also contributed to strengthening the judiciary (e.g. through the CLOUT system, which helped judges to better understand international commercial law standards and apply them in a uniform way). They could also make positive changes to dispute settlement strategies and behaviour in affected societies.

318. While acknowledging the need for UNCITRAL and its secretariat to be more actively engaged in post-conflict reconstruction, the Commission was of the view that, since it faced a lack of sufficient resources, its contribution in that context would remain modest or might even diminish unless innovative ways were found for the early engagement of UNCITRAL instruments and resources in post-conflict

recovery operations by the United Nations and other donors (such as through the Department of Peacekeeping Operations, the Peacebuilding Commission, the United Nations Development Programme, the World Bank, the European Union and OSCE). The secretariat was encouraged to seek and develop partnerships to that end. It was noted that the establishment of UNCITRAL regional centres, discussed earlier at the current session (see paras. 262-270 above), should also facilitate achieving that goal.

319. It was considered necessary to achieve increased awareness about the work of UNCITRAL, in particular recognition that UNCITRAL dealt not only with complex sophisticated trade practices (such as the assignment of receivables) but also with the basic building blocks of any commercial activity (such as the sale of goods) and thus could make a real and immediate contribution in societies emerging from conflict. Such awareness should be achieved not only in the United Nations system but also among bilateral and multilateral donors, as well as in recipient countries and affected societies. The role of non-governmental organizations and academia in publicizing the relevance of the work of UNCITRAL in that context was noted. It was also suggested that means should be explored for more broadly disseminating UNCITRAL instruments, including by translating them into local languages in post-conflict societies.

320. The Commission reiterated its conviction that promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international level, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General. The Commission was looking forward to being part of strengthened and coordinated rule-of-law activities of the Organization.

#### **E. High-level meeting of the General Assembly on the rule of law at the national and international levels in 2012**

321. The attention of the Commission was drawn to paragraph 13 of General Assembly resolution 65/32. The Commission noted that it would be informed by the Secretariat in due course of the agreed modalities of the high-level segment of the Assembly's sixty-seventh session on the rule of law at the national and international levels so that the Commission could explore at its next session, in 2012, ways and means of ensuring that aspects of the work of UNCITRAL were duly reflected in that meeting. The importance of not overlooking such aspects in discussions during that high-level meeting was noted.

### **XVIII. International commercial arbitration moot competitions**

#### **A. General remarks**

322. The Commission noted with satisfaction that the Willem C. Vis International Commercial Arbitration Moot competition, which involved participants from all over the world, was a very successful educational initiative, having contributed both to the dissemination of information about UNCITRAL instruments and to the

development of university courses dedicated to international commercial arbitration. Special appreciation was expressed to Eric Bergsten, former secretary of the Commission, for developing the moot competition and giving it direction since its inception during the 1993/94 academic year. Appreciation was also expressed to all institutions and persons involved in the preparation and conduct of the moot competitions.

323. The Commission took note with appreciation and expressed support for the continuation of preliminary consultations between the Secretariat, universities and other institutions in various parts of the world regarding the possibility of developing a moot court specifically designed to promote UNCITRAL insolvency standards. In that connection, it was suggested that future inspiration for moot courts could also be derived from UNCITRAL standards on security interests.

## **B. Willem C. Vis International Commercial Arbitration Moot 2011**

324. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Eighteenth Moot. The oral arguments phase had taken place in Vienna from 15 to 21 April 2011. As in previous years, the Moot had been co-sponsored by the Commission. It was noted that the legal issues dealt with by the teams of students participating in the Eighteenth Moot had been based on the United Nations Sales Convention and the Arbitration Rules of the Chamber of Arbitration of Milan. A total of 254 teams from law schools in 63 countries had participated in the Eighteenth Moot. The best team in oral arguments was that of the University of Ottawa (Canada). The oral arguments of the Nineteenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 30 March to 5 April 2012.

325. It was also noted that the Eighth Willem C. Vis (East) International Commercial Arbitration Moot had been organized by the Vis East Moot Foundation with the Chartered Institute of Arbitrators, East Asia Branch, and also co-sponsored by the Commission. The final phase had been organized in Hong Kong, China, from 4 to 10 April 2011. A total of 85 teams from 19 countries had taken part in the Eighth (East) Moot. The winning team in the oral arguments was from Bond University (Australia). The Ninth (East) Moot would be held in Hong Kong, China, from 19 to 25 March 2012.

## **C. Madrid Commercial Arbitration Moot 2011**

326. It was noted that Carlos III University of Madrid had organized the Third International Commercial Arbitration Competition in Madrid from 20 to 25 June 2011. The Madrid Moot had also been co-sponsored by the Commission. The legal issues involved in the competition were the international sale of goods (the United Nations Sales Convention), international transport (the Rotterdam Rules) and international commercial arbitration under the Model Law on Arbitration and the New York Convention. A total of nine teams from law schools or masters programmes in five countries had participated in the Madrid Moot in Spanish. The

best team in oral arguments was from the University of Versailles (France). The Fourth Madrid Moot would be held in 2012 on dates yet to be confirmed.

## **XIX. Relevant General Assembly resolutions**

327. The Commission took note with appreciation of the following four General Assembly resolutions adopted on 6 December 2010: resolution 65/21 on the report of the United Nations Commission on International Trade Law on the work of its forty-third session; resolution 65/22 on the UNCITRAL Arbitration Rules as revised in 2010; resolution 65/23 on the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property; and resolution 65/24 on part three of the UNCITRAL Legislative Guide on Insolvency Law.

## **XX. Other business**

### **A. Internship programme**

328. An oral report was presented on the internship programme at the UNCITRAL secretariat. It was in particular noted that, since the secretariat's oral report to the Commission at its forty-third session, in July 2010, 17 new interns had undertaken an internship with the UNCITRAL secretariat.

329. The Commission noted that the secretariat, in selecting interns from the roster of interns maintained and administered by the United Nations Office at Vienna, kept in mind the needs of UNCITRAL and its secretariat at any given period, in particular the need to maintain the UNCITRAL website in the six official languages of the United Nations. The Commission further noted that, when a sufficient pool of qualified candidates was available, the secretariat tried to ensure a balanced gender representation and representation from various geographical regions, paying particular attention to the needs of developing countries and countries with economies in transition.

330. During the period under review, the secretariat received, out of a total of 17 interns, 11 female interns and 12 interns from developing countries and countries with economies in transition. The Commission noted that during the period under review the secretariat faced difficulties in finding on the roster of interns eligible and qualified candidates from African and Latin American and Caribbean States, as well as candidates with Arabic language skills.

### **B. Evaluation of the role of the Secretariat in facilitating the work of the Commission**

331. It was recalled that, as indicated to the Commission at its fortieth session, in 2007,<sup>60</sup> the programme budget for the biennium 2008-2009 listed among the "expected accomplishments of the Secretariat" its contribution to facilitating the

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<sup>60</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 243.

work of UNCITRAL. The performance measure of that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).<sup>61</sup> The Commission agreed to provide feedback to the Secretariat. It was recalled that a similar question regarding the level of satisfaction of UNCITRAL with the services provided by the Secretariat had been asked at the close of the forty-third session of the Commission.<sup>62</sup> It was further recalled that, at that session, the question had elicited replies from six delegations, with an average rating of 4.66.

### C. Entitlement to summary records

332. At the request of the Conference Management Service at the United Nations Office at Vienna, the Commission was informed by the Chief of the Conference Management Service of proposals to substitute the production of summary records of UNCITRAL meetings with either: (a) unedited transcripts of proceedings, in all six official languages of the United Nations; or (b) digital recordings of proceedings, which would be searchable to some degree and could be made available on the UNCITRAL website. The objective of those changes would be to respond to calls for the reduction of expenditure on documentation throughout the United Nations. The Chief of the Conference Management Service indicated a possible range of savings that could be achieved as a result of the measures suggested. It was understood that none of the proposed changes would affect the record of proceedings of the current Commission session.

333. While acknowledging the need to address the issue of reducing costs throughout the United Nations Secretariat, the Commission emphasized the importance of records of its meetings being as comprehensive as possible to facilitate subsequent research of the legislative history of the legal standards prepared by UNCITRAL. The Commission noted that, under General Assembly resolution 49/221, it was entitled to summary records. Furthermore, the Commission noted that it had previously addressed the issue of the necessity of those summary records at its thirty-seventh session, in 2004. On that occasion, the Commission had been presented with the options of unedited verbatim transcripts or digital sound recordings and had determined that summary records were essential for its work.<sup>63</sup> From that perspective, the Commission's entitlement to summary records should not be parted with lightly. After discussion, the Commission expressed its willingness to discuss the matter again and agreed to revisit the matter at its next session, on the basis of a report to be prepared by the Secretariat setting out the issues and options involved.

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<sup>61</sup> A/62/6 (Sect. 8) and Corr.1, table 8.19 (d).

<sup>62</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 348.

<sup>63</sup> *Ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 129-130.

## **XXI. Date and place of future meetings**

### **A. Consideration of a budget proposal made by the Secretary-General affecting the alternating pattern of UNCITRAL meetings in New York and Vienna**

334. The Commission was informed of a proposal made by the Secretary-General with the aim of reducing administrative costs involved in servicing UNCITRAL sessions by cutting the travel budget of Secretariat staff to service UNCITRAL meetings in New York. It was noted that the effect of the Secretary-General's proposal would be that the long-established practice of holding sessions of the Commission and its working groups alternately in New York and Vienna would be discontinued and thus, as from 2012, all sessions of the Commission and its Working Groups would be held in Vienna. It was also noted that, for that proposal to come into effect, decisions must be made by the Commission and the General Assembly. The Commission was also informed that the Secretary-General's budget proposal for 2012-2013 involved cutting not only travel funds required for the servicing of meetings in New York (a proposed reduction of \$274,200 for the biennium 2012-2013, or 94.3 per cent of the 2010-2011 appropriation) but also resources budgeted for the following: hiring of consultants (a reduction of \$20,000, or 23.6 per cent); travel of experts (a reduction of \$39,100, or 17.8 per cent); other travel of Secretariat staff (a reduction of \$22,800, or 20 per cent); and furniture and equipment (a reduction of \$17,200, or 44.9 per cent), among other things. Altogether, the budget reduction proposed for UNCITRAL and its secretariat would amount to \$364,700 for the biennium 2012-2013, or 5.2 per cent of the 2010-2011 appropriation. Bearing in mind that 84.2 per cent of the aggregate budget of the UNCITRAL secretariat was spent on staff posts, the proposed reduction would amount to 33 per cent of the non-post appropriation for 2010-2011.

335. The Commission took note of the proposal. Unanimous support was expressed for efforts to achieve savings across the United Nations.

336. The Commission recalled that the alternating pattern of meetings between New York and a European city (Geneva from 1969 to 1977 and Vienna since 1978) had been a feature of UNCITRAL throughout its existence. Among the reasons for such a changing venue that were put forward by States when the Commission was established and when its secretariat was transferred from New York to Vienna were the following: the proportionate distribution of travel costs among delegations; the influence and presence of UNCITRAL globally; and the needs of developing countries, many of which did not have representation in Vienna. The Commission confirmed that those reasons remained as valid today as ever. It was recalled that, throughout the history of UNCITRAL, proposals had been made for holding some meetings of the Commission and its working groups in other regions of the world, so as to increase the visibility of UNCITRAL in those regions and worldwide. From that perspective, the current alternating pattern was already the result of a compromise that should not be unravelled. The Commission also recalled its decisions as regards ways and means of achieving better integration of UNCITRAL resources into other United Nations activities, such as joint rule-of-law programmes, development programmes and post-conflict reconstruction (see paras. 318-320 above). Implementing those decisions would require closer cooperation and



coordination between the UNCITRAL secretariat and the relevant parts of the United Nations system located in New York.

337. Member States attending the current session unanimously felt that abolishing the alternating pattern of meetings would entail detrimental consequences to the ability of UNCITRAL to continue its work on the harmonization and unification of the law of international trade. That work, it was said, presupposed the fullest possible participation of States in sessions of the Commission and its working groups so that UNCITRAL standards achieved universal acceptability. It was emphasized that the special interests of developing countries should be taken into account to ensure their continued or increased representation in the work of UNCITRAL. In terms of perception, it was also important that the uniform instruments of UNCITRAL should be seen to be the result of worldwide consensus based on proper representation. Concern was expressed that the proposed change would contradict General Assembly resolution 2205 (XXI) on the establishment of UNCITRAL, as well as Assembly resolutions 2609 (XXIV) and 31/140, all of which dealt with the pattern of UNCITRAL conferences. In view of the above, the Commission expressed its unanimous support for the continuation of the current alternating pattern of meetings held by UNCITRAL.

338. Bearing in mind the current financial crisis, the Commission generally agreed that, while the proposed abolition of the alternating pattern of meetings should be avoided, every effort should be made to identify alternatives that would achieve an equal amount of savings. In response to a question, the Commission was informed that, according to a recent estimate, the costs of servicing a one-week meeting within the entitlement to conference services support for regular calendar meetings of UNCITRAL or its working groups amounted to \$132,654, regardless of whether the meeting was held in New York or Vienna. That amount was approximately the same as the annual cost (\$137,100) of Secretariat staff travelling to New York to service sessions of UNCITRAL and its working groups. The Commission was generally of the view that reducing its entitlement to conference services support by one week per year, while disruptive to its work programme, would constitute an acceptable alternative to abolishing its alternating pattern of meetings. In that context, the Commission noted that its current entitlement to conference services support amounted to 12 weeks per year for working group sessions and 3 weeks per year for the Commission session — a total of 15 weeks of conference services support per year. The possible savings would result in a reduction of that entitlement from 15 to 14 weeks of meetings per year.

339. The Commission understood that abolishing the alternating pattern of meetings, as opposed to eliminating one week of conference services support, although substantially equivalent for the overall budget of the United Nations, would not be equally reflected in the budget of the Office of Legal Affairs and, in particular, of the UNCITRAL secretariat. It was explained that savings achieved by eliminating one week of conference services support would appear under the budget of the Department for General Assembly and Conference Management, while savings achieved by eliminating the alternating pattern of meetings of UNCITRAL would appear under the budget of the Office of Legal Affairs. Concern was expressed as to whether the link between the proposed alternative savings in the Department for General Assembly and Conference Management budget and the operation of UNCITRAL would be sufficiently visible to the Fifth Committee of the

General Assembly to be credited to the Office of Legal Affairs. A number of delegations expressed their confidence that compensation between two lines of the regular budget should be acceptable provided that sufficient explanations were given.

340. The Commission decided to propose the alternative to the General Assembly. It appealed to members of delegations represented at the forty-fourth session of the Commission to coordinate closely with representatives of their delegations in the Fifth and Sixth Committees when the proposal and reasons therefor were considered in those bodies. The understanding was that the final decision of the Commission on the date and place of sessions of UNCITRAL and its working groups in 2012 (see paras. 345, 349 and 350 below) would be deferred until the decision of the Assembly on the Secretary-General's proposal and the alternative proposal of the Commission was taken, which was expected to be in December 2011.

341. The Commission exchanged ideas as to possible additional ways of achieving savings on the budget of its secretariat. One delegation suggested reducing the number of personnel travelling to New York to service sessions. Other delegations were of the view that micromanagement should be avoided and flexibility should be preserved in that regard since some projects might require the involvement of more staff than others. Holding back-to-back sessions with mostly the same personnel servicing two or more sessions was also suggested. While there was general agreement that this might constitute a desirable goal, practical difficulties were highlighted, in particular since the dates were not always available for holding back-to-back sessions and the lack of expertise of the Secretariat staff in the topics considered in different working groups might detrimentally affect substantive secretariat services provided during sessions. As to the possibility of cutting posts in the UNCITRAL secretariat, the view was strongly held by a number of delegations that this should not be considered an acceptable way forward.

342. The Commission was invited to reconsider the frequency with which working groups met and the desirability of undertaking new projects. The view was shared that servicing six working groups stretched the resources of the UNCITRAL secretariat to the maximum and increased the risk that the quality of services would be negatively affected. Holding one session of a working group per year instead of the traditional two sessions (as was decided at the current session as regards Working Group I (see para. 184 above)) and temporarily suspending the activities of one working group were considered as options. For example, it was suggested that the Commission might decide at its next session to suspend the work of Working Group VI once that working group completed work on its current project. Nevertheless, concerns about long suspensions of working group activities were expressed, since the prolonged inactivity might create doubt about the ability of UNCITRAL to maintain its level of expertise in a particular field. Electronic commerce and transport law were cited as examples.

343. Some delegations expressed the view that, in the light of the shortage of resources and the budgetary cuts faced by the UNCITRAL secretariat, the time was ripe for the Commission to engage in strategic planning by holding a comprehensive review of its current and future work programmes and more efficient ways to implement them. Prioritizing work on the various topics, clearly defining a time frame for a working group to complete its work and rationalizing the Commission's work, in particular the volume and contents of documentation, were considered to

be among the issues worth considering in that context. More extensive resort to informal consultations for resolving controversial issues and to drafting groups for finalizing text, as had successfully been done during the current session in respect of the Model Law on Public Procurement, was suggested as a pattern to be considered to expedite decision-taking at plenary meetings of the Commission. Nevertheless, a note of caution was struck and it was generally agreed that any proposed changes should not negatively affect the flexibility of the methods by which the Commission had successfully operated and proved its effectiveness and efficiency. After discussion, the Commission requested the Secretariat to prepare for the next session of the Commission a note on strategic planning, with possible options and an assessment of their financial implications.

344. A number of delegations expressed concern over the fact that the full range of financial information, including existing documents containing budget proposals that might have a decisive impact on the work of the Commission and require policy decisions on its part, was not made available to the Commission as a matter of course.

## **B. Forty-fifth session of the Commission**

345. The Commission approved the holding of its forty-fifth session in New York from 18 June to 6 July 2012 (or in Vienna from 9 to 27 July 2012). The Secretariat was requested to consider shortening the duration of the session by one week if the expected workload of the session would justify doing so.

## **C. Sessions of working groups**

346. At its thirty-sixth session, in 2003, the Commission had agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group provided that such arrangement would not result in an increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in an increase of the 12-week allotment, that request should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.<sup>64</sup>

347. At the current session, in view of the extraordinary constraints placed on the Commission and its secretariat to reduce regular budget expenditures during the 2012-2013 biennium, the Commission agreed that its entitlement to 12 weeks of conference services per year for sessions of six working groups, together with its entitlement to three weeks of conference services per year for its own session, should be reduced so as not to exceed a total of 14 weeks of conference services instead of the habitual 15-week total entitlement per year. The Commission emphasized that its agreement to such a reduction in its use of conference services was conditional on the continued availability of a venue to hold sessions in

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<sup>64</sup> Ibid., *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 275.

New York, with full servicing by the Commission's secretariat as per established practice (see paras. 338-340 above).

348. The Secretariat was requested to consider cancelling working group sessions if the expected availability of resources or the workload of the session would justify doing so.

## **1. Sessions of working groups before the forty-fifth session of the Commission**

349. The Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (Procurement) would hold its twenty-first session in New York from 16 to 20 April 2012 (or in Vienna from 27 February to 2 March 2012);

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-fifth session in Vienna from 3 to 7 October 2011 and its fifty-sixth session in New York from 6 to 10 February 2012 (or in Vienna from 30 January to 3 February 2012);

(c) Working Group III (Online Dispute Resolution) would hold its twenty-fourth session in Vienna from 14 to 18 November 2011 and its twenty-fifth session in New York from 28 May to 1 June 2012 (or in Vienna from 7 to 11 May 2012);

(d) Working Group IV (Electronic Commerce) would hold its forty-fifth session in Vienna from 10 to 14 October 2011 and its forty-sixth session in New York from 13 to 17 February 2012 (or in Vienna from 9 to 13 January 2012);

(e) Working Group V (Insolvency Law) would hold its fortieth session in Vienna from 31 October to 4 November 2011 and its forty-first session in New York from 9 to 13 April 2012 (or in Vienna from 20 to 24 February 2012);

(f) Working Group VI (Security Interests) would hold its twentieth session in Vienna from 12 to 16 December 2011, and its twenty-first session in New York from 14 to 18 May 2012 (or in Vienna from 5 to 9 March 2012).

## **2. Sessions of working groups in 2012 after the forty-fifth session of the Commission**

350. The Commission noted that tentative arrangements had been made for working group meetings in 2012 after its forty-fifth session (the arrangements were subject to the approval of the Commission at its forty-fifth session) as follows:

(a) Working Group II (Arbitration and Conciliation) would hold its fifty-seventh session in Vienna from 1 to 5 October 2012;

(b) Working Group III (Online Dispute Resolution) would hold its twenty-sixth session in Vienna from 10 to 14 December 2012;

(c) Working Group IV (Electronic Commerce) would hold its forty-seventh session in Vienna from 3 to 7 December 2012;

(d) Working Group V (Insolvency Law) would hold its forty-second session in Vienna from 26 to 30 November 2012;

(e) Working Group VI (Security Interests) would be expected to hold its twenty-second session in Vienna from 5 to 9 November 2012, unless it completed its work on the finalization of a text by the Commission at its forty-fifth session, in 2012.

## Annex I

### UNCITRAL Model Law on Public Procurement

#### *Preamble*

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement 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 regardless of nationality, thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;
- (d) Providing for the fair, equal and equitable treatment of all suppliers and contractors;
- (e) Promoting the integrity of, and fairness and public confidence in, the procurement process;
- (f) Achieving transparency in the procedures relating to procurement.

Be it therefore enacted as follows:

### Chapter I. General provisions

#### *Article 1*

##### *Scope of application*

This Law applies to all public procurement.

#### *Article 2*

##### *Definitions*

For the purposes of this Law:

- (a) “Currency” includes the monetary unit of account;
- (b) “Direct solicitation” means solicitation addressed directly to one supplier or contractor or a restricted number of suppliers or contractors. This excludes solicitation addressed to a limited number of suppliers or contractors following pre-qualification or pre-selection proceedings;
- (c) “Domestic procurement” means procurement limited to domestic suppliers or contractors pursuant to article 8 of this Law;
- (d) “Electronic reverse auction” means an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves the presentation by suppliers or contractors of successively lowered bids during a scheduled period of time and the automatic evaluation of bids;

(e) “Framework agreement procedure” means a procedure conducted in two stages: a first stage to select a supplier (or suppliers) or a contractor (or contractors) to be a party (or parties) to a framework agreement with a procuring entity, and a second stage to award a procurement contract under the framework agreement to a supplier or contractor party to the framework agreement:

(i) “Framework agreement” means an agreement between the procuring entity and the selected supplier (or suppliers) or contractor (or contractors) concluded upon completion of the first stage of the framework agreement procedure;

(ii) “Closed framework agreement” means a framework agreement to which no supplier or contractor that is not initially a party to the framework agreement may subsequently become a party;

(iii) “Open framework agreement” means a framework agreement to which a supplier (or suppliers) or a contractor (or contractors) in addition to the initial parties may subsequently become a party or parties;

(iv) “Framework agreement procedure with second-stage competition” means a procedure under an open framework agreement or a closed framework agreement with more than one supplier or contractor in which certain terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded are to be established or refined through a second-stage competition;

(v) “Framework agreement procedure without second-stage competition” means a procedure under a closed framework agreement in which all terms and conditions of the procurement are established when the framework agreement is concluded;

(f) “Pre-qualification” means the procedure set out in article 18 of this Law to identify, prior to solicitation, suppliers or contractors that are qualified;

(g) “Pre-qualification documents” means documents issued by the procuring entity under article 18 of this Law that set out the terms and conditions of the pre-qualification proceedings;

(h) “Pre-selection” means the procedure set out in paragraph 3 of article 49 of this Law to identify, prior to solicitation, a limited number of suppliers or contractors that best meet the qualification criteria for the procurement concerned;

(i) “Pre-selection documents” means documents issued by the procuring entity under paragraph 3 of article 49 of this Law that set out the terms and conditions of the pre-selection proceedings;

(j) “Procurement” or “public procurement” means the acquisition of goods, construction or services by a procuring entity;

(k) “Procurement contract” means a contract concluded between the procuring entity and a supplier (or suppliers) or a contractor (or contractors) at the end of the procurement proceedings;

(l) “Procurement involving classified information” means procurement in which the procuring entity may be authorized by the procurement regulations or by

other provisions of law of this State to take measures and impose requirements for the protection of classified information;

(m) “Procurement regulations” means regulations enacted in accordance with article 4 of this Law;

(n) “Procuring entity” means:

*Option I*

(i) Any governmental department, agency, organ or other unit, or any subdivision or multiplicity thereof, that engages in procurement, except ...; [and]

*Option II*

(i) Any department, agency, organ or other unit, or any subdivision or multiplicity thereof, of the [Government] [*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”*];

(o) “Socio-economic policies” means environmental, social, economic and other policies of this State authorized or required by the procurement regulations or other provisions of law of this State to be taken into account by the procuring entity in the procurement proceedings. [*The enacting State may expand this subparagraph by providing an illustrative list of such policies.*];

(p) “Solicitation” means an invitation to tender, present submissions or participate in request-for-proposals proceedings or an electronic reverse auction;

(q) “Solicitation document” means a document issued by the procuring entity, including any amendments thereto, that sets out the terms and conditions of the given procurement;

(r) “Standstill period” means the period starting from the dispatch of a notice as required by paragraph 2 of article 22 of this Law, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge, under chapter VIII of this Law, the decision so notified;

(s) “A submission (or submissions)” means a tender (or tenders), a proposal (or proposals), an offer (or offers), a quotation (or quotations) and a bid (or bids) referred to collectively or generically, including, where the context so requires, an initial or indicative submission (or submissions);

(t) “Supplier or contractor” means, according to the context, any potential party or any party to the procurement proceedings with the procuring entity;

(u) “Tender security” means a security required from suppliers or contractors by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation referred to in paragraph 1 (f) of article 17 of this Law and includes such arrangements as bank guarantees, surety bonds, standby letters of credit,



cheques for which a bank is primarily liable, cash deposits, promissory notes and bills of exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract.

### *Article 3*

#### *International obligations of this State relating to procurement [and intergovernmental agreements within [this State]]<sup>65</sup>*

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; [or]

(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 [name of the organ or authority authorized to promulgate the procurement regulations] is authorized to promulgate procurement regulations to fulfil the objectives and to implement the provisions of this Law.

### *Article 5*

#### *Publication of legal texts*

1. This Law, the procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

2. Judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public.

### *Article 6*

#### *Information on possible forthcoming procurement*

1. Procuring entities may publish information regarding planned procurement activities for forthcoming months or years.

2. Procuring entities may also publish an advance notice of possible future procurement.

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<sup>65</sup> The text in brackets in this article is relevant to, and intended for consideration by, federal States.

3. Publication under this article does not constitute a solicitation, does not oblige the procuring entity to issue a solicitation and does not confer any rights on suppliers or contractors.

#### *Article 7*

##### *Communications in procurement*

1. Any document, notification, decision or other information generated in the course of a procurement and communicated as required by this Law, including in connection with challenge proceedings under chapter VIII or in the course of a meeting, or forming part of the record of procurement proceedings under article 25 of this Law shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

2. Direct solicitation and communication of information between suppliers or contractors and the procuring entity referred to in article 16, paragraph 1 (d) of article 17, paragraphs 6 and 9 of article 18, paragraph 2 (a) of article 41 and paragraphs 2 to 4 of article 50 of this Law may be made by means that do not provide a record of the content of the information, on the condition that immediately thereafter confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

3. The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall specify:

(a) Any requirement of form;

(b) In procurement involving classified information, if the procuring entity considers it necessary, measures and requirements needed to ensure the protection of classified information at the requisite level;

(c) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to any person, or by a supplier or contractor to the procuring entity or other entity acting on its behalf;

(d) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and

(e) The means to be used to hold any meeting of suppliers or contractors.

4. The procuring entity may use only those means of communication that are in common use by suppliers or contractors in the context of the particular procurement. In any meeting held with suppliers or contractors, the procuring entity shall use only those means that ensure in addition that suppliers or contractors can fully and contemporaneously participate in the meeting.

5. The procuring entity shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of information concerned.

*Article 8**Participation by suppliers or contractors*

1. Suppliers or contractors shall be permitted to participate in procurement proceedings without regard to nationality, except where the procuring entity decides to limit participation in procurement proceedings on the basis of nationality on grounds specified in the procurement regulations or other provisions of law of this State.
2. Except when authorized or required to do so by the procurement regulations or other provisions of law of this State, the procuring entity shall establish no other requirement aimed at limiting the participation of suppliers or contractors in procurement proceedings that discriminates against or among suppliers or contractors or against categories thereof.
3. The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare whether the participation of suppliers or contractors in the procurement proceedings is limited pursuant to this article and on which ground. Any such declaration may not later be altered.
4. A procuring entity that decides to limit the participation of suppliers or contractors in procurement proceedings pursuant to this article shall include in the record of the procurement proceedings a statement of the reasons and circumstances on which it relied.
5. The procuring entity shall make available to any person, upon request, its reasons for limiting the participation of suppliers or contractors in the procurement proceedings pursuant to this article.

*Article 9**Qualifications of suppliers and contractors*

1. This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings.
2. Suppliers or contractors shall meet such of the following criteria as the procuring entity considers appropriate and relevant in the circumstances of the particular procurement:
  - (a) That they have the necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and personnel to perform the procurement contract;
  - (b) That they meet ethical and other standards applicable in this State;
  - (c) That they have the legal capacity to enter into the procurement contract;
  - (d) 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;

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

(f) 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 debarment proceedings.

3. 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 appropriate documentary evidence or other information to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph 2 of this article.

4. Any requirement established pursuant to this article shall be set out in the pre-qualification or pre-selection documents, if any, and in the solicitation documents 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 Law.

5. The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set out in the pre-qualification or pre-selection documents, if any, and in the solicitation documents.

6. Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article 8 of this Law, 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, or that is not objectively justifiable.

7. Notwithstanding paragraph 6 of this article, the procuring entity may require the legalization of documentary evidence provided by the supplier or contractor presenting the successful submission so as to demonstrate its qualifications for the particular procurement. In doing so, 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.

8. (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 or constituted a misrepresentation;

(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, however, be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity;

(d) The procuring entity may require a supplier or contractor that was pre-qualified in accordance with article 18 of this Law to demonstrate its qualifications again in accordance with the same criteria used to pre-qualify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate its qualifications again if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate its qualifications again as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

#### *Article 10*

##### *Rules concerning description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement*

1. (a) The pre-qualification or pre-selection documents, if any, shall set out a description of the subject matter of the procurement;

(b) The procuring entity shall set out in the solicitation documents the detailed description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied.

2. Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article 8 of this Law, no description of the subject matter of a procurement that may restrict the participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction based on nationality, shall be included or used in the pre-qualification or pre-selection documents, if any, or in the solicitation documents.

3. The description of the subject matter of the procurement may include specifications, plans, drawings, designs, requirements, testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology.

4. To the extent practicable, the description of the subject matter of the procurement shall be objective, functional and generic. It shall set out the relevant technical, quality and performance characteristics of that subject matter. There shall be no requirement for or reference to a particular trademark or trade name, patent, design or type, specific origin or producer 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.

5. (a) Standardized features, requirements, symbols and terminology relating to the technical, quality and performance characteristics of the subject matter of the procurement shall be used, where available, in formulating the description of the subject matter of the procurement to be included in the pre-qualification or pre-selection documents, if any, and in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms and standardized conditions, where available, in formulating the terms and conditions of

the procurement and the procurement contract or the framework agreement to be entered into in the procurement proceedings, and in formulating other relevant aspects of the pre-qualification or pre-selection documents, if any, and solicitation documents.

#### *Article 11*

##### *Rules concerning evaluation criteria and procedures*

1. Except for the criteria set out in paragraph 3 of this article, the evaluation criteria shall relate to the subject matter of the procurement.
2. The evaluation criteria relating to the subject matter of the procurement may include:
  - (a) Price;
  - (b) The cost of operating, maintaining and repairing goods or of construction; the time for delivery of goods, completion of construction or provision of services; the characteristics of the subject matter of the procurement, such as the functional characteristics of goods or construction and the environmental characteristics of the subject matter; and the terms of payment and of guarantees in respect of the subject matter of the procurement;
  - (c) Where relevant in procurement conducted in accordance with articles 47, 49 and 50 of this Law, the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement.
3. In addition to the criteria set out in paragraph 2 of this article, the evaluation criteria may include:
  - (a) Any criteria that the procurement regulations or other provisions of law of this State authorize or require to be taken into account;
  - (b) A margin of preference for the benefit of domestic suppliers or contractors or for domestically produced goods, or any other preference, if authorized or required by the procurement regulations or other provisions of law of this State. The margin of preference shall be calculated in accordance with the procurement regulations.
4. To the extent practicable, all non-price evaluation criteria shall be objective, quantifiable and expressed in monetary terms.
5. The procuring entity shall set out in the solicitation documents:
  - (a) Whether the successful submission will be ascertained on the basis of price or price and other criteria;
  - (b) All evaluation criteria established pursuant to this article, including price as modified by any preference;
  - (c) The relative weights of all evaluation criteria, except where the procurement is conducted under article 49 of this Law, in which case the procuring entity may list all evaluation criteria in descending order of importance;
  - (d) The manner of application of the criteria in the evaluation procedure.

6. In evaluating submissions and determining the successful submission, the procuring entity shall use only those criteria and procedures that have been set out in the solicitation documents and shall apply those criteria and procedures in the manner that has been disclosed in those solicitation documents. No criterion or procedure shall be used that has not been set out in accordance with this provision.

#### *Article 12*

##### *Rules concerning estimation of the value of procurement*

1. A procuring entity shall neither divide its procurement nor use a particular valuation method for estimating the value of procurement so as to limit competition among suppliers or contractors or otherwise avoid its obligations under this Law.
2. In estimating the value of procurement, the procuring entity shall include the estimated maximum total value of the procurement contract or of all procurement contracts envisaged under a framework agreement over its entire duration, taking into account all forms of remuneration.

#### *Article 13*

##### *Rules concerning the language of documents*

1. The pre-qualification or pre-selection documents, if any, and the solicitation documents shall be formulated in [*the enacting State specifies its official language or languages*] [and in a language customarily used in international trade, unless decided otherwise by the procuring entity in the circumstances referred to in paragraph 4 of article 33 of this Law].
2. Applications to pre-qualify or for pre-selection, if any, and submissions may be formulated and presented in the language of the pre-qualification or pre-selection documents, if any, and solicitation documents, respectively, or in any other language permitted by those documents.

#### *Article 14*

##### *Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions*

1. The manner, place and deadline for presenting applications to pre-qualify or for pre-selection shall be set out in the invitation to pre-qualify or for pre-selection and in the pre-qualification or pre-selection documents, as applicable. The manner, place and deadline for presenting submissions shall be set out in the solicitation documents.
2. Deadlines for presenting applications to pre-qualify or for pre-selection or for presenting submissions shall be expressed as a specific date and time and shall allow sufficient time for suppliers or contractors to prepare and present their applications or submissions, taking into account the reasonable needs of the procuring entity.
3. If the procuring entity issues a clarification or modification of the pre-qualification, pre-selection or solicitation documents, it shall, prior to the applicable deadline for presenting applications to pre-qualify or for pre-selection or for presenting submissions, extend the deadline if necessary or as required under

paragraph 3 of article 15 of this Law in order to afford suppliers or contractors sufficient time to take the clarification or modification into account in their applications or submissions.

4. The procuring entity may, at its absolute discretion, prior to a deadline for presenting applications to pre-qualify or for pre-selection or for presenting submissions, extend the applicable deadline if it is not possible for one or more suppliers or contractors to present their applications or submissions by the deadline initially stipulated because of any circumstance beyond their control.

5. Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the pre-qualification, pre-selection or solicitation documents.

#### *Article 15*

##### *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 presenting submissions. The procuring entity shall respond within a time period that will enable the supplier or contractor to present its submission in a timely fashion 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 presenting submissions, 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 as a result of a clarification or modification issued in accordance with this article, the information published when first soliciting the participation of suppliers or contractors in the procurement proceedings becomes materially inaccurate, the procuring entity shall cause the amended information to be published in the same manner and place in which the original information was published and shall extend the deadline for presentation of submissions as provided for in paragraph 3 of article 14 of this Law.

4. 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 submissions.



*Article 16**Clarification of qualification information and of submissions*

1. At any stage of the procurement proceedings, the procuring entity may ask a supplier or contractor for clarification of its qualification information or of its submission, in order to assist in the ascertainment of qualifications or the examination and evaluation of submissions.
2. The procuring entity shall correct purely arithmetical errors that are discovered during the examination of submissions. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that presented the submission concerned.
3. No substantive change to qualification information or to a submission, including changes aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive, shall be sought, offered or permitted.
4. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to qualification information or submissions, nor shall any change in price be made pursuant to a clarification that is sought under this article.
5. Paragraph 4 of this article shall not apply to proposals submitted under articles 49, 50, 51 and 52 of this Law.
6. All communications generated under this article shall be included in the record of the procurement proceedings.

*Article 17**Tender securities*

1. When the procuring entity requires suppliers or contractors presenting submissions to provide a tender security:
  - (a) The requirement shall apply to all 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. In cases of domestic procurement, the solicitation documents may in addition stipulate that the tender security shall be issued by an issuer in this State;
  - (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 out 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 presenting a submission, 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 has otherwise ceased to be creditworthy;

(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 the conduct of the supplier or contractor presenting the submission may relate only to:

- (i) Withdrawal or modification of the submission after the deadline for presenting submissions, or before the deadline if so stipulated in the solicitation documents;
- (ii) Failure to sign a procurement contract if so required by the solicitation documents; and
- (iii) Failure to provide a required security for the performance of the contract after the successful submission has been accepted or failure 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 security document after the earliest of the following events:

- (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 cancellation of the procurement;
- (d) The withdrawal of a submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

#### *Article 18*

##### *Pre-qualification proceedings*

1. The procuring entity may engage in pre-qualification proceedings with a view to identifying, prior to solicitation, suppliers and contractors that are qualified. The provisions of article 9 of this Law shall apply to pre-qualification proceedings.
2. If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in the publication identified in the procurement regulations. Unless decided otherwise by the procuring entity in the circumstances referred to in paragraph 4 of article 33 of this Law, the invitation to pre-qualify shall also be published internationally, so as to be widely accessible to international suppliers or contractors.
3. The invitation to pre-qualify shall include the following information:
  - (a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into in the procurement proceedings, including the nature, quantity and place of delivery of the goods to be supplied, the nature and location of the construction to be effected or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods, the completion of the construction or the provision of the services;

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article 9 of this Law;

(d) A declaration as required by article 8 of this Law;

(e) The means of obtaining the pre-qualification documents and the place where they may be obtained;

(f) The price, if any, to be charged by the procuring entity for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents;

(g) If a price is to be charged, the means of payment for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents, and the currency of payment;

(h) The language or languages in which the pre-qualification documents and, subsequent to pre-qualification, the solicitation documents are available;

(i) The manner, place and deadline for presenting applications to pre-qualify and, if already known, the manner, place and deadline for presenting submissions, in conformity with article 14 of this Law.

4. The procuring entity shall provide a set of pre-qualification documents to each supplier or contractor that requests them in accordance with the invitation to pre-qualify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the pre-qualification documents shall reflect only the cost of providing them to suppliers or contractors.

5. The pre-qualification documents shall include the following information:

(a) Instructions for preparing and presenting pre-qualification applications;

(b) Any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;

(c) 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 pre-qualification proceedings without the intervention of an intermediary;

(d) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the pre-qualification proceedings, and the place where those laws and regulations may be found;

(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 presentation of applications to pre-qualify and to the pre-qualification proceedings.

6. The procuring entity shall respond to any request by a supplier or contractor for clarification of the pre-qualification documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting applications to pre-qualify. The procuring entity shall respond within a time period that will enable the supplier or contractor to present its application to pre-qualify in a timely fashion. 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 has provided the pre-qualification documents.
7. The procuring entity shall take a decision with respect to the qualifications of each supplier or contractor presenting an application to pre-qualify. In reaching that decision, the procuring entity shall apply only the criteria and procedures set out in the invitation to pre-qualify and in the pre-qualification documents.
8. Only suppliers or contractors that have been pre-qualified are entitled to participate further in the procurement proceedings.
9. The procuring entity shall promptly notify each supplier or contractor presenting an application to pre-qualify whether or not it has been pre-qualified. It shall also make available to any person, upon request, the names of all suppliers or contractors that have been pre-qualified.
10. The procuring entity shall promptly communicate to each supplier or contractor that has not been pre-qualified the reasons therefor.

#### *Article 19*

##### *Cancellation of the procurement*

1. The procuring entity may cancel the procurement at any time prior to the acceptance of the successful submission and, after the successful submission is accepted, under the circumstances referred to in paragraph 8 of article 22 of this Law. The procuring entity shall not open any tenders or proposals after taking a decision to cancel the procurement.
2. The decision of the procuring entity to cancel the procurement and the reasons for the decision shall be included in the record of the procurement proceedings and promptly communicated to any supplier or contractor that presented a submission. The procuring entity shall in addition promptly publish a notice of the cancellation of the procurement in the same manner and place in which the original information regarding the procurement proceedings was published, and return any tenders or proposals that remain unopened at the time of the decision to the suppliers or contractors that presented them.
3. Unless the cancellation of the procurement is a consequence of irresponsible or dilatory conduct on the part of the procuring entity, the procuring entity shall incur no liability, solely by virtue of its invoking paragraph 1 of this article, towards suppliers or contractors that have presented submissions.

*Article 20**Rejection of abnormally low submissions*

1. The procuring entity may reject a submission if the procuring entity has determined that the price, in combination with other constituent elements of the submission, is abnormally low in relation to the subject matter of the procurement and raises concerns with the procuring entity as to the ability of the supplier or contractor that presented that submission to perform the procurement contract, provided that the procuring entity has taken the following actions:

(a) The procuring entity has requested in writing from the supplier or contractor details of the submission that gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract; and

(b) The procuring entity has taken account of any information provided by the supplier or contractor following this request and the information included in the submission, but continues, on the basis of all such information, to hold concerns.

2. The decision of the procuring entity to reject a submission in accordance with this article, the reasons for that decision, and all communications with the supplier or contractor under this article shall be included in the record of the procurement proceedings. The decision of the procuring entity and the reasons therefor shall be promptly communicated to the supplier or contractor concerned.

*Article 21**Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest*

1. A procuring entity shall exclude a supplier or contractor from the procurement proceedings if:

(a) The supplier or contractor 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, so as to influence an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings; or

(b) The supplier or contractor has an unfair competitive advantage or a conflict of interest, in violation of provisions of law of this State.

2. Any decision of the procuring entity to exclude a supplier or contractor from the procurement proceedings under this article and the reasons therefor shall be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

*Article 22**Acceptance of the successful submission and entry into force of the procurement contract*

1. The procuring entity shall accept the successful submission unless:
  - (a) The supplier or contractor presenting the successful submission is disqualified in accordance with article 9 of this Law;
  - (b) The procurement is cancelled in accordance with paragraph 1 of article 19 of this Law;
  - (c) The submission found successful at the end of evaluation is rejected as abnormally low under article 20 of this Law; or
  - (d) The supplier or contractor presenting the successful submission is excluded from the procurement proceedings on the grounds specified in article 21 of this Law.
2. The procuring entity shall promptly notify each supplier or contractor that presented submissions of its decision to accept the successful submission at the end of the standstill period. The notice shall contain, at a minimum, the following information:
  - (a) The name and address of the supplier or contractor presenting the successful submission;
  - (b) The contract price or, where the successful submission was ascertained on the basis of price and other criteria, the contract price and a summary of other characteristics and relative advantages of the successful submission; and
  - (c) The duration of the standstill period as set out in the solicitation documents and in accordance with the requirements of the procurement regulations. The standstill period shall run from the date of the dispatch of the notice under this paragraph to all suppliers or contractors that presented submissions.
3. Paragraph 2 of this article shall not apply to awards of procurement contracts:
  - (a) Under a framework agreement procedure without second-stage competition;
  - (b) Where the contract price is less than the threshold amount set out in the procurement regulations; or
  - (c) Where the procuring entity determines that urgent public interest considerations require the procurement to proceed without a standstill period. The decision of the procuring entity that such urgent considerations exist and the reasons for the decision shall be included in the record of the procurement proceedings.
4. Upon expiry of the standstill period or, where there is none, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor that presented that submission, unless the [name of court or courts] or the [name of the relevant organ designated by the enacting State] orders otherwise.
5. Unless a written procurement contract and/or approval by another authority is/are required, a procurement contract in accordance with the terms and conditions

of the successful submission enters into force when the notice of acceptance is dispatched to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in effect.

6. Where the solicitation documents require the supplier or contractor whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the accepted submission:

(a) The procuring entity and the supplier or contractor concerned shall sign the procurement contract within a reasonable period of time after the notice of acceptance is dispatched to the supplier or contractor concerned;

(b) Unless the solicitation documents stipulate that the procurement contract is subject to approval by another authority, the procurement contract enters into force when the contract is signed by the supplier or contractor concerned and by the procuring entity. Between the time when the notice of acceptance is dispatched to the supplier or contractor concerned and the entry into force of the procurement contract, neither the procuring entity nor that supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

7. Where the solicitation documents stipulate that the procurement contract is subject to approval by another 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 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 submissions specified in the solicitation documents or the period of effectiveness of the tender security required under article 17 of this Law, unless extended under the provisions of this Law.

8. If the supplier or contractor whose submission has been accepted fails to sign any written procurement contract as required or fails to provide any required security for the performance of the contract, the procuring entity may either cancel the procurement or decide to select the next successful submission from among those remaining in effect, in accordance with the criteria and procedures set out in this Law and in the solicitation documents. In the latter case, the provisions of this article shall apply *mutatis mutandis* to such submission.

9. Notices under this article are dispatched when they are promptly and 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 any reliable means specified in accordance with article 7 of this Law.

10. 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 promptly 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.

*Article 23**Public notice of the award of a procurement contract or framework agreement*

1. Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name of the supplier (or suppliers) or contractor (or contractors) to which the procurement contract or the framework agreement was awarded and, in the case of procurement contracts, the contract price.
2. Paragraph 1 is not applicable to awards where the contract price is less than the threshold amount set out in the procurement regulations. The procuring entity shall publish a cumulative notice of such awards from time to time but at least once a year.
3. The procurement regulations shall provide for the manner of publication of the notices required under this article.

*Article 24**Confidentiality*

1. In its communications with suppliers or contractors or with any person, the procuring entity shall not disclose any information if non-disclosure of such information is necessary for the protection of essential security interests of the State or if disclosure of such information would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition, unless disclosure of that information is ordered by the [name of the court or courts] or the [name of the relevant organ designated by the enacting State] and, in such case, subject to the conditions of such an order.
2. Other than when providing or publishing information pursuant to paragraphs 2 and 10 of article 22 and to articles 23, 25 and 42 of this Law, the procuring entity shall treat applications to pre-qualify or for pre-selection and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors or to any other person not authorized to have access to this type of information.
3. Any discussions, communications, negotiations or dialogue between the procuring entity and a supplier or contractor pursuant to paragraph 3 of article 48 and to articles 49 to 52 of this Law shall be confidential. Unless required by law or ordered by the [name of the court or courts] or the [name of the relevant organ designated by the enacting State], no party to any such discussions, communications, negotiations or dialogue shall disclose to any other person any technical, price or other information relating to these discussions, communications, negotiations or dialogue without the consent of the other party.
4. Subject to the requirements in paragraph 1 of this article, in procurement involving classified information, the procuring entity may:
  - (a) Impose on suppliers or contractors requirements aimed at protecting classified information; and



(b) Demand that suppliers or contractors ensure that their sub-contractors comply with requirements aimed at protecting classified information.

*Article 25*

*Documentary record of procurement proceedings*

1. The procuring entity shall maintain a record of the procurement proceedings that includes the following information:

- (a) A brief description of the subject matter of the procurement;
- (b) The names and addresses of suppliers or contractors that presented submissions, the name and address of the supplier (or suppliers) or contractor (or contractors) with which the procurement contract is entered into and the contract price (and, in the case of a framework agreement procedure, the name and address of the supplier (or suppliers) or contractor (or contractors) with which the framework agreement is concluded);
- (c) A statement of the reasons and circumstances relied upon by the procuring entity for the decision as regards means of communication and any requirement of form;
- (d) In procurement proceedings in which the procuring entity, in accordance with article 8 of this Law, limits the participation of suppliers or contractors, a statement of the reasons and circumstances relied upon by the procuring entity for imposing such a limit;
- (e) If the procuring entity uses a method of procurement other than open tendering, a statement of the reasons and circumstances relied upon by the procuring entity to justify the use of such other method;
- (f) In the case of procurement by means of an electronic reverse auction or involving an electronic reverse auction as a phase preceding the award of the procurement contract, a statement of the reasons and circumstances relied upon by the procuring entity for the use of the auction and information about the date and time of the opening and closing of the auction;
- (g) In the case of a framework agreement procedure, a statement of the reasons and circumstances upon which it relied to justify the use of a framework agreement procedure and the type of framework agreement selected;
- (h) If the procurement is cancelled pursuant to paragraph 1 of article 19 of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision to cancel the procurement;
- (i) If any socio-economic policies were considered in the procurement proceedings, details of such policies and the manner in which they were applied;
- (j) If no standstill period was applied, a statement of the reasons and circumstances relied upon by the procuring entity in deciding not to apply a standstill period;
- (k) In the case of a challenge or appeal under chapter VIII of this Law, a copy of the application for reconsideration or review and the appeal, as applicable,

and a copy of all decisions taken in the relevant challenge or appeal proceedings, or both, and the reasons therefor;

(l) A summary of any requests for clarification of the pre-qualification or pre-selection documents, if any, or of the solicitation documents and the responses thereto, as well as a summary of any modifications to those documents;

(m) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented applications to pre-qualify or for pre-selection, if any, or submissions;

(n) If a submission is rejected pursuant to article 20 of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision;

(o) If a supplier or contractor is excluded from the procurement proceedings pursuant to article 21 of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision;

(p) A copy of the notice of the standstill period given in accordance with paragraph 2 of article 22 of this Law;

(q) If the procurement proceedings resulted in the award of a procurement contract in accordance with paragraph 8 of article 22 of this Law, a statement to that effect and of the reasons therefor;

(r) The contract price and other principal terms and conditions of the procurement contract; where a written procurement contract has been concluded, a copy thereof. (In the case of a framework agreement procedure, in addition a summary of the principal terms and conditions of the framework agreement or a copy of any written framework agreement that was concluded);

(s) For each submission, the price and a summary of the other principal terms and conditions;

(t) A summary of the evaluation of submissions, including the application of any preference pursuant to paragraph 3 (b) of article 11 of this Law, and the reasons and circumstances on which the procuring entity relied to justify any rejection of bids presented during the auction;

(u) Where exemptions from disclosure of information were invoked under paragraph 1 of article 24 or under article 69 of this Law, the reasons and circumstances relied upon in invoking them;

(v) In procurement involving classified information, any requirements imposed on suppliers or contractors for the protection of classified information pursuant to paragraph 4 of article 24 of this Law; and

(w) Other information required to be included in the record in accordance with the provisions of this Law or the procurement regulations.

2. The portion of the record referred to in subparagraphs (a) to (k) of paragraph 1 of this article shall, on request, be made available to any person after the successful submission has been accepted or the procurement has been cancelled.

3. Subject to paragraph 4 of this article, or except as disclosed pursuant to paragraph 3 of article 42 of this Law, the portion of the record referred to in

subparagraphs (p) to (t) of paragraph 1 of this article shall, after the decision on acceptance of the successful submission has become known to them, be made available, upon request, to suppliers or contractors that presented submissions.

4. Except when ordered to do so by the [*name of court or courts*] or the [*name of the relevant organ designated by the enacting State*], and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information from the record of the procurement proceedings if its non-disclosure is necessary for the protection of essential security interests of the State or if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition;

(b) Information relating to the examination and evaluation of submissions, other than the summary referred to in subparagraph (t) of paragraph 1 of this article.

5. The procurement entity shall record, file and preserve all documents relating to the procurement proceedings, according to procurement regulations or other provisions of law of this State.

#### *Article 26*

##### *Code of conduct*

A code of conduct for officers or employees of procuring entities shall be enacted. It shall address, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements. The code of conduct so enacted shall be promptly made accessible to the public and systematically maintained.

## **Chapter II. Methods of procurement and their conditions for use; solicitation and notices of the procurement**

### **Section I. Methods of procurement and their conditions for use**

#### *Article 27*

##### *Methods of procurement*<sup>66</sup>

1. The procuring entity may conduct procurement by means of:

- (a) Open tendering;
- (b) Restricted tendering;
- (c) Request for quotations;

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<sup>66</sup> States may choose not to incorporate all the methods of procurement listed in this article into their national legislation, although an appropriate range of options, including open tendering, should be always provided for. On this question, see the Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/...). States may consider whether, for certain methods of procurement, to include a requirement for high-level approval by a designated organ. On this question, see the Guide to Enactment.

- (d) Request for proposals without negotiation;
  - (e) Two-stage tendering;
  - (f) Request for proposals with dialogue;
  - (g) Request for proposals with consecutive negotiations;
  - (h) Competitive negotiations;
  - (i) Electronic reverse auction; and
  - (j) Single-source procurement.
2. The procuring entity may engage in a framework agreement procedure in accordance with the provisions of chapter VII of this Law.

#### *Article 28*

##### *General rules applicable to the selection of a procurement method*

1. Except as otherwise provided for in articles 29 to 31 of this Law, a procuring entity shall conduct procurement by means of open tendering.
2. A procuring entity may use a method of procurement other than open tendering only in accordance with articles 29 to 31 of this Law, shall select the other method of procurement to accommodate the circumstances of the procurement concerned and shall seek to maximize competition to the extent practicable.
3. If the procuring entity uses a method of procurement other than open tendering, it shall include in the record required under article 25 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of that method.

#### *Article 29*

##### *Conditions for the use of methods of procurement under chapter IV of this Law (restricted tendering, requests for quotations and requests for proposals without negotiation)*

1. The procuring entity may engage in procurement by means of restricted tendering in accordance with article 45 of this Law when:
  - (a) The subject matter of the procurement, by reason of its highly complex or specialized nature, is 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 subject matter of the procurement.
2. A procuring entity may engage in procurement by means of a request for quotations in accordance with article 46 of this Law for the procurement of readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the threshold amount set out in the procurement regulations.

3. The procuring entity may engage in procurement by means of request for proposals without negotiation in accordance with article 47 of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of the quality and technical aspects of the proposals.

#### *Article 30*

*Conditions for the use of methods of procurement under chapter V of this Law (two-stage tendering, requests for proposals with dialogue, requests for proposals with consecutive negotiations, competitive negotiations and single-source procurement)*

1. A procuring entity may engage in procurement by means of two-stage tendering in accordance with article 48 of this Law where:

(a) The procuring entity assesses that discussions with suppliers or contractors are needed to refine aspects of the description of the subject matter of the procurement and to formulate them with the detail required under article 10 of this Law, and in order to allow the procuring entity to obtain the most satisfactory solution to its procurement needs; or

(b) Open tendering was engaged in but no tenders were presented or the procurement was cancelled by the procuring entity pursuant to paragraph 1 of article 19 of this Law and where, in the judgement of the procuring entity, engaging in new open-tendering proceedings or a procurement method under chapter IV of this Law would be unlikely to result in a procurement contract.

2. [Subject to approval by the *[name of the organ designated by the enacting State to issue the approval]*],<sup>67</sup> a procuring entity may engage in procurement by means of request for proposals with dialogue in accordance with article 49 of this Law where:

(a) It is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement in accordance with article 10 of this Law, and the procuring entity assesses that dialogue with suppliers or contractors is needed to obtain the most satisfactory solution to its procurement needs;

(b) The procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) The procuring entity determines that the selected method is the most appropriate method of procurement for the protection of essential security interests of the State; or

(d) Open tendering was engaged in but no tenders were presented or the procurement was cancelled by the procuring entity pursuant to paragraph 1 of article 19 of this Law and where, in the judgement of the procuring entity, engaging

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<sup>67</sup> The enacting State may consider enacting the provisions in brackets if it wishes to subject the use of this procurement method to a measure of ex ante control.

in new open-tendering proceedings or a procurement method under chapter IV of this Law would be unlikely to result in a procurement contract.

3. A procuring entity may engage in procurement by means of request for proposals with consecutive negotiations in accordance with article 50 of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of the quality and technical aspects of the proposals, and it assesses that consecutive negotiations with suppliers or contractors are needed in order to ensure that the financial terms and conditions of the procurement contract are acceptable to the procuring entity.

4. A procuring entity may engage in competitive negotiations, in accordance with the provisions of article 51 of this Law, in the following circumstances:

(a) There is an urgent need for the subject matter of the procurement, and engaging in open-tendering proceedings or any other competitive method of procurement, because of the time involved in using those methods, 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;

(b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use open-tendering proceedings or any other competitive method of procurement because of the time involved in using those methods; or

(c) The procuring entity determines that the use of any other competitive method of procurement is not appropriate for the protection of essential security interests of the State.

5. A procuring entity may engage in single-source procurement in accordance with the provisions of article 52 of this Law in the following exceptional circumstances:

(a) The subject matter of the procurement is available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible;

(b) Owing to a catastrophic event, there is an extremely urgent need for the subject matter of the procurement, and engaging in any other method of procurement would be impractical because of the time involved in using those methods;

(c) The procuring entity, having procured goods, equipment, technology or services 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, technology or services, 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 or services in question;

(d) The procuring entity determines that the use of any other method of procurement is not appropriate for the protection of essential security interests of the State; or

(e) [Subject to approval by the *[name of the organ designated by the enacting State to issue the approval]* and,] following public notice and adequate opportunity to comment, procurement from a particular supplier or contractor is necessary in order to implement a socio-economic policy of this State, provided that procurement from no other supplier or contractor is capable of promoting that policy.

#### *Article 31*

##### *Conditions for use of an electronic reverse auction*

1. A procuring entity may engage in procurement by means of an electronic reverse auction in accordance with the provisions of chapter VI of this Law, under the following conditions:

(a) It is feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement;

(b) There is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction, such that effective competition is ensured; and

(c) The criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.

2. A procuring entity may use an electronic reverse auction as a phase preceding the award of the procurement contract in a procurement method, as appropriate under the provisions of this Law. It may also use an electronic reverse auction for award of a procurement contract in a framework agreement procedure with second-stage competition in accordance with the provisions of this Law. An electronic reverse auction under this paragraph may be used only where the conditions of paragraph 1 (c) of this article are satisfied.

#### *Article 32*

##### *Conditions for use of a framework agreement procedure*

1. A procuring entity may engage in a framework agreement procedure in accordance with chapter VII of this Law where it determines that:

(a) The need for the subject matter of the procurement is expected to arise on an indefinite or repeated basis during a given period of time; or

(b) By virtue of the nature of the subject matter of the procurement, the need for that subject matter may arise on an urgent basis during a given period of time.

2. The procuring entity shall include in the record required under article 25 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of a framework agreement procedure and the type of framework agreement selected.

## Section II. Solicitation and notices of the procurement

### *Article 33*

#### *Solicitation in open tendering, two-stage tendering and procurement by means of an electronic reverse auction*

1. An invitation to tender in open tendering or two-stage tendering and an invitation to an electronic reverse auction under article 53 of this Law shall be published in the publication identified in the procurement regulations.
2. The invitation shall also be published internationally, so as to be widely accessible to international suppliers or contractors.
3. The provisions of this article shall not apply where the procuring entity engages in pre-qualification proceedings in accordance with article 18 of this Law.
4. The procuring entity shall not be required to cause the invitation to be published in accordance with paragraph 2 of this article in domestic procurement and in procurement proceedings where the procuring entity decides, in view of the low value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in presenting submissions.

### *Article 34*

#### *Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement: requirement for an advance notice of the procurement*

1. (a) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified in paragraph 1 (a) of article 29 of this Law, it shall solicit tenders from all suppliers and contractors from which the subject matter of the procurement is available;  
  
(b) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified in paragraph 1 (b) of article 29 of this Law, it shall select suppliers or contractors from which to solicit tenders in a non-discriminatory manner, and it shall select a sufficient number of suppliers or contractors to ensure effective competition.
2. Where the procuring entity engages in procurement by means of request for quotations in accordance with paragraph 2 of article 29 of this Law, it shall request quotations from as many suppliers or contractors as practicable, but from at least three.
3. Where the procuring entity engages in procurement by means of competitive negotiations in accordance with paragraph 4 of article 30 of this Law, it shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.
4. Where the procuring entity engages in single-source procurement in accordance with paragraph 5 of article 30 of this Law, it shall solicit a proposal or price quotation from a single supplier or contractor.



5. Prior to direct solicitation in accordance with the provisions of paragraphs 1, 3 and 4 of this article, the procuring entity shall cause a notice of the procurement to be published in the publication identified in the procurement regulations. The notice shall contain at a minimum the following information:

- (a) The name and address of the procuring entity;
- (b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into in the procurement proceedings, including the nature, quantity and place of delivery of the goods to be supplied, the nature and location of the construction to be effected or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods, the completion of the construction or the provision of the services;
- (c) A declaration pursuant to article 8 of this Law; and
- (d) The method of procurement to be used.

6. The requirements of paragraph 5 of this article shall not apply in cases of urgent need as referred to in paragraphs 4 (a), 4 (b) and 5 (b) of article 30 of this Law.

#### *Article 35*

##### *Solicitation in request-for-proposals proceedings*

1. An invitation to participate in request-for-proposals proceedings shall be published in accordance with paragraphs 1 and 2 of article 33 of this Law, except where:

- (a) The procuring entity engages in pre-qualification proceedings in accordance with article 18 of this Law or in pre-selection proceedings in accordance with paragraph 3 of article 49 of this Law;
- (b) The procuring entity engages in direct solicitation under the conditions set out in paragraph 2 of this article; or
- (c) The procuring entity decides not to cause the invitation to be published in accordance with paragraph 2 of article 33 of this Law in the circumstances referred to in paragraph 4 of article 33 of this Law.

2. The procuring entity may engage in direct solicitation in request-for-proposals proceedings if:

- (a) The subject matter to be procured is available from only a limited number of suppliers or contractors, provided that the procuring entity solicits proposals from all those suppliers or contractors;
- (b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the subject matter to be procured, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition and selects suppliers or contractors from which to solicit proposals in a non-discriminatory manner; or
- (c) The procurement involves classified information, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.

3. The procuring entity shall include in the record required under article 25 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request-for-proposals proceedings.

4. The procuring entity shall cause a notice of the procurement to be published in accordance with the requirements set out in paragraph 5 of article 34 of this Law when it engages in direct solicitation in request-for-proposals proceedings.

### **Chapter III. Open tendering**

#### **Section I. Solicitation of tenders**

##### *Article 36*

##### *Procedures for soliciting tenders*

The procuring entity shall solicit tenders by causing an invitation to tender to be published in accordance with the provisions of article 33 of this Law.

##### *Article 37*

##### *Contents of invitation to tender*

The invitation to tender shall include the following information:

- (a) The name and address of the procuring entity;
- (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, including the nature, quantity and place of delivery of the goods to be supplied, the nature and location of the construction to be effected or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods, the completion of the construction or the provision of the services;
- (c) A summary of the criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, and of any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law;
- (d) A declaration pursuant to article 8 of this Law;
- (e) The means of obtaining the solicitation documents and the place where they may be obtained;
- (f) The price, if any, to be charged by the procuring entity for the solicitation documents;
- (g) If a price is to be charged for the solicitation documents, the means and currency of payment;
- (h) The language or languages in which the solicitation documents are available;
- (i) The manner, place and deadline for presenting tenders.

*Article 38**Provision of solicitation documents*

The procuring entity shall provide the solicitation documents to each supplier or contractor that responds to the invitation to tender in accordance with the procedures and requirements specified therein. If pre-qualification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been pre-qualified 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 providing them to suppliers or contractors.

*Article 39**Contents of solicitation documents*

The solicitation documents shall include the following information:

- (a) Instructions for preparing tenders;
- (b) The criteria and procedures, in conformity with the provisions of article 9 of this Law, that will be applied in the ascertainment of the qualifications of suppliers or contractors and in any further demonstration of qualifications pursuant to paragraph 5 of article 43 of this Law;
- (c) The requirements as to documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;
- (d) A detailed description of the subject matter of the procurement, in conformity with article 10 of this Law; the quantity of the goods; the services to be performed; the location where the goods are to be delivered, construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;
- (e) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the form of the contract, if any, to be signed by the parties;
- (f) If alternatives to the characteristics of the subject matter of the procurement, the contractual terms and conditions or other requirements set out 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;
- (g) If suppliers or contractors are permitted to present tenders for only a portion of the subject matter of the procurement, a description of the portion or portions for which tenders may be presented;
- (h) 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 subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;
- (i) The currency or currencies in which the tender price is to be formulated and expressed;

- (j) The language or languages, in conformity with article 13 of this Law, in which tenders are to be prepared;
- (k) 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 presenting tenders in accordance with article 17 of this Law, 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 material bonds;
- (l) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security, a statement to that effect;
- (m) The manner, place and deadline for presenting tenders, in conformity with article 14 of this Law;
- (n) The means by which, pursuant to article 15 of this Law, suppliers or contractors may seek clarification of the solicitation documents and a statement as to whether the procuring entity intends to convene a meeting of suppliers or contractors at this stage;
- (o) The period of time during which tenders shall be in effect, in conformity with article 41 of this Law;
- (p) The manner, place, date and time for the opening of tenders, in conformity with article 42 of this Law;
- (q) The criteria and procedure for examining tenders against the description of the subject matter of the procurement;
- (r) The criteria and procedure for evaluating tenders in accordance with article 11 of this Law;
- (s) The currency that will be used for the purpose of evaluating tenders pursuant to paragraph 4 of article 43 of this Law and either the exchange rate that will be used for the conversion of tender prices into that currency or a statement that the rate published by a specified financial institution and 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, including those applicable to procurement involving classified information, and the place where those laws and regulations may be found;
- (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) Notice of the right provided under article 64 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and the reasons therefor;

(w) Any formalities that will be required, once a successful tender has been accepted, for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract and approval by another authority pursuant to article 22 of this Law, and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(x) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of tenders and to other aspects of the procurement proceedings.

## **Section II. Presentation of tenders**

### *Article 40*

#### *Presentation of tenders*

1. Tenders shall be presented in the manner, at the place and by the deadline specified in the solicitation documents.
2. (a) A tender shall be presented in writing, signed and:
  - (i) If in paper form, in a sealed envelope; or
  - (ii) If in any other form, according to the requirements specified by the procuring entity in the solicitation documents, which shall ensure at least a similar degree of authenticity, security, integrity and confidentiality;
- (b) The procuring entity shall provide to the supplier or contractor a receipt showing the date and time when its tender was received;
- (c) The procuring entity shall preserve the security, integrity and confidentiality of a tender and shall ensure that the content of the tender is examined only after it is opened in accordance with this Law.
3. A tender received by the procuring entity after the deadline for presenting tenders shall not be opened and shall be returned unopened to the supplier or contractor that presented it.

### *Article 41*

#### *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;
- (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 presenting 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 presenting tenders.

### **Section III. Evaluation of tenders**

#### *Article 42*

##### *Opening of tenders*

1. Tenders shall be opened at the time specified in the solicitation documents as the deadline for presenting tenders. They shall be opened at the place and in accordance with the manner and procedures specified in the solicitation documents.

2. All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to participate in 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 presented tenders but that are not present or represented at the opening of tenders, and included immediately in the record of the procurement proceedings required by article 25 of this Law.

#### *Article 43*

##### *Examination and evaluation of tenders*

1. (a) Subject to subparagraph (b) of this paragraph, the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with article 10 of this Law;

(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 out in the solicitation documents or if it contains errors or oversights that can be 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 of tenders.

2. The procuring entity shall reject a tender:

- (a) If the supplier or contractor that presented the tender is not qualified;
- (b) If the supplier or contractor that presented the tender does not accept a correction of an arithmetical error made pursuant to article 16 of this Law;
- (c) If the tender is not responsive;
- (d) In the circumstances referred to in article 20 or 21 of this Law.

3. (a) The procuring entity shall evaluate the tenders that have not been rejected in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the criteria and procedures set out in the solicitation documents. No criterion or procedure shall be used that has not been set out in the solicitation documents;

(b) The successful tender shall be:

(i) Where price is the only award criterion, the tender with the lowest tender price; or

(ii) Where there are price and other award criteria, the most advantageous tender ascertained on the basis of the criteria and procedures for evaluating tenders specified in the solicitation documents in accordance with article 11 of this Law.

4. When tender prices are expressed in two or more currencies, for the purpose of evaluating and comparing tenders, the tender prices of all tenders shall be converted to the currency specified in the solicitation documents according to the rate set out in those documents, pursuant to subparagraph (s) of article 39 of this Law.

5. Whether or not it has engaged in pre-qualification proceedings pursuant to article 18 of this Law, the procuring entity may require the supplier or contractor presenting the tender that has been found to be the successful tender pursuant to paragraph 3 (b) of this article to demonstrate its qualifications again, in accordance with criteria and procedures conforming to the provisions of article 9 of this Law. The criteria and procedures to be used for such further demonstration shall be set out in the solicitation documents. Where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings.

6. If the supplier or contractor presenting the successful tender is requested to demonstrate its qualifications again in accordance with paragraph 5 of this article but fails to do so, the procuring entity shall reject that tender and shall select the next successful tender from among those remaining in effect, in accordance with paragraph 3 of this article, subject to the right of the procuring entity to cancel the procurement in accordance with paragraph 1 of article 19 of this Law.

#### *Article 44*

##### *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 presented by the supplier or contractor.

### **Chapter IV. Procedures for restricted tendering, requests for quotations and requests for proposals without negotiation**

#### *Article 45*

##### *Restricted tendering*

1. The procuring entity shall solicit tenders in accordance with the provisions of paragraphs 1 and 5 of article 34 of this Law.

2. The provisions of chapter III of this Law, except for articles 36 to 38, shall apply to restricted-tendering proceedings.

#### *Article 46*

##### *Request for quotations*

1. The procuring entity shall request quotations in accordance with the provisions of paragraph 2 of article 34 of this Law. Each supplier or contractor from which a quotation is requested shall be informed whether any elements other than the charges for the subject matter of the procurement itself, such as any applicable 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 presented by the supplier or contractor.
3. The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity as set out in the request for quotations.

#### *Article 47*

##### *Request for proposals without negotiation*

1. The procuring entity shall solicit proposals by causing an invitation to participate in the request-for-proposals-without-negotiation proceedings to be published in accordance with paragraph 1 of article 35 of this Law, unless an exception provided for in that article applies.
2. The invitation shall include:
  - (a) The name and address of the procuring entity;
  - (b) A detailed description of the subject matter of the procurement, in conformity with article 10 of this Law, and the desired or required time and location for the provision of such subject matter;
  - (c) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the form of the contract, if any, to be signed by the parties;
  - (d) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law;
  - (e) The criteria and procedures for opening the proposals and for examining and evaluating the proposals in accordance with articles 10 and 11 of this Law, including the minimum requirements with respect to technical, quality and performance characteristics that proposals must meet in order to be considered responsive in accordance with article 10 of this Law, and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;
  - (f) A declaration pursuant to article 8 of this Law;



(g) The means of obtaining the request for proposals and the place where it may be obtained;

(h) The price, if any, to be charged by the procuring entity for the request for proposals;

(i) If a price is to be charged for the request for proposals, the means and currency of payment;

(j) The language or languages in which the request for proposals is available;

(k) The manner, place and deadline for presenting proposals.

3. The procuring entity shall issue the request for proposals:

(a) Where an invitation to participate in the request-for-proposals-without-negotiation proceedings has been published in accordance with the provisions of paragraph 1 of article 35 of this Law, to each supplier or contractor responding to the invitation in accordance with the procedures and requirements specified therein;

(b) In the case of pre-qualification, to each supplier or contractor pre-qualified in accordance with article 18 of this Law;

(c) In the case of direct solicitation under paragraph 2 of article 35 of this Law, to each supplier or contractor selected by the procuring entity;

that pays the price, if any, charged for the request for proposals. The price that the procuring entity may charge for the request for proposals shall reflect only the cost of providing it to suppliers or contractors.

4. The request for proposals shall include, in addition to the information referred to in subparagraphs (a) to (e) and (k) of paragraph 2 of this article, the following information:

(a) Instructions for preparing and presenting proposals, including instructions to suppliers or contractors to present simultaneously to the procuring entity proposals in two envelopes: one envelope containing the technical, quality and performance characteristics of the proposal, and the other envelope containing the financial aspects of the proposal;

(b) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;

(c) The currency or currencies in which the proposal price is to be formulated and expressed, the currency that will be used for the purpose of evaluating proposals and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution and prevailing on a specified date will be used;

(d) The manner in which the proposal 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 subject matter of the procurement itself, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(e) The means by which, pursuant to article 15 of this Law, suppliers or contractors may seek clarification of the request for proposals, and a statement as to whether the procuring entity intends to convene a meeting of suppliers or contractors at this stage;

(f) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where those laws and regulations may be found;

(g) 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;

(h) Notice of the right provided under article 64 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and the reasons therefor;

(i) Any formalities that will be required, once the successful proposal has been accepted, for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract and approval by another authority pursuant to article 22 of this Law, and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(j) 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 presentation of proposals and to the procurement proceedings.

5. Before opening the envelopes containing the financial aspects of the proposals, the procuring entity shall examine and evaluate the technical, quality and performance characteristics of proposals in accordance with the criteria and procedures specified in the request for proposals.

6. The results of the examination and evaluation of the technical, quality and performance characteristics of the proposals shall immediately be included in the record of the procurement proceedings.

7. The proposals whose technical, quality and performance characteristics fail to meet the relevant minimum requirements shall be considered to be non-responsive and shall be rejected on that ground. A notice of rejection and the reasons for the rejection, together with the unopened envelope containing the financial aspects of the proposal, shall promptly be dispatched to each respective supplier or contractor whose proposal was rejected.

8. The proposals whose technical, quality and performance characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive. The procuring entity shall promptly communicate to each supplier or contractor presenting such a proposal the score of the technical, quality and performance characteristics of its respective proposal. The procuring entity shall invite all such

suppliers or contractors to the opening of the envelopes containing the financial aspects of their proposals.

9. The score of the technical, quality and performance characteristics of each responsive proposal and the corresponding financial aspect of that proposal shall be read out in the presence of the suppliers or contractors invited, in accordance with paragraph 8 of this article, to the opening of the envelopes containing the financial aspects of the proposals.

10. The procuring entity shall compare the financial aspects of the responsive proposals and on that basis identify the successful proposal in accordance with the criteria and the procedure set out in the request for proposals. The successful proposal shall be the proposal with the best combined evaluation in terms of: (a) the criteria other than price specified in the request for proposals; and (b) the price.

## **Chapter V. Procedures for two-stage tendering, requests for proposals with dialogue, requests for proposals with consecutive negotiations, competitive negotiations and single-source procurement**

### *Article 48*

#### *Two-stage tendering*

1. The provisions of chapter III of this Law shall apply to two-stage-tendering proceedings, except to the extent that those provisions are derogated from in this article.

2. The solicitation documents shall call upon suppliers or contractors to present, in the first stage of 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 performance characteristics of the subject matter of the procurement, as well as to contractual terms and conditions of supply and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

3. The procuring entity may, in the first stage, engage in discussions with suppliers or contractors whose initial tenders have not been rejected pursuant to provisions of this Law concerning any aspect of their initial tenders. When the procuring entity engages in discussions with any supplier or contractor, it shall extend an equal opportunity to participate in discussions to all suppliers or contractors.

4. (a) In the second stage of two-stage-tendering proceedings, the procuring entity shall invite all suppliers or contractors whose initial tenders were not rejected in the first stage to present final tenders with prices in response to a revised set of terms and conditions of the procurement;

(b) In revising the relevant terms and conditions of the procurement, the procuring entity may not modify the subject matter of the procurement but may refine aspects of the description of the subject matter of the procurement by:

- (i) Deleting or modifying any aspect of the technical, quality or performance characteristics of the subject matter of the procurement initially provided and adding any new characteristics that conform to the requirements of this Law;
- (ii) Deleting or modifying any criterion for examining or evaluating tenders initially provided and adding any new criterion that conforms to the requirements of this Law, only to the extent that the deletion, modification or addition is required as a result of changes made in the technical, quality or performance characteristics of the subject matter of the procurement;
- (c) Any deletion, modification or addition made pursuant to subparagraph (b) of this paragraph shall be communicated to suppliers or contractors in the invitation to present final tenders;
- (d) A supplier or contractor not wishing to present 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;
- (e) The final tenders shall be evaluated in order to ascertain the successful tender as defined in paragraph 3 (b) of article 43 of this Law.

#### *Article 49*

##### *Request for proposals with dialogue*

1. The procuring entity shall solicit proposals by causing an invitation to participate in the request-for-proposals-with-dialogue proceedings to be published in accordance with paragraph 1 of article 35 of this Law, unless an exception provided for in that article applies.
2. The invitation shall include:
  - (a) The name and address of the procuring entity;
  - (b) A description of the subject matter of the procurement, to the extent known, and the desired or required time and location for the provision of such subject matter;
  - (c) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the form of the contract, if any, to be signed by the parties;
  - (d) The intended stages of the procedure;
  - (e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law;
  - (f) The minimum requirements that proposals must meet in order to be considered responsive in accordance with article 10 of this Law and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;
  - (g) A declaration pursuant to article 8 of this Law;
  - (h) The means of obtaining the request for proposals and the place where it may be obtained;

(i) The price, if any, to be charged by the procuring entity for the request for proposals;

(j) If a price is to be charged for the request for proposals, the means and currency of payment;

(k) The language or languages in which the request for proposals is available;

(l) The manner, place and deadline for presenting proposals.

3. For the purpose of limiting the number of suppliers or contractors from which to request proposals, the procuring entity may engage in pre-selection proceedings. The provisions of article 18 of this Law shall apply *mutatis mutandis* to the pre-selection proceedings, except to the extent that those provisions are derogated from in this paragraph:

(a) The procuring entity shall specify in the pre-selection documents that it will request proposals from only a limited number of pre-selected suppliers or contractors that best meet the qualification criteria specified in the pre-selection documents;

(b) The pre-selection documents shall set out the maximum number of pre-selected suppliers or contractors from which the proposals will be requested and the manner in which the selection of that number will be carried out. In establishing such a limit, the procuring entity shall bear in mind the need to ensure effective competition;

(c) The procuring entity shall rate the suppliers or contractors that meet the criteria specified in the pre-selection documents according to the manner of rating that is set out in the invitation to pre-selection and the pre-selection documents;

(d) The procuring entity shall pre-select suppliers or contractors that acquired the best rating, up to the maximum number indicated in the pre-selection documents but at least three, if possible;

(e) The procuring entity shall promptly notify each supplier or contractor whether it has been pre-selected and shall, upon request, communicate to suppliers or contractors that have not been pre-selected the reasons therefor. It shall make available to any person, upon request, the names of all suppliers or contractors that have been pre-selected.

4. The procuring entity shall issue the request for proposals:

(a) Where an invitation to participate in the request-for-proposals-with-dialogue proceedings has been published in accordance with the provisions of paragraph 1 of article 35 of this Law, to each supplier or contractor responding to the invitation in accordance with the procedures and requirements specified therein;

(b) In the case of pre-qualification, to each supplier or contractor pre-qualified in accordance with article 18 of this Law;

(c) Where pre-selection proceedings have been engaged in, to each pre-selected supplier or contractor in accordance with the procedures and requirements specified in the pre-selection documents;

(d) In the case of direct solicitation under paragraph 2 of article 35 of this Law, to each supplier or contractor selected by the procuring entity;

that pays the price, if any, charged for the request for proposals. The price that the procuring entity may charge for the request for proposals shall reflect only the cost of providing it to suppliers or contractors.

5. The request for proposals shall include, in addition to the information referred to in paragraphs 2 (a) to (f) and (l) of this article, the following information:

(a) Instructions for preparing and presenting proposals;

(b) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;

(c) The currency or currencies in which the proposal price is to be formulated and expressed, the currency that will be used for the purpose of evaluating proposals and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution and prevailing on a specified date will be used;

(d) The manner in which the proposal 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 subject matter of the procurement itself, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(e) The means by which, pursuant to article 15 of this Law, suppliers or contractors may seek clarification of the request for proposals and a statement as to whether the procuring entity intends to convene a meeting of suppliers or contractors at this stage;

(f) Any element of the description of the subject matter of the procurement or term or condition of the procurement contract that will not be the subject of dialogue during the procedure;

(g) Where the procuring entity intends to limit the number of suppliers or contractors that it will invite to participate in the dialogue, the minimum number of suppliers or contractors, which shall be not lower than three, if possible, and, where appropriate, the maximum number of suppliers or contractors and the criteria and procedure, in conformity with the provisions of this Law, that will be followed in selecting either number;

(h) The criteria and procedure for evaluating the proposals in accordance with article 11 of this Law;

(i) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where those laws and regulations may be found;

(j) 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;

(k) Notice of the right provided under article 64 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and the reasons therefor;

(l) Any formalities that will be required, once the successful offer has been accepted, for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract and approval by another authority pursuant to article 22 of this Law, and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;

(m) 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 presentation of proposals and to the procurement proceedings.

6. (a) The procuring entity shall examine all proposals received against the established minimum requirements and shall reject each proposal that fails to meet these minimum requirements on the ground that it is non-responsive;

(b) Where a maximum limit on the number of suppliers or contractors that can be invited to participate in the dialogue has been established and the number of responsive proposals exceeds that limit, the procuring entity shall select the maximum number of responsive proposals in accordance with the criteria and procedure specified in the request for proposals;

(c) A notice of rejection and the reasons for the rejection shall be promptly dispatched to each respective supplier or contractor whose proposal was rejected.

7. The procuring entity shall invite each supplier or contractor that presented a responsive proposal, within any applicable maximum, to participate in the dialogue. The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the dialogue, which shall be at least three, if possible, is sufficient to ensure effective competition.

8. The dialogue shall be conducted by the same representatives of the procuring entity on a concurrent basis.

9. During the course of the dialogue, the procuring entity shall not modify the subject matter of the procurement, any qualification or evaluation criterion, any minimum requirements established pursuant to paragraph 2 (f) of this article, any element of the description of the subject matter of the procurement or any term or condition of the procurement contract that is not subject to the dialogue as specified in the request for proposals.

10. Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that is communicated by the procuring entity to a supplier or contractor shall be communicated at the same time and on an equal basis to all other participating suppliers or contractors, unless such information is specific or exclusive to that supplier or contractor or such communication would be in breach of the confidentiality provisions of article 24 of this Law.

11. Following the dialogue, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present a best and final offer with

respect to all aspects of their proposals. The request shall be in writing and shall specify the manner, place and deadline for presenting best and final offers.

12. No negotiations shall take place between the procuring entity and suppliers or contractors with respect to their best and final offers.

13. The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

#### *Article 50*

##### *Request for proposals with consecutive negotiations*

1. The provisions of paragraphs 1 to 7 of article 47 of this Law shall apply mutatis mutandis to procurement conducted by means of request for proposals with consecutive negotiations, except to the extent that those provisions are derogated from in this article.

2. Proposals whose technical, quality and performance characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive. The procuring entity shall rank each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals and shall:

(a) Promptly communicate to each supplier or contractor presenting a responsive proposal the score of the technical, quality and performance characteristics of its respective proposal and its ranking;

(b) Invite the supplier or contractor that has attained the best ranking, in accordance with those criteria and procedure, for negotiations on the financial aspects of its proposal; and

(c) Inform other suppliers or contractors that presented responsive proposals that their proposals may be considered for negotiation if negotiations with the supplier (or suppliers) or contractor (or contractors) with a better ranking do not result in a procurement contract.

3. If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph 2 (b) 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.

4. The procuring entity shall then invite for negotiations the supplier or contractor that attained the second-best ranking; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors still participating in the procurement proceedings for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

5. During the course of the negotiations, the procuring entity shall not modify the subject matter of the procurement; any qualification, examination or evaluation criterion, including any established minimum requirements; any element of the description of the subject matter of the procurement; or term or condition of the



procurement contract other than financial aspects of proposals that are subject to the negotiations as specified in the request for proposals.

6. The procuring entity may not reopen negotiations with any supplier or contractor with which it has terminated negotiations.

#### *Article 51*

##### *Competitive negotiations*

1. Paragraphs 3, 5 and 6 of article 34 of this Law shall apply to the procedure preceding the negotiations.

2. Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that is communicated by the procuring entity to a supplier or contractor before or during the negotiations shall be communicated at the same time and on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement, unless such information is specific or exclusive to that supplier or contractor or such communication would be in breach of the confidentiality provisions of article 24 of this Law.

3. Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present, by a specified date, a best and final offer with respect to all aspects of their proposals.

4. No negotiations shall take place between the procuring entity and suppliers or contractors with respect to their best and final offers.

5. The successful offer shall be the offer that best meets the needs of the procuring entity.

#### *Article 52*

##### *Single-source procurement*

Paragraphs 4 to 6 of article 34 of this Law shall apply to the procedure preceding the solicitation of a proposal or price quotation from a single supplier or contractor. The procuring entity shall engage in negotiations with the supplier or contractor from which a proposal or price quotation is solicited unless such negotiations are not feasible in the circumstances of the procurement concerned.

## **Chapter VI. Electronic reverse auctions**

#### *Article 53*

##### *Electronic reverse auction as a stand-alone method of procurement*

1. The procuring entity shall solicit bids by causing an invitation to the electronic reverse auction to be published in accordance with article 33 of this Law. The invitation shall include:

- (a) The name and address of the procuring entity;

- (b) A detailed description of the subject matter of the procurement, in conformity with article 10 of this Law, and the desired or required time and location for the provision of such subject matter;
- (c) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the form of the contract, if any, to be signed by the parties;
- (d) A declaration pursuant to article 8 of this Law;
- (e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article 9 of this Law;
- (f) The criteria and procedure for examining bids against the description of the subject matter of the procurement;
- (g) The criteria and procedure for evaluating bids in accordance with article 11 of this Law, including any mathematical formula that will be used in the evaluation procedure during the auction;
- (h) The manner in which the bid 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 subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;
- (i) The currency or currencies in which the bid price is to be formulated and expressed;
- (j) The minimum number of suppliers or contractors required to register for the auction in order for the auction to be held, which shall be sufficient to ensure effective competition;
- [(k) If any limit on the number of suppliers or contractors that can be registered for the auction is imposed in accordance with paragraph 2 of this article, the relevant maximum number and the criteria and procedure, in conformity with paragraph 2 of this article, that will be followed in selecting it;]
- (l) How the auction can be accessed, including appropriate information regarding connection to the auction;
- (m) The deadline by which suppliers or contractors must register for the auction and the requirements for registration;
- (n) The date and time of the opening of the auction and the requirements for identification of bidders at the opening of the auction;
- (o) The criteria governing the closing of the auction;
- (p) Other rules for the conduct of the auction, including the information that will be made available to the bidders in the course of the auction, the language in which it will be made available and the conditions under which the bidders will be able to bid;
- (q) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those

applicable to procurement involving classified information, and the place where those laws and regulations may be found;

(r) The means by which suppliers or contractors may seek clarification of information relating to the procurement proceedings;

(s) 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 before and after the auction without the intervention of an intermediary;

(t) Notice of the right provided under article 64 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and the reasons therefor;

(u) Any formalities that will be required after the auction for a procurement contract to enter into force, including, where applicable, ascertainment of qualifications or responsiveness in accordance with article 57 of this Law and the execution of a written procurement contract pursuant to article 22 of this Law;

(v) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the procurement proceedings.

[2. The procuring entity may impose a maximum limit on the number of suppliers or contractors that can be registered for the electronic reverse auction only to the extent that capacity constraints in its communications system so require, and shall select the suppliers or contractors to be so registered in a non-discriminatory manner. The procuring entity shall include a statement of the reasons and circumstances upon which it relied to justify the imposition of such a maximum limit in the record required under article 25 of this Law.]

3. The procuring entity may decide, in the light of the circumstances of the given procurement, that the electronic reverse auction shall be preceded by an examination or evaluation of initial bids. In such case, the invitation to the auction shall, in addition to information listed in paragraph 1 of this article, include:

(a) An invitation to present initial bids, together with instructions for preparing initial bids;

(b) The manner, place and deadline for presenting initial bids.

4. Where the electronic reverse auction has been preceded by an examination or evaluation of initial bids, the procuring entity shall promptly after the completion of the examination or evaluation of initial bids:

(a) Dispatch the notice of rejection and reasons for rejection to each supplier or contractor whose initial bid was rejected;

(b) Issue an invitation to the auction to each qualified supplier or contractor whose initial bid is responsive, providing all information required to participate in the auction;

(c) Where an evaluation of initial bids has taken place, each invitation to the auction shall also be accompanied by the outcome of the evaluation, as relevant to the supplier or contractor to which the invitation is addressed.

#### *Article 54*

##### *Electronic reverse auction as a phase preceding the award of the procurement contract*

1. Where an electronic reverse auction is to be used as a phase preceding the award of the procurement contract in a procurement method, as appropriate, or in a framework agreement procedure with second-stage competition, the procuring entity shall notify suppliers or contractors when first soliciting their participation in the procurement proceedings that an auction will be held, and shall provide, in addition to other information required to be included under provisions of this Law, the following information about the auction:

(a) The mathematical formula that will be used in the evaluation procedure during the auction;

(b) How the auction can be accessed, including appropriate information regarding connection to the auction.

2. Before the electronic reverse auction is held, the procuring entity shall issue an invitation to the auction to all suppliers or contractors remaining in the proceedings, specifying:

(a) The deadline by which the suppliers or contractors must register for the auction and requirements for registration;

(b) The date and time of the opening of the auction and requirements for the identification of bidders at the opening of the auction;

(c) Criteria governing the closing of the auction;

(d) Other rules for the conduct of the auction, including the information that will be made available to the bidders during the auction and the conditions under which the bidders will be able to bid.

3. Where an evaluation of initial bids has taken place, each invitation to the auction shall also be accompanied by the outcome of the evaluation as relevant to the supplier or contractor to which the invitation is addressed.

#### *Article 55*

##### *Registration for the electronic reverse auction and the timing of the holding of the auction*

1. Confirmation of registration for the electronic reverse auction shall be communicated promptly to each registered supplier or contractor.

2. If the number of suppliers or contractors registered for the electronic reverse auction is insufficient to ensure effective competition, the procuring entity may cancel the auction. The cancellation of the auction shall be communicated promptly to each registered supplier or contractor.

3. The period of time between the issuance of the invitation to the electronic reverse auction and the auction shall be sufficiently long to allow suppliers or contractors to prepare for the auction, taking into account the reasonable needs of the procuring entity.

#### *Article 56*

##### *Requirements during the electronic reverse auction*

1. The electronic reverse auction shall be based on:
  - (a) Price, where the procurement contract is to be awarded to the lowest-priced bid; or
  - (b) Price and other criteria specified to suppliers or contractors under articles 53 and 54 of this Law, as applicable, where the procurement contract is to be awarded to the most advantageous bid.
2. During the auction:
  - (a) All bidders shall have an equal and continuous opportunity to present their bids;
  - (b) There shall be automatic evaluation of all bids in accordance with the criteria, procedure and formula provided to suppliers or contractors under articles 53 and 54 of this Law, as applicable;
  - (c) Each bidder must receive, instantaneously and on a continuous basis during the auction, sufficient information allowing it to determine the standing of its bid vis-à-vis other bids;
  - (d) There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in subparagraphs (a) and (c) of this paragraph.
3. The procuring entity shall not disclose the identity of any bidder during the auction.
4. The auction shall be closed in accordance with the criteria specified to suppliers or contractors under articles 53 and 54 of this Law, as applicable.
5. The procuring entity shall suspend or terminate the auction in the case of failures in its communication system that put at risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.

#### *Article 57*

##### *Requirements after the electronic reverse auction*

1. The bid that at the closure of the electronic reverse auction is the lowest-priced bid or the most advantageous bid, as applicable, shall be the successful bid.
2. In procurement by means of an auction that was not preceded by examination or evaluation of initial bids, the procuring entity shall ascertain after the auction the responsiveness of the successful bid and the qualifications of the supplier or

contractor submitting it. The procuring entity shall reject that bid if it is found to be unresponsive or if the supplier or contractor submitting it is found unqualified. Without prejudice to the right of the procuring entity to cancel the procurement in accordance with paragraph 1 of article 19 of this Law, the procuring entity shall select the bid that was the next lowest-priced or next most advantageous bid at the closure of the auction, provided that that bid is ascertained to be responsive and the supplier or contractor submitting it is ascertained to be qualified.

3. Where the successful bid at the closure of the auction appears to the procuring entity to be abnormally low and gives rise to concerns on the part of the procuring entity as to the ability of the bidder that presented it to perform the procurement contract, the procuring entity may follow the procedures described in article 20 of this Law. If the procuring entity rejects the bid as abnormally low under article 20, it shall select the bid that at the closure of the auction was the next lowest-priced or next most advantageous bid. This provision is without prejudice to the right of the procuring entity to cancel the procurement in accordance with paragraph 1 of article 19 of this Law.

## **Chapter VII. Framework agreement procedures**

### *Article 58*

#### *Award of a closed framework agreement*

1. The procuring entity shall award a closed framework agreement:

(a) By means of open-tendering proceedings, in accordance with provisions of chapter III of this Law, except to the extent that those provisions are derogated from in this chapter; or

(b) By means of other procurement methods, in accordance with the relevant provisions of chapters II, IV and V of this Law, except to the extent that those provisions are derogated from in this chapter.

2. The provisions of this Law regulating pre-qualification and the contents of the solicitation in the context of the procurement methods referred to in paragraph 1 of this article shall apply *mutatis mutandis* to the information to be provided to suppliers or contractors when first soliciting their participation in a closed framework agreement procedure. The procuring entity shall in addition specify at that stage:

(a) That the procurement will be conducted as a framework agreement procedure, leading to a closed framework agreement;

(b) Whether the framework agreement is to be concluded with one or more than one supplier or contractor;

(c) If the framework agreement will be concluded with more than one supplier or contractor, any minimum or maximum limit on the number of suppliers or contractors that will be parties thereto;

(d) The form, terms and conditions of the framework agreement in accordance with article 59 of this Law.

3. The provisions of article 22 of this Law shall apply mutatis mutandis to the award of a closed framework agreement.

#### *Article 59*

##### *Requirements for closed framework agreements*

1. A closed framework agreement shall be concluded in writing and shall set out:
  - (a) The duration of the framework agreement, which shall not exceed the maximum duration established by the procurement regulations;
  - (b) The description of the subject matter of the procurement and all other terms and conditions of the procurement established when the framework agreement is concluded;
  - (c) To the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded;
  - (d) Whether, in a closed framework agreement concluded with more than one supplier or contractor, there will be a second-stage competition to award a procurement contract under the framework agreement and, if so:
    - (i) A statement of the terms and conditions of the procurement that are to be established or refined through second-stage competition;
    - (ii) The procedures for and the anticipated frequency of any second-stage competition, and envisaged deadlines for presenting second-stage submissions;
    - (iii) The procedures and criteria to be applied during the second-stage competition, including the relative weight of such criteria and the manner in which they will be applied, in accordance with articles 10 and 11 of this Law. If the relative weights of the evaluation criteria may be varied during the second-stage competition, the framework agreement shall specify the permissible range;
  - (e) Whether the award of a procurement contract under the framework agreement will be to the lowest-priced or to the most advantageous submission; and
  - (f) The manner in which the procurement contract will be awarded.
2. A closed framework agreement with more than one supplier or contractor shall be concluded as one agreement between all parties unless:
  - (a) The procuring entity determines that it is in the interests of a party to the framework agreement that a separate agreement with any supplier or contractor party be concluded;
  - (b) The procuring entity includes in the record required under article 25 of this Law a statement of the reasons and circumstances on which it relied to justify the conclusion of separate agreements; and
  - (c) Any variation in the terms and conditions of the separate agreements for a given procurement is minor and concerns only those provisions that justify the conclusion of separate agreements.

3. The framework agreement shall contain, in addition to information specified elsewhere in this article, all information necessary to allow the effective operation of the framework agreement, including information on how the agreement and notifications of forthcoming procurement contracts thereunder can be accessed and appropriate information regarding connection, where applicable.

*Article 60*

*Establishment of an open framework agreement*

1. The procuring entity shall establish and maintain an open framework agreement online.

2. The procuring entity shall solicit participation in the open framework agreement by causing an invitation to become a party to the open framework agreement to be published following the requirements of article 33 of this Law.

3. The invitation to become a party to the open framework agreement shall include the following information:

(a) The name and address of the procuring entity establishing and maintaining the open framework agreement and the name and address of any other procuring entities that will have the right to award procurement contracts under the framework agreement;

(b) That the procurement will be conducted as a framework agreement procedure leading to an open framework agreement;

(c) The language (or languages) of the open framework agreement and all information about the operation of the agreement, including how the agreement and notifications of forthcoming procurement contracts thereunder can be accessed and appropriate information regarding connection;

(d) The terms and conditions for suppliers or contractors to be admitted to the open framework agreement, including:

(i) A declaration pursuant to article 8 of this Law;

[(ii) If any maximum limit on the number of suppliers or contractors that are parties to the open framework agreement is imposed in accordance with paragraph 7 of this article, the relevant number and the criteria and procedure, in conformity with paragraph 7 of this article, that will be followed in selecting it;]

(iii) Instructions for preparing and presenting the indicative submissions necessary to become a party to the open framework agreement, including the currency or currencies and the language (or languages) to be used, as well as the criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article 9 of this Law;

(iv) An explicit statement that suppliers or contractors may apply to become parties to the framework agreement at any time during the period of its operation by presenting indicative submissions, subject to any maximum limit



on the number of suppliers or contractors and any declaration made pursuant to article 8 of this Law;

(e) Other terms and conditions of the open framework agreement, including all information required to be set out in the open framework agreement in accordance with article 61 of this Law;

(f) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where those laws and regulations may be found;

(g) 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.

4. Suppliers or contractors may apply to become a party or parties to the framework agreement at any time during its operation by presenting indicative submissions to the procuring entity in compliance with the requirements of the invitation to become a party to the open framework agreement.

5. The procuring entity shall examine all indicative submissions received during the period of operation of the framework agreement within a maximum of ... working days [*the enacting State specifies the maximum period of time*], in accordance with the procedures set out in the invitation to become a party to the open framework agreement.

6. The framework agreement shall be concluded with all qualified suppliers or contractors that presented submissions unless their submissions have been rejected on the grounds specified in the invitation to become a party to the open framework agreement.

[7. The procuring entity may impose a maximum limit on the number of parties to the open framework agreement only to the extent that capacity limitations in its communications system so require, and shall select the suppliers or contractors to be parties to the open framework agreement in a non-discriminatory manner. The procuring entity shall include in the record required under article 25 of this Law a statement of the reasons and circumstances upon which it relied to justify the imposition of such a maximum limit.]

8. The procuring entity shall promptly notify the suppliers or contractors whether they have become parties to the framework agreement and of the reasons for the rejection of their indicative submissions if they have not.

#### *Article 61*

##### *Requirements for open framework agreements*

1. An open framework agreement shall provide for second-stage competition for the award of a procurement contract under the agreement and shall include:

(a) The duration of the framework agreement;

(b) The description of the subject matter of the procurement and all other terms and conditions of the procurement known when the open framework agreement is established;

(c) Any terms and conditions of the procurement that may be refined through second-stage competition;

(d) The procedures and the anticipated frequency of second-stage competition;

(e) Whether the award of procurement contracts under the framework agreement will be to the lowest-priced or the most advantageous submission;

(f) The procedures and criteria to be applied during the second-stage competition, including the relative weight of the evaluation criteria and the manner in which they will be applied, in accordance with articles 10 and 11 of this Law. If the relative weights of the evaluation criteria may be varied during second-stage competition, the framework agreement shall specify the permissible range.

2. The procuring entity shall, during the entire period of operation of the open framework agreement, republish at least annually the invitation to become a party to the open framework agreement and shall in addition ensure unrestricted, direct and full access to the terms and conditions of the framework agreement and to any other necessary information relevant to its operation.

#### *Article 62*

##### *Second stage of a framework agreement procedure*

1. Any procurement contract under a framework agreement shall be awarded in accordance with the terms and conditions of the framework agreement and the provisions of this article.

2. A procurement contract under a framework agreement may be awarded only to a supplier or contractor that is a party to the framework agreement.

3. The provisions of article 22 of this Law, except for paragraph 2, shall apply to the acceptance of the successful submission under a framework agreement without second-stage competition.

4. In a closed framework agreement with second-stage competition and in an open framework agreement, the following procedures shall apply to the award of a procurement contract:

(a) The procuring entity shall issue a written invitation to present submissions, simultaneously to:

(i) Each supplier or contractor party to the framework agreement; or

(ii) Only to those suppliers or contractors parties to the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement, provided that at the same time notice of the second-stage competition is given to all parties to the framework agreement so that they have the opportunity to participate in the second-stage competition;

(b) The invitation to present submissions shall include the following information:

- (i) A restatement of the existing terms and conditions of the framework agreement to be included in the anticipated procurement contract, a statement of the terms and conditions of the procurement that are to be subject to second-stage competition and further detail regarding those terms and conditions, where necessary;
  - (ii) A restatement of the procedures and criteria for the award of the anticipated procurement contract, including their relative weight and the manner of their application;
  - (iii) Instructions for preparing submissions;
  - (iv) The manner, place and deadline for presenting submissions;
  - (v) If suppliers or contractors are permitted to present submissions for only a portion of the subject matter of the procurement, a description of the portion or portions for which submissions may be presented;
  - (vi) The manner in which the submission 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 subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;
  - (vii) Reference to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where those laws and regulations may be found;
  - (viii) 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 second-stage competition without the intervention of an intermediary;
  - (ix) Notice of the right provided under article 64 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and the reasons therefor;
  - (x) Any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 22 of this Law;
  - (xi) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of submissions and to other aspects of the second-stage competition;
- (c) The procuring entity shall evaluate all submissions received and determine the successful submission in accordance with the evaluation criteria and the procedures set out in the invitation to present submissions;
- (d) The procuring entity shall accept the successful submission in accordance with article 22 of this Law.

*Article 63**Changes during the operation of a framework agreement*

During the operation of a framework agreement, no change shall be allowed to the description of the subject matter of the procurement. Changes to other terms and conditions of the procurement, including to the criteria (and their relative weight and the manner of their application) and procedures for the award of the anticipated procurement contract, may occur only to the extent expressly permitted in the framework agreement.

**Chapter VIII. Challenge proceedings<sup>68</sup>***Article 64**Right to challenge and appeal*

1. A supplier or contractor that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the procuring entity with the provisions of this Law may challenge the decision or action concerned.
2. Challenge proceedings may be made by way of [an application for reconsideration to the procuring entity under article 66 of this Law, an application for review to the [*name of the independent body*] under article 67 of this Law or an application or appeal to the [*name of the court or courts*]].
- [3. A supplier or contractor may appeal any decision taken in challenge proceedings under article 66 or 67 of this Law in the [*name of the court or courts*]].

*Article 65**Effect of a challenge*

1. The procuring entity shall not take any step that would bring into force a procurement contract or framework agreement in the procurement proceedings concerned:
  - (a) Where it receives an application for reconsideration within the time limits specified in paragraph 2 of article 66;
  - (b) Where it receives notice of an application for review from the [*name of the independent body*] under paragraph 5 (b) of article 67; or
  - (c) Where it receives notice of an application or of an appeal from the [*name of the court or courts*].
2. The prohibition referred to in paragraph 1 shall lapse ... working days [*the enacting State specifies the period*] after the decision of the procuring entity, the [*name of the independent body*] or the [*name of the court or courts*] has been communicated to the applicant or appellant, as the case may be, to the procuring entity, where applicable, and to all other participants in the challenge proceedings.

<sup>68</sup> Certain options are presented in this Chapter in square brackets. See the Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/...) for guidance on those options.

3. (a) The procuring entity may at any time request the [*name of the independent body*] or the [*name of the court or courts*] to authorize it to enter into the procurement contract or framework agreement on the ground that urgent public interest considerations so justify;

(b) The [*name of the independent body*], upon consideration of such a request [, or of its own motion,] may authorize the procuring entity to enter into the procurement contract or framework agreement where it is satisfied that urgent public interest considerations so justify. The decision of the [*name of the independent body*] and the reasons therefor shall be made part of the record of the procurement proceedings, and shall promptly be communicated to the procuring entity, to the applicant, to all other participants in the challenge proceedings and to all other participants in the procurement proceedings.

#### *Article 66*

##### *Application for reconsideration before the procuring entity*

1. A supplier or contractor may apply to the procuring entity for a reconsideration of a decision or an action taken by the procuring entity in the procurement proceedings.

2. Applications for reconsideration shall be submitted to the procuring entity in writing within the following time periods:

(a) Applications for reconsideration of the terms of solicitation, pre-qualification or pre-selection or decisions or actions taken by the procuring entity in pre-qualification or pre-selection proceedings shall be submitted prior to the deadline for presenting submissions;

(b) Applications for reconsideration of other decisions or actions taken by the procuring entity in the procurement proceedings shall be submitted within the standstill period applied pursuant to paragraph 2 of article 22 of this Law, or, where none has been applied, prior to the entry into force of the procurement contract or the framework agreement.

3. Promptly after receipt of the application, the procuring entity shall publish a notice of the application and shall, not later than three (3) working days after receipt of the application:

(a) Decide whether the application shall be entertained or dismissed and, if it is to be entertained, whether the procurement proceedings shall be suspended. The procuring entity may dismiss the application if it decides that the application is manifestly without merit, the application was not submitted within the deadlines set out in paragraph 2 of this article or the applicant is without standing. Such a dismissal constitutes a decision on the application;

(b) Notify all participants in the procurement proceedings to which the application relates about the submission of the application and its substance;

(c) Notify the applicant and all other participants in the procurement proceedings of its decision on whether the application is to be entertained or dismissed;

- (i) If the application is to be entertained, the procuring entity shall in addition advise whether the procurement proceedings are suspended and, if so, the duration of the suspension;
  - (ii) If the application is to be dismissed or the procurement proceedings are not suspended, the procuring entity shall in addition advise the applicant of the reasons for its decision.
4. If the procuring entity does not give notice to the applicant as required in paragraphs 3 (c) and 8 of this article within the time-limit specified in paragraph 3 of this article, or if the applicant is dissatisfied with the decision so notified, the applicant may immediately thereafter commence proceedings [in the *[name of the independent body]* under article 67 of this Law or in the *[name of the court or courts]*]. Where such proceedings are commenced, the competence of the procuring entity to entertain the application ceases.
5. In taking its decision on an application that it has entertained, the procuring entity may overturn, correct, vary or uphold any decision or action taken in the procurement proceedings to which the application relates.
6. The decision of the procuring entity under paragraph 5 of this article shall be issued within ... working days [*the enacting State specifies the period*] after receipt of the application. The procuring entity shall immediately thereafter communicate the decision to the applicant, to all other participants in the challenge proceedings and to all other participants in the procurement proceedings.
7. If the procuring entity does not communicate its decision to the applicant in accordance with the requirements of paragraphs 6 and 8 of this article, the applicant is entitled immediately thereafter to commence proceedings [in the *[name of the independent body]* under article 67 of this Law or in the *[name of the court or courts]*]. Where such proceedings are commenced, the competence of the procuring entity to entertain the application ceases.
8. All decisions of the procuring entity under this article shall be in writing, shall state the action taken and the reasons therefor, and shall promptly be made part of the record of the procurement proceedings, together with the application received by the procuring entity under this article.

#### *Article 67*

##### *Application for review before an independent body*

1. A supplier or contractor may apply to the *[name of the independent body]* for review of a decision or an action taken by the procuring entity in the procurement proceedings, or of the failure of the procuring entity to issue a decision under article 66 of this Law within the time limits prescribed in that article.
2. Applications for review shall be submitted to the *[name of the independent body]* in writing within the following time periods:
  - (a) Applications for review of the terms of solicitation, pre-qualification or pre-selection or of decisions or actions taken by the procuring entity in pre-qualification or pre-selection proceedings shall be submitted prior to the deadline for presenting submissions;

(b) Applications for review of other decisions or actions taken by the procuring entity in the procurement proceedings shall be submitted:

(i) Within the standstill period applied pursuant to paragraph 2 of article 22 of this Law; or

(ii) Where no standstill period has been applied, within ... working days [*the enacting State specifies the period*] after the time when the applicant became aware of the circumstances giving rise to the application or when the applicant should have become aware of those circumstances, whichever is earlier, but not later than ... working days [*the enacting State specifies the period*] after the entry into force of the procurement contract or the framework agreement [or a decision to cancel the procurement];

(c) Notwithstanding subparagraph (b) (i) of this paragraph, a supplier or contractor may request the [*name of the independent body*] to entertain an application for review filed after the expiry of the standstill period, but not later than ... working days [*the enacting State specifies the period*] after the entry into force of the procurement contract or the framework agreement [or a decision to cancel the procurement], on the ground that the application raises significant public interest considerations. The [*name of the independent body*] may entertain the application where it is satisfied that significant public interest considerations so justify. The decision of the [*name of the independent body*] and the reasons therefor shall promptly be communicated to the supplier or contractor concerned;

(d) Applications for review of the failure of the procuring entity to issue a decision under article 66 of this Law within the time limits prescribed in that article shall be submitted within ... working days [*the enacting State specifies the period*] after the decision of the procuring entity should have been communicated to the applicant in accordance with the requirements of paragraphs 3, 6 and 8 of article 66 of this Law, as appropriate.

3. Following receipt of an application for review, the [*name of the independent body*] may, subject to the requirements of paragraph 4 of this article:

[(a)] Order the suspension of the procurement proceedings at any time before the entry into force of the procurement contract; [and

(b) Order the suspension of the performance of a procurement contract or the operation of a framework agreement that has entered into force;]

if and for as long as it finds such a suspension necessary to protect the interests of the applicant unless the [*name of the independent body*] decides that urgent public interest considerations require the procurement proceedings[, the procurement contract or the framework agreement, as applicable,] to proceed. The [*name of the independent body*] may also order that any suspension applied be extended or lifted, taking into account the aforementioned considerations.

4. The [*name of the independent body*] shall:

(a) Order the suspension of the procurement proceedings for a period of ten (10) working days where an application is received prior to the deadline for presenting submissions; and

(b) Order the suspension of the procurement proceedings [or the performance of a procurement contract or the operation of a framework agreement, as the case may be] where an application is received after the deadline for presenting submissions and where no standstill period has been applied;

unless the [*name of the independent body*] decides that urgent public interest considerations require the procurement proceedings[, the procurement contract or the framework agreement, as applicable,] to proceed.

5. Promptly upon receipt of the application, the [*name of the independent body*] shall:

(a) Suspend or decide not to suspend the procurement proceedings [or the performance of a procurement contract or the operation of a framework agreement, as the case may be] in accordance with paragraphs 3 and 4 of this article;

(b) Notify the procuring entity and all identified participants in the procurement proceedings to which the application relates of the application and its substance;

(c) Notify all identified participants in the procurement proceedings to which the application relates of its decision on suspension. Where the [*name of the independent body*] decides to suspend the procurement proceedings [or the performance of a procurement contract or the operation of a framework agreement, as the case may be], it shall in addition specify the period of the suspension. Where it decides not to suspend them, it shall provide the reasons for its decision to the applicant and to the procuring entity; and

(d) Publish a notice of the application.

6. The [*name of the independent body*] may dismiss the application and shall lift any suspension applied, where it decides that:

(a) The application is manifestly without merit or was not presented in compliance with the deadlines set out in paragraph 2 of this article; or

(b) The applicant is without standing.

The [*name of the independent body*] shall promptly notify the applicant, the procuring entity and all other participants in the procurement proceedings of the dismissal and the reasons therefor and that any suspension in force is lifted. Such a dismissal constitutes a decision on the application.

7. The notices to the applicant, the procuring entity and other participants in the procurement proceedings under paragraphs 5 and 6 of this article shall be given no later than three (3) working days after receipt of the application.

8. Promptly upon receipt of a notice under paragraph 5 (b) of this article, the procuring entity shall provide the [*name of the independent body*] with effective access to all documents relating to the procurement proceedings in its possession, in a manner appropriate to the circumstances.

9. In taking its decision on an application that it has entertained, the [*name of the independent body*] may declare the legal rules or principles that govern the subject matter of the application, shall address any suspension in force and shall take one or more of the following actions, as appropriate:



(a) Prohibit the procuring entity from acting, taking a decision or following a procedure that is not in compliance with the provisions of this Law;

(b) Require the procuring entity that has acted or proceeded in a manner that is not in compliance with the provisions of this Law to act, to take a decision or to proceed in a manner that is in compliance with the provisions of this Law;

[(c) Overturn in whole or in part an act or a decision of the procuring entity that is not in compliance with the provisions of this Law [other than any act or decision bringing the procurement contract or the framework agreement into force];

(d) Revise a decision by the procuring entity that is not in compliance with the provisions of this Law [other than any act or decision bringing the procurement contract or the framework agreement into force];

(e) Confirm a decision of the procuring entity;

(f) Overturn the award of a procurement contract or a framework agreement that has entered into force in a manner that is not in compliance with the provisions of this Law and, if notice of the award of the procurement contract or the framework agreement has been published, order the publication of notice of the overturning of the award;]

(g) Order that the procurement proceedings be terminated;

(h) Dismiss the application;

(i) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting an application as a result of an act or decision of, or procedure followed by, the procuring entity in the procurement proceedings that is not in compliance with the provisions of this Law, and for any loss or damages suffered[, which shall be limited to the costs of the preparation of the submission or the costs relating to the application, or both]; or

(j) Take such alternative action as is appropriate in the circumstances.

10. The decision of the [*name of the independent body*] under paragraph 9 of this article shall be issued within ... working days [*the enacting State specifies the period*] after receipt of the application. The [*name of the independent body*] shall immediately thereafter communicate the decision to the procuring entity, to the applicant, to all other participants in the application for review and to all other participants in the procurement proceedings.

11. All decisions of the [*name of the independent body*] under this article shall be in writing, shall state the action taken and the reasons therefor and shall promptly be made part of the record of the procurement proceedings, together with the application received by the [*name of the independent body*] under this article.

#### *Article 68*

##### *Rights of participants in challenge proceedings*

1. Any supplier or contractor participating in the procurement proceedings to which the application relates, as well as any governmental authority whose interests are or could be affected by the application, shall have the right to participate in challenge proceedings under articles 66 and 67 of this Law. A supplier or contractor

duly notified of the proceedings that fails to participate in such proceedings is barred from subsequently challenging under articles 66 and 67 of this Law the decisions or actions that are the subject matter of the application.

2. The procuring entity shall have the right to participate in challenge proceedings under article 67 of this Law.

3. The participants in challenge proceedings under articles 66 and 67 of this Law shall have the right to be present, represented and accompanied at all hearings during the proceedings; the right to be heard; the right to present evidence, including witnesses; the right to request that any hearing take place in public; and the right to seek access to the record of the challenge proceedings subject to the provisions of article 69 of this Law.

#### *Article 69*

##### *Confidentiality in challenge proceedings*

No information shall be disclosed in challenge proceedings and no public hearing under articles 66 and 67 of this Law shall take place if so doing would impair the protection of essential security interests of the State, would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition.

## Annex II

## List of documents before the Commission at its forty-fourth session

<i>Symbol</i>	<i>Title or description</i>
A/CN.9/711 and Corr.1	Provisional agenda, annotations thereto and scheduling of meetings of the forty-fourth session
A/CN.9/712	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4-8 October 2010)
A/CN.9/713	Report of Working Group I (Procurement) on the work of its nineteenth session (Vienna, 1-5 November 2010)
A/CN.9/714	Report of Working Group VI (Security Interests) on the work of its eighteenth session (Vienna, 8-12 November 2010)
A/CN.9/715	Report of Working Group V (Insolvency Law) on the work of its thirty-ninth session (Vienna, 6-10 December 2010)
A/CN.9/716	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 December 2010)
A/CN.9/717	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (New York, 7-11 February 2011)
A/CN.9/718	Report of Working Group I (Procurement) on the work of its twentieth session (New York, 14-18 March 2011)
A/CN.9/719	Report of Working Group VI (Security Interests) on the work of its nineteenth session (New York, 11-15 April 2011)
A/CN.9/720	Note by the Secretariat on comparison and analysis of major features of international instruments relating to secured transactions
A/CN.9/721	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23-27 May 2011)
A/CN.9/722	Note by the Secretariat on bibliography of recent writings related to the work of UNCITRAL
A/CN.9/723	Note by the Secretariat on the status of conventions and model laws
A/CN.9/724	Note by the Secretariat on technical cooperation and assistance
A/CN.9/725	Note by the Secretariat on coordination activities
A/CN.9/726	Note by the Secretariat on the promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts
A/CN.9/727	Note by the Secretariat on legal and regulatory issues surrounding microfinance
A/CN.9/728 and Add.1	Note by the Secretariat on present and possible future work on electronic commerce
A/CN.9/729 and Add.1-8	Note by the Secretariat on the draft revised text of the Model Law
A/CN.9/730 and Add.1 and 2	Note by the Secretariat on the finalization and adoption of the UNCITRAL Model Law on Public Procurement: compilation of comments by Governments and international organizations on the draft Model Law on Public Procurement
A/CN.9/731 and Add.1-9	Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement

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<i>Symbol</i>	<i>Title or description</i>
A/CN.9/732 and Add.1-3	Note by the Secretariat on judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency
A/CN.9/733 and Add.1	Note by the Secretariat on judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency: compilation of comments by Governments
A/CN.9/734	Note by the Secretariat transmitting a proposal by the United Nations Conference on Trade and Development on strengthening awareness and use of alternative dispute resolution methods in the settlement of investment disputes

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**B. United Nations Conference on Trade and Development (UNCTAD): extract from  
the report of the Trade and Development Board  
on its fifty-eighth session**

**(TD/B/58/9)**

**Progressive development of the law of international trade: forty-third  
annual report of the United Nations Commission  
on International Trade Law**

At its 1078th plenary meeting, the Board took note of the forty-fourth annual report of the  
United Nations Commission on International Trade Law (A/66/17).

**C. General Assembly: Report of the Sixth Committee on the report of the United Nations Commission on International Trade Law on the work of its forty-fourth session (A/66/471)**

**[Original: English]**

*Rapporteur:* Ms. Jacqueline Kemunto **Moseti** (Kenya)

**I. Introduction**

1. At its 2nd plenary meeting, on 16 September 2011, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its sixty-sixth session the item entitled “Report of the United Nations Commission on International Trade Law on the work of its forty-fourth session” and to allocate it to the Sixth Committee.
2. The Sixth Committee considered the item at its 10th, 22nd, 25th and 30th meetings, on 10, 27 and 31 October and on 11 November 2011. The views of the representatives who spoke during the Committee’s consideration of the item are reflected in the relevant summary records (A/C.6/66/SR.10, 22, 25 and 30).
3. For its consideration of the item, the Committee had before it the report of the United Nations Commission on International Trade Law on the work of its forty-fourth session (A/66/17).
4. At the 10th meeting, on 10 October, the Chair of the United Nations Commission on International Trade Law at its forty-fourth session introduced the report of the Commission on the work of its forty-fourth session.

**II. Consideration of proposals**

**A. Draft resolution A/C.6/66/L.10**

5. At the 22nd meeting, on 27 October, the representative of Austria, on behalf of Albania, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, the Czech Republic, Denmark, El Salvador, Estonia, Finland, France, Germany, Greece, Guatemala, Hungary, India, Ireland, Israel, Italy, Japan, Jordan, Latvia, Lithuania, Luxembourg, Madagascar, Malta, Mexico, Montenegro, the Netherlands, New Zealand, Norway, Poland, Portugal, the Republic of Moldova, Romania, the Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Trinidad and Tobago, Ukraine, the United Kingdom of Great Britain and Northern Ireland and Venezuela (Bolivarian Republic of), subsequently joined by Liechtenstein and Uganda, introduced a draft resolution entitled “Report of the United Nations Commission on International Trade Law on the work of its forty-fourth session” (A/C.6/66/L.10).
6. At the 25th meeting, on 31 October, Malaysia, the former Yugoslav Republic of Macedonia, Turkey and the United States of America joined in sponsoring the

draft resolution. The Committee adopted draft resolution A/C.6/66/L.10 without a vote.

7. At its 30th meeting, on 11 November, the Committee decided to reopen the agenda item. On behalf of the Bureau, the Chair orally proposed an amendment to draft resolution A/C.6/66/L.10, by which, in operative paragraph 20, the words “endorses the Commission’s agreement to achieve that result by reducing its allocation for conference services, and” would be deleted before the words “encourages Member States”.

8. At the same meeting, the Committee adopted draft resolution A/C.6/66/L.10, as orally amended, without a vote (see para. 14, draft resolution I).

9. Also at the same meeting, the representatives of France, Cuba, Iran (Islamic Republic of) and Venezuela (Bolivarian Republic of) made statements in explanation of position after the adoption of the draft resolution.

#### **B. Draft resolution A/C.6/66/L.11**

10. At the 22nd meeting, on 27 October, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled “United Nations Commission on International Trade Law Model Law on Public Procurement” (A/C.6/66/L.11).

11. At its 25th meeting, on 31 October, the Committee adopted draft resolution A/C.6/66/L.11 without a vote (see para. 14, draft resolution II).

#### **C. Draft resolution A/C.6/66/L.12**

12. At the 22nd meeting, on 27 October, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled “United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency: The Judicial Perspective” (A/C.6/66/L.12).

13. At its 25th meeting, on 31 October, the Committee adopted draft resolution A/C.6/66/L.12 without a vote (see para. 14, draft resolution III).

### III. Recommendations of the Sixth Committee

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

#### **Draft resolution I**

#### **Report of the United Nations Commission on International Trade Law on the work of its forty-fourth session**

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate 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, in particular those of developing countries, in the extensive development of international trade,

*Reaffirming its belief* that the progressive modernization and harmonization of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples,

*Having considered* the report of the Commission,<sup>69</sup>

*Reiterating its concern* that activities undertaken by other bodies in the field of international trade law without adequate coordination with the Commission might lead to undesirable duplication of efforts and would not be in keeping with the aim of promoting efficiency, consistency and coherence in the unification and harmonization of international trade law,

*Reaffirming* the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field, in particular to avoid duplication of efforts, including among organizations formulating rules of international trade, and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law, and to continue, through its secretariat, to maintain close cooperation with other international organs and organizations, including regional organizations, active in the field of international trade law,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law;<sup>1</sup>

2. *Commends* the Commission for the finalization and adoption of the United Nations Commission on International Trade Law Model Law on Public

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<sup>69</sup> Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17).



Procurement<sup>70</sup> and the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency: The Judicial Perspective;<sup>71</sup>

3. *Takes note with interest* of the progress made by the Commission in its work on the preparation of legal standards on transparency in treaty-based investor-State arbitration, online dispute resolution for cross-border electronic transactions and electronic commerce, in particular at the colloquium held in February 2011, the interpretation and application of selected concepts of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency<sup>72</sup> relating to centre of main interests, and a draft text on the registration of security rights in movable assets;<sup>73</sup>

4. *Welcomes* the decisions of the Commission to prepare a guide to enactment of the Model Law on Public Procurement, in as efficient and practical a manner as possible, and a study on possible future work of the Commission in the area of public-private partnerships and privately financed infrastructure projects, to undertake work in the field of electronic transferable records, to prepare, in cooperation with the World Bank, draft principles on effective secured transactions regimes, within existing resources and without utilizing working group resources, and to include microfinance as an item for the future work of the Commission and to further consider that matter at its next session, in 2012;<sup>74</sup>

5. *Notes with appreciation* the decision of the Commission to commend the use of the 2010 revision of the Uniform Rules for Demand Guarantees, published by the International Chamber of Commerce, as appropriate, in transactions involving demand guarantees;<sup>75</sup>

6. *Also notes with appreciation* the progress made in the ongoing project of the Commission on monitoring the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,<sup>76</sup> and the decision of the Commission to request the Secretariat to pursue its efforts towards the preparation of a guide on the Convention;<sup>77</sup>

7. *Endorses* the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field, and in this regard appeals to relevant international and regional organizations to coordinate their legal activities with those of the Commission, to avoid duplication of efforts and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law;

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<sup>70</sup> Ibid., chap. III and annex I.

<sup>71</sup> Ibid., chap. IV.

<sup>72</sup> *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* (United Nations publication, Sales No. E.99.V.3), part one.

<sup>73</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, chaps. V-IX.

<sup>74</sup> Ibid., chap. III, paras. 181-187, 190 and 191; chap. VIII, para. 228; and chaps. IX and X.

<sup>75</sup> Ibid., chap. XI.

<sup>76</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>77</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, chap. XII.

8. *Notes with appreciation* the significant progress in the Commission's coordination and cooperation activities in the field of security interests and in particular the approval by the Commission of a paper prepared jointly by the Permanent Bureau of the Hague Conference on Private International Law and the secretariats of the Commission and the International Institute for the Unification of Private Law, with the assistance of outside experts, entitled "Comparison and analysis of major features of international instruments relating to secured transactions",<sup>78</sup> as well as the request that it be given the widest possible dissemination, including as a United Nations sales publication, with proper recognition of the contribution of the Permanent Bureau of the Hague Conference on Private International Law and the secretariat of the International Institute for the Unification of Private Law;<sup>79</sup>

9. *Notes* the agreement of the Commission that a coordinated approach to the matter of the law applicable to the proprietary effects of assignments of receivables is in the interest of all States and its request to the Secretariat to cooperate closely with the European Commission with a view to ensuring a coordinated approach to the matter, taking into account the approach followed in the United Nations Convention on the Assignment of Receivables in International Trade<sup>80</sup> and the *UNCITRAL Legislative Guide on Secured Transactions*;<sup>81</sup>

10. *Reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with technical cooperation and assistance in the field of international trade law reform and development, and in this connection:

(a) Welcomes the initiatives of the Commission towards expanding, through its secretariat, its technical cooperation and assistance programme, and in that respect encourages the Secretary-General to seek partnerships with State and non-State actors to increase awareness about the work of the Commission and facilitate the effective implementation of legal standards resulting from its work;

(b) Expresses its appreciation to the Commission for carrying out technical cooperation and assistance activities and for providing assistance with legislative drafting in the field of international trade law, and draws the attention of the Secretary-General to the limited resources that are made available in this field;

(c) Takes note with interest of the comprehensive approach to technical cooperation and assistance, based on the strategic framework for technical assistance suggested by the Secretariat to promote universal adoption of the texts of the Commission and to disseminate information on recently adopted texts;<sup>82</sup>

(d) Expresses its appreciation to the Governments whose contributions enabled the technical cooperation and assistance activities to take place, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law Trust Fund for Symposia and, where

<sup>78</sup> See A/CN.9/720.

<sup>79</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 278-283.

<sup>80</sup> Resolution 56/81, annex.

<sup>81</sup> United Nations publication, Sales No. E.09.V.12.

<sup>82</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, chap. XIII.

appropriate, for the financing of special projects, and otherwise to assist the secretariat of the Commission in carrying out technical cooperation and assistance activities, in particular in developing countries;

(e) Reiterates its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to support the technical cooperation and assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission, in the light of the relevance and importance of the work and programmes of the Commission for the promotion of the rule of law at the national and international levels and for the implementation of the United Nations development agenda, including the achievement of the Millennium Development Goals;

11. *Calls upon* Member States, non-member States, observer organizations and the Secretariat to apply the rules of procedure and methods of work of the Commission, taking into account the summary of conclusions as reproduced in annex III to the report on the work of its forty-third session,<sup>83</sup> with a view to ensuring the high quality of the work of the Commission and international acceptability of its instruments, and in this regard recalls its previous resolutions related to this matter;

12. *Welcomes* the decision by the Commission to establish, subject to the relevant rules and regulations of the United Nations and the internal approval process in the Office of Legal Affairs of the Secretariat, a Regional Centre for Asia and the Pacific, in the Republic of Korea, as a novel yet important first step for the Commission in reaching out and providing technical assistance to developing countries in the region, it being understood that the establishment of a regional presence would have to rely entirely on extrabudgetary resources, including but not limited to voluntary contributions from States, expresses its appreciation to the Government of the Republic of Korea for its generous contribution to the pilot project, and requests the Secretary-General to keep the General Assembly informed of developments regarding the establishment of such regional centres, including the Regional Centre for Asia and the Pacific in the Republic of Korea and, in particular, their funding and budgetary situation;<sup>84</sup>

13. *Appeals* to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General, in order to enable renewal of the provision of that assistance and to increase expert representation from developing countries at sessions of the Commission and its working groups, necessary to build local expertise and capacities in the field of international trade law in those countries to facilitate the development of international trade and the promotion of foreign investment;

14. *Decides*, in order to ensure full participation of all Member States in the sessions of the Commission and its working groups, to continue, in the competent Main Committee during the sixty-sixth session of the General Assembly, its

<sup>83</sup> Ibid., *Sixty-fifth Session, Supplement No. 17 (A/65/17)*.

<sup>84</sup> Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 262-270.

consideration of granting travel assistance to the least developed countries that are members of the Commission, at their request and in consultation with the Secretary-General;

15. *Endorses* the conviction of the Commission that the implementation and effective use of modern private law standards on international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General;

16. *Welcomes*, in this regard, the panel discussion on the role of the Commission in the promotion of the rule of law in conflict and post-conflict societies, held during the forty-fourth session of the Commission, and takes note of the particular relevance of the instruments and resources of the Commission for creating an environment of sustainable economic activity conducive to post-conflict reconstruction and preventing societies from sliding back into conflict;

17. *Takes note* of the views expressed by the Commission at the end of the panel discussion that, owing to a lack of sufficient resources, innovative ways need to be found for the early engagement of the instruments and resources of the Commission in post-conflict recovery operations of the United Nations and other donors, and that awareness needs to be increased of the fact that the Commission deals also with the basic building blocks for commercial activity and thus makes a real and immediate contribution in societies emerging from conflict;<sup>85</sup>

18. *Reiterates its request* to the Secretary-General, in conformity with General Assembly resolutions on documentation-related matters,<sup>86</sup> which, in particular, emphasize that any invitation to limit, where appropriate, the length of documents should not adversely affect either the quality of the presentation or the substance of the documents, to bear in mind the particular characteristics of the mandate and functions of the Commission in the progressive development and codification of international trade law when implementing page limits with respect to the documentation of the Commission;<sup>87</sup>

19. *Requests* the Secretary-General to continue providing summary records of the meetings of the Commission, including committees of the whole established by the Commission for the duration of its annual session, relating to the formulation of normative texts, and encourages the Commission to discuss the matter at its next session, on the basis of a report to be prepared by the Secretariat;<sup>88</sup>

20. *Reaffirms* the need to ensure the broadest possible participation in meetings of the Commission, and in this connection notes the existing rationale for the historical alternating pattern of sites for meetings of the Commission, that is, the proportionate distribution of travel costs among delegations, the global influence

<sup>85</sup> Ibid., paras. 318 and 319.

<sup>86</sup> Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

<sup>87</sup> Resolutions 59/39, para. 9, and 65/21, para. 18; see also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 124-128.

<sup>88</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 333.

and presence of the Commission and the needs of developing countries, many of which do not have representation in Vienna, also notes the agreement of the Commission that every effort should be made to identify alternatives to abolishing the alternating pattern of meetings that would achieve a similar result, and in this respect encourages Member States, jointly with the Secretariat, to continue to review current working practices to achieve increased efficiency, and with a view to identifying budgetary savings;<sup>89</sup>

21. *Stresses* the importance of promoting the use of texts emanating from the work of the Commission for the global unification and harmonization of international trade law, and to this end urges States that have not yet done so to consider signing, ratifying or acceding to conventions, enacting model laws and encouraging the use of other relevant texts;

22. *Welcomes* the preparation of digests of case law relating to the texts of the Commission, such as a digest of case law relating to the United Nations Convention on Contracts for the International Sale of Goods,<sup>90</sup> a digest of case law relating to the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration,<sup>91</sup> and a digest of case law relating to the Model Law on Cross-Border Insolvency, with the aim of assisting in the dissemination of information on those texts and promoting their use, enactment and uniform interpretation.

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<sup>89</sup> Ibid., chap. XXI.

<sup>90</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

<sup>91</sup> *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I; and *ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, annex I.

**Draft resolution II**  
**United Nations Commission on International Trade Law Model Law**  
**on Public Procurement**

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

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

*Recalling* its resolution 49/54 of 9 December 1994 recommending the use of the United Nations Commission on International Trade Law Model Law on Procurement of Goods, Construction and Services,<sup>1</sup>

*Observing* that the 1994 Model Law, which has become an important international benchmark in procurement law reform, sets out procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process,

*Observing also* that, despite the widely recognized value of the 1994 Model Law, new issues and practices have arisen since its adoption that have justified revision of the text,

*Recognizing* that at its thirty-seventh session, in 2004, the Commission agreed that the 1994 Model Law would benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications in public procurement, and the experience gained in the use of the 1994 Model Law as a basis for law reform, not departing, however, from the basic principles behind it and not modifying the provisions whose usefulness had been proved,

*Noting* that the revisions to the 1994 Model Law were the subject of due deliberation and extensive consultations with Governments and interested international organizations, and that thus it can be expected that the revised Model Law, to be called the “United Nations Commission on International Trade Law Model Law on Public Procurement”, would be acceptable to States with different legal, social and economic systems,

*Noting also* that the revised Model Law is expected to contribute significantly to the establishment of a harmonized and modern legal framework for public procurement that promotes economy, efficiency and competition in procurement and, at the same time, fosters integrity, confidence, fairness and transparency in the procurement process,

*Convinced* that the revised Model Law will significantly assist all States, in particular developing countries and countries with economies in transition, in enhancing their existing procurement laws and formulating procurement laws where

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<sup>1</sup> *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1), annex I.*

none presently exist, and will lead to the development of harmonious international economic relations and increased economic development,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for developing and adopting the draft United Nations Commission on International Trade Law Model Law on Public Procurement;<sup>2</sup>

2. *Requests* the Secretary-General to transmit the text of the Model Law to Governments and other interested bodies;

3. *Recommends* that all States use the Model Law in assessing their legal regimes for public procurement and give favourable consideration to the Model Law when they enact or revise their laws;

4. *Calls for* closer cooperation and coordination among the Commission and other international organs and organizations, including regional organizations, active in the field of procurement law reform, in order to avoid undesirable duplication of efforts and inconsistent, incoherent or conflicting results in the modernization and harmonization of public procurement law;

5. *Endorses* the efforts and initiatives of the secretariat of the Commission aimed at increasing the coordination of, and cooperation on, legal activities concerned with public procurement reform.

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<sup>2</sup> Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 192 and annex I.

**Draft resolution III**  
**United Nations Commission on International Trade Law Model Law**  
**on Cross-Border Insolvency: The Judicial Perspective**

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

*Noting* that, where individuals and enterprises conduct their businesses on a global basis and have assets and interests in more than one State, the efficient conduct of the insolvency of those individuals and enterprises requires cross-border cooperation in, and coordination of, the supervision and administration of those assets and affairs,

*Considering* that the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency<sup>1</sup> contributes significantly to the establishment of a harmonized legal framework for effectively administering cross-border insolvency and facilitating cooperation and coordination,

*Acknowledging* that familiarity with cooperation and coordination in cross-border insolvency cases and how the Model Law may be implemented in practice is not widespread,

*Convinced* that providing readily accessible information on the interpretation of and current practice with respect to the Model Law for reference and use by judges in insolvency proceedings has the potential to promote wider use and understanding of the Model Law and facilitate cross-border judicial cooperation and coordination, avoiding unnecessary delay and costs,

*Noting with satisfaction* the completion and adoption on 1 July 2011 of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency: The Judicial Perspective by the Commission at its forty-fourth session,<sup>2</sup>

*Noting* that the preparation of the Model Law on Cross-Border Insolvency: The Judicial Perspective was the subject of consultation with Governments, judges and other insolvency professionals,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the completion and adoption of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency: The Judicial Perspective;<sup>2</sup>

2. *Requests* the establishment by the Secretariat of the United Nations of a mechanism for updating the Model Law on Cross-Border Insolvency: The Judicial Perspective on an ongoing basis in the same flexible manner as that in which it was

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<sup>1</sup> *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* (United Nations publication, Sales No. E.99.V.3), part one.

<sup>2</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 198.



developed, ensuring that it maintains a neutral tone and continues to meet its stated purpose;

3. *Requests* the Secretary-General to publish, including electronically, the text of the Model Law on Cross-Border Insolvency: The Judicial Perspective, as updated or amended from time to time in accordance with paragraph 2 of the present resolution, and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available;

4. *Recommends* that the Model Law on Cross-Border Insolvency: The Judicial Perspective be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings;

5. *Also recommends* that all States consider the implementation of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency.<sup>1</sup>

## **D. General Assembly resolutions 66/94, 65/95, 66/96, and 66/102**

### **Resolutions adopted by the General Assembly on the report of the Sixth Committee (A/66/471)**

#### **66/94. Report of the United Nations Commission on International Trade Law on the work of its forty-fourth session**

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate 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, in particular those of developing countries, in the extensive development of international trade,

*Reaffirming its belief* that the progressive modernization and harmonization of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples,

*Having considered* the report of the Commission,<sup>1</sup>

*Reiterating its concern* that activities undertaken by other bodies in the field of international trade law without adequate coordination with the Commission might lead to undesirable duplication of efforts and would not be in keeping with the aim of promoting efficiency, consistency and coherence in the unification and harmonization of international trade law,

*Reaffirming* the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field, in particular to avoid duplication of efforts, including among organizations formulating rules of international trade, and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law, and to continue, through its secretariat, to maintain close cooperation with other international organs and organizations, including regional organizations, active in the field of international trade law,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law;<sup>1</sup>

2. *Commends* the Commission for the finalization and adoption of the United Nations Commission on International Trade Law Model Law on Public Procurement<sup>2</sup> and the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency: The Judicial Perspective;<sup>3</sup>

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<sup>1</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17).*

<sup>2</sup> *Ibid.*, chap. III and annex I.

<sup>3</sup> *Ibid.*, chap. IV.

3. *Takes note with interest* of the progress made by the Commission in its work on the preparation of legal standards on transparency in treaty-based investor-State arbitration, online dispute resolution for cross-border electronic transactions and electronic commerce, in particular at the colloquium held in February 2011, the interpretation and application of selected concepts of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency<sup>4</sup> relating to centre of main interests, and a draft text on the registration of security rights in movable assets;<sup>5</sup>

4. *Welcomes* the decisions of the Commission to prepare a guide to enactment of the Model Law on Public Procurement, in as efficient and practical a manner as possible, and a study on possible future work of the Commission in the area of public-private partnerships and privately financed infrastructure projects, to undertake work in the field of electronic transferable records, to prepare, in cooperation with the World Bank, draft principles on effective secured transactions regimes, within existing resources and without utilizing working group resources, and to include microfinance as an item for the future work of the Commission and to further consider that matter at its next session, in 2012;<sup>6</sup>

5. *Notes with appreciation* the decision of the Commission to commend the use of the 2010 revision of the Uniform Rules for Demand Guarantees, published by the International Chamber of Commerce, as appropriate, in transactions involving demand guarantees;<sup>7</sup>

6. *Also notes with appreciation* the progress made in the ongoing project of the Commission on monitoring the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,<sup>8</sup> and the decision of the Commission to request the Secretariat to pursue its efforts towards the preparation of a guide on the Convention;<sup>9</sup>

7. *Endorses* the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field, and in this regard appeals to relevant international and regional organizations to coordinate their legal activities with those of the Commission, to avoid duplication of efforts and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law;

8. *Notes with appreciation* the significant progress in the Commission's coordination and cooperation activities in the field of security interests and in particular the approval by the Commission of a paper prepared jointly by the Permanent Bureau of the Hague Conference on Private International Law and the

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<sup>4</sup> *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* (United Nations publication, Sales No. E.99.V.3), part one.

<sup>5</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, chaps. V-IX.

<sup>6</sup> *Ibid.*, chap. III, paras. 181-187, 190 and 191; chap. VIII, para. 228; and chaps. IX and X.

<sup>7</sup> *Ibid.*, chap. XI.

<sup>8</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>9</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, chap. XII.

secretariats of the Commission and the International Institute for the Unification of Private Law, with the assistance of outside experts, entitled “Comparison and analysis of major features of international instruments relating to secured transactions”,<sup>10</sup> as well as the request that it be given the widest possible dissemination, including as a United Nations sales publication, with proper recognition of the contribution of the Permanent Bureau of the Hague Conference on Private International Law and the secretariat of the International Institute for the Unification of Private Law;<sup>11</sup>

9. *Notes* the agreement of the Commission that a coordinated approach to the matter of the law applicable to the proprietary effects of assignments of receivables is in the interest of all States and its request to the Secretariat to cooperate closely with the European Commission with a view to ensuring a coordinated approach to the matter, taking into account the approach followed in the United Nations Convention on the Assignment of Receivables in International Trade<sup>12</sup> and the *UNCITRAL Legislative Guide on Secured Transactions*;<sup>13</sup>

10. *Reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with technical cooperation and assistance in the field of international trade law reform and development, and in this connection:

(a) Welcomes the initiatives of the Commission towards expanding, through its secretariat, its technical cooperation and assistance programme, and in that respect encourages the Secretary-General to seek partnerships with State and non-State actors to increase awareness about the work of the Commission and facilitate the effective implementation of legal standards resulting from its work;

(b) Expresses its appreciation to the Commission for carrying out technical cooperation and assistance activities and for providing assistance with legislative drafting in the field of international trade law, and draws the attention of the Secretary-General to the limited resources that are made available in this field;

(c) Takes note with interest of the comprehensive approach to technical cooperation and assistance, based on the strategic framework for technical assistance suggested by the Secretariat to promote universal adoption of the texts of the Commission and to disseminate information on recently adopted texts;<sup>14</sup>

(d) Expresses its appreciation to the Governments whose contributions enabled the technical cooperation and assistance activities to take place, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law Trust Fund for Symposia and, where appropriate, for the financing of special projects, and otherwise to assist the secretariat of the Commission in carrying out technical cooperation and assistance activities, in particular in developing countries;

<sup>10</sup> See A/CN.9/720.

<sup>11</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 278-283.

<sup>12</sup> Resolution 56/81, annex.

<sup>13</sup> United Nations publication, Sales No. E.09.V.12.

<sup>14</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, chap. XIII.

(e) Reiterates its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to support the technical cooperation and assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission, in the light of the relevance and importance of the work and programmes of the Commission for the promotion of the rule of law at the national and international levels and for the implementation of the United Nations development agenda, including the achievement of the Millennium Development Goals;

11. *Calls upon* Member States, non-member States, observer organizations and the Secretariat to apply the rules of procedure and methods of work of the Commission, taking into account the summary of conclusions as reproduced in annex III to the report on the work of its forty-third session,<sup>15</sup> with a view to ensuring the high quality of the work of the Commission and international acceptability of its instruments, and in this regard recalls its previous resolutions related to this matter;

12. *Welcomes* the decision by the Commission to establish, subject to the relevant rules and regulations of the United Nations and the internal approval process in the Office of Legal Affairs of the Secretariat, a Regional Centre for Asia and the Pacific, in the Republic of Korea, as a novel yet important first step for the Commission in reaching out and providing technical assistance to developing countries in the region, it being understood that the establishment of a regional presence would have to rely entirely on extrabudgetary resources, including but not limited to voluntary contributions from States, expresses its appreciation to the Government of the Republic of Korea for its generous contribution to the pilot project, and requests the Secretary-General to keep the General Assembly informed of developments regarding the establishment of such regional centres, including the Regional Centre for Asia and the Pacific in the Republic of Korea and, in particular, their funding and budgetary situation;<sup>16</sup>

13. *Appeals* to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General, in order to enable renewal of the provision of that assistance and to increase expert representation from developing countries at sessions of the Commission and its working groups, necessary to build local expertise and capacities in the field of international trade law in those countries to facilitate the development of international trade and the promotion of foreign investment;

14. *Decides*, in order to ensure full participation of all Member States in the sessions of the Commission and its working groups, to continue, in the competent Main Committee during the sixty-sixth session of the General Assembly, its consideration of granting travel assistance to the least developed countries that are members of the Commission, at their request and in consultation with the Secretary-General;

<sup>15</sup> Ibid., *Sixty-fifth Session, Supplement No. 17 (A/65/17)*.

<sup>16</sup> Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 262270.

15. *Endorses* the conviction of the Commission that the implementation and effective use of modern private law standards on international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General;

16. *Welcomes*, in this regard, the panel discussion on the role of the Commission in the promotion of the rule of law in conflict and post-conflict societies, held during the forty-fourth session of the Commission, and takes note of the particular relevance of the instruments and resources of the Commission for creating an environment of sustainable economic activity conducive to post-conflict reconstruction and preventing societies from sliding back into conflict;

17. *Takes note* of the views expressed by the Commission at the end of the panel discussion that, owing to a lack of sufficient resources, innovative ways need to be found for the early engagement of the instruments and resources of the Commission in post-conflict recovery operations of the United Nations and other donors, and that awareness needs to be increased of the fact that the Commission deals also with the basic building blocks for commercial activity and thus makes a real and immediate contribution in societies emerging from conflict;<sup>17</sup>

18. *Reiterates its request* to the Secretary-General, in conformity with General Assembly resolutions on documentation-related matters,<sup>18</sup> which, in particular, emphasize that any invitation to limit, where appropriate, the length of documents should not adversely affect either the quality of the presentation or the substance of the documents, to bear in mind the particular characteristics of the mandate and functions of the Commission in the progressive development and codification of international trade law when implementing page limits with respect to the documentation of the Commission;<sup>19</sup>

19. *Requests* the Secretary-General to continue providing summary records of the meetings of the Commission, including committees of the whole established by the Commission for the duration of its annual session, relating to the formulation of normative texts, and encourages the Commission to discuss the matter at its next session, on the basis of a report to be prepared by the Secretariat;<sup>20</sup>

20. *Reaffirms* the need to ensure the broadest possible participation in meetings of the Commission, and in this connection notes the existing rationale for the historical alternating pattern of sites for meetings of the Commission, that is, the proportionate distribution of travel costs among delegations, the global influence and presence of the Commission and the needs of developing countries, many of which do not have representation in Vienna, also notes the agreement of the Commission that every effort should be made to identify alternatives to abolishing the alternating pattern of meetings that would achieve a similar result, and in this

<sup>17</sup> Ibid., paras. 318 and 319.

<sup>18</sup> Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

<sup>19</sup> Resolutions 59/39, para. 9, and 65/21, para. 18; see also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 124-128.

<sup>20</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 333.

respect encourages Member States, jointly with the Secretariat, to continue to review current working practices to achieve increased efficiency, and with a view to identifying budgetary savings;<sup>21</sup>

21. *Stresses* the importance of promoting the use of texts emanating from the work of the Commission for the global unification and harmonization of international trade law, and to this end urges States that have not yet done so to consider signing, ratifying or acceding to conventions, enacting model laws and encouraging the use of other relevant texts;

22. *Welcomes* the preparation of digests of case law relating to the texts of the Commission, such as a digest of case law relating to the United Nations Convention on Contracts for the International Sale of Goods,<sup>22</sup> a digest of case law relating to the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration,<sup>23</sup> and a digest of case law relating to the Model Law on Cross-Border Insolvency, with the aim of assisting in the dissemination of information on those texts and promoting their use, enactment and uniform interpretation.

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<sup>21</sup> Ibid., chap. XXI.

<sup>22</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

<sup>23</sup> *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I; and *ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, annex I.

## **66/95. United Nations Commission on International Trade Law Model Law on Public Procurement**

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

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

*Recalling* its resolution 49/54 of 9 December 1994 recommending the use of the United Nations Commission on International Trade Law Model Law on Procurement of Goods, Construction and Services,<sup>1</sup>

*Observing* that the 1994 Model Law, which has become an important international benchmark in procurement law reform, sets out procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process,

*Observing also* that, despite the widely recognized value of the 1994 Model Law, new issues and practices have arisen since its adoption that have justified revision of the text,

*Recognizing* that at its thirty-seventh session, in 2004, the Commission agreed that the 1994 Model Law would benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications in public procurement, and the experience gained in the use of the 1994 Model Law as a basis for law reform, not departing, however, from the basic principles behind it and not modifying the provisions whose usefulness had been proved,

*Noting* that the revisions to the 1994 Model Law were the subject of due deliberation and extensive consultations with Governments and interested international organizations, and that thus it can be expected that the revised Model Law, to be called the “United Nations Commission on International Trade Law Model Law on Public Procurement”, would be acceptable to States with different legal, social and economic systems,

*Noting also* that the revised Model Law is expected to contribute significantly to the establishment of a harmonized and modern legal framework for public procurement that promotes economy, efficiency and competition in procurement and, at the same time, fosters integrity, confidence, fairness and transparency in the procurement process,

*Convinced* that the revised Model Law will significantly assist all States, in particular developing countries and countries with economies in transition, in enhancing their existing procurement laws and formulating procurement laws where none presently exist, and will lead to the development of harmonious international economic relations and increased economic development,

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<sup>1</sup> *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1), annex I.*



1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for developing and adopting the draft United Nations Commission on International Trade Law Model Law on Public Procurement;<sup>2</sup>
2. *Requests* the Secretary-General to transmit the text of the Model Law to Governments and other interested bodies;
3. *Recommends* that all States use the Model Law in assessing their legal regimes for public procurement and give favourable consideration to the Model Law when they enact or revise their laws;
4. *Calls for* closer cooperation and coordination among the Commission and other international organs and organizations, including regional organizations, active in the field of procurement law reform, in order to avoid undesirable duplication of efforts and inconsistent, incoherent or conflicting results in the modernization and harmonization of public procurement law;
5. *Endorses* the efforts and initiatives of the secretariat of the Commission aimed at increasing the coordination of, and cooperation on, legal activities concerned with public procurement reform.

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<sup>2</sup> Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 192 and annex I.

**66/96. United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency: The Judicial Perspective**

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

*Noting* that, where individuals and enterprises conduct their businesses on a global basis and have assets and interests in more than one State, the efficient conduct of the insolvency of those individuals and enterprises requires cross-border cooperation in, and coordination of, the supervision and administration of those assets and affairs,

*Considering* that the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency<sup>1</sup> contributes significantly to the establishment of a harmonized legal framework for effectively administering cross-border insolvency and facilitating cooperation and coordination,

*Acknowledging* that familiarity with cooperation and coordination in cross-border insolvency cases and how the Model Law may be implemented in practice is not widespread,

*Convinced* that providing readily accessible information on the interpretation of and current practice with respect to the Model Law for reference and use by judges in insolvency proceedings has the potential to promote wider use and understanding of the Model Law and facilitate cross-border judicial cooperation and coordination, avoiding unnecessary delay and costs,

*Noting with satisfaction* the completion and adoption on 1 July 2011 of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency: The Judicial Perspective by the Commission at its forty-fourth session,<sup>2</sup>

*Noting* that the preparation of the Model Law on Cross-Border Insolvency: The Judicial Perspective was the subject of consultation with Governments, judges and other insolvency professionals,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the completion and adoption of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency: The Judicial Perspective;<sup>2</sup>

2. *Requests* the establishment by the Secretariat of the United Nations of a mechanism for updating the Model Law on Cross-Border Insolvency: The Judicial Perspective on an ongoing basis in the same flexible manner as that in which it was developed, ensuring that it maintains a neutral tone and continues to meet its stated purpose;

<sup>1</sup> *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* (United Nations publication, Sales No. E.99.V.3), part one.

<sup>2</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 198.

3. *Requests* the Secretary-General to publish, including electronically, the text of the Model Law on Cross-Border Insolvency: The Judicial Perspective, as updated or amended from time to time in accordance with paragraph 2 of the present resolution, and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available;

4. *Recommends* that the Model Law on Cross-Border Insolvency: The Judicial Perspective be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings;

5. *Also recommends* that all States consider the implementation of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency.<sup>1</sup>

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**66/102. The rule of law at the national and international levels**

*The General Assembly,*

*Recalling* its resolution 65/32 of 6 December 2010,

*Reaffirming its commitment* to the purposes and principles of the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterating its determination to foster strict respect for them and to establish a just and lasting peace all over the world,

*Reaffirming* that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations,

*Reaffirming also* the need for universal adherence to and implementation of the rule of law at both the national and international levels and its solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful coexistence and cooperation among States,

*Convinced* that the advancement of the rule of law at the national and international levels is essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms, and acknowledging that collective security depends on effective cooperation, in accordance with the Charter and international law, against transnational threats,

*Reaffirming* the duty of all States to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations and to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered, in accordance with Chapter VI of the Charter, and calling upon States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute,

*Convinced* that the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and of its Member States,

*Recalling* paragraph 134 (e) of the 2005 World Summit Outcome,<sup>1</sup>

1. *Takes note* of the annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities;<sup>2</sup>

2. *Reaffirms* the role of the General Assembly in encouraging the progressive development of international law and its codification, and reaffirms further that States shall abide by all their obligations under international law;

3. *Reaffirms also* the imperative of upholding and promoting the rule of law at the international level in accordance with the principles of the Charter;

4. *Welcomes* the dialogue initiated by the Rule of Law Coordination and Resource Group and the Rule of Law Unit with Member States on the topic

<sup>1</sup> See resolution 60/1.

<sup>2</sup> A/66/133.

“Promoting the rule of law at the international level”, and calls for the continuation of this dialogue with a view to fostering the rule of law at the international level;

5. *Stresses* the importance of adherence to the rule of law at the national level and the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations through enhanced technical assistance and capacity-building, based on greater coordination and coherence within the United Nations system and among donors, and reiterates its call for greater evaluation of the effectiveness of such activities, including possible measures to improve the effectiveness of those capacity-building activities;

6. *Calls*, in this context, for dialogue to be enhanced among all stakeholders with a view to placing national perspectives at the centre of rule of law assistance in order to strengthen national ownership;

7. *Calls upon* the United Nations system to systematically address, as appropriate, aspects of the rule of law in relevant activities, including the participation of women in rule of law-related activities, recognizing the importance of the rule of law to virtually all areas of United Nations engagement;

8. *Expresses full support* for the overall coordination and coherence role of the Rule of Law Coordination and Resource Group within the United Nations system within existing mandates, supported by the Rule of Law Unit in the Executive Office of the Secretary-General, under the leadership of the Deputy Secretary-General;

9. *Requests* the Secretary-General to submit, in a timely manner, his next annual report on United Nations rule of law activities, in accordance with paragraph 5 of its resolution 63/128 of 11 December 2008;

10. *Recognizes* the importance of restoring confidence in the rule of law as a key element of transitional justice;

11. *Encourages* the Secretary-General and the United Nations system to accord high priority to rule of law activities;

12. *Invites* the International Court of Justice, the United Nations Commission on International Trade Law and the International Law Commission to continue to comment, in their respective reports to the General Assembly, on their current roles in promoting the rule of law;

13. *Invites* the Rule of Law Coordination and Resource Group and the Rule of Law Unit to continue to interact with Member States on a regular basis, in particular in informal briefings;

14. *Stresses* the need to provide the Rule of Law Unit with the necessary funding and staff in order to enable it to carry out its tasks in an effective and sustainable manner, and urges the Secretary-General and Member States to continue to support the functioning of the Unit;

15. *Recalls* its decision to convene a high-level meeting of the General Assembly on the topic “The rule of law at the national and international levels” during the high-level segment of its sixty-seventh session, and decides that the organizational arrangements for the high-level meeting should be as follows:

(a) The high-level meeting will be held as a one-day plenary on Monday, 24 September 2012;

(b) The President of the General Assembly, the Secretary-General, the President of the International Court of Justice, the President of the Security Council, the United Nations High Commissioner for Human Rights, the Administrator of the United Nations Development Programme, the Executive Director of the United Nations Office on Drugs and Crime, the Chair of the International Law Commission, Member States and observers, as well as a limited number of representatives of non-governmental organizations active in the field of the rule of law,<sup>3</sup> will be invited to speak at the plenary;

(c) The President of the General Assembly shall draw up a list of representatives of non-governmental organizations in consultative status with the Economic and Social Council who will participate in the high-level meeting;

(d) The President of the General Assembly shall draw up a list of representatives of civil society organizations, including non-governmental organizations active in the field of the rule of law and, taking into account the principle of equitable geographical representation, submit the list to Member States for consideration on a no-objection basis, for participation in the high-level meeting;

16. *Decides* that the high-level meeting will result in a concise outcome document, and requests the President of the General Assembly to produce a draft text, in consultation with Member States, and to convene inclusive informal consultations at an appropriate date in order to enable sufficient consideration and agreement by Member States prior to the meeting;

17. *Requests* the President of the General Assembly, in consultation with Member States, to finalize the organizational arrangements of the meetings, including the list of speakers for the plenary, taking into account the length of the high-level meeting, the level of representation, equitable geographical representation and the need to ensure that all listed speakers will have the opportunity to speak;

18. *Requests* the Secretary-General to submit a report for the consideration of Member States in preparation for the high-level meeting, no later than March 2012;

19. *Decides* to include in the provisional agenda of its sixty-seventh session the item entitled “The rule of law at the national and international levels”;

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<sup>3</sup> To speak on a non-objection basis in accordance with past practice.

20. *Invites* Member States as well as the Secretary-General to suggest possible sub-topics for future Sixth Committee debates for inclusion in the forthcoming annual report, with a view to assisting the Sixth Committee in choosing future sub-topics.

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*Part Two*

STUDIES AND REPORTS ON SPECIFIC SUBJECTS



# **I. ARBITRATION AND CONCILIATION**

## **A. Report of the Working Group on Arbitration and Conciliation on the work of its fifty-third session (Vienna, 4-8 October 2010) (A/CN.9/712)**

**[Original: English]**

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## I. Introduction

1. The Commission considered the question of transparency in treaty-based investor-State arbitration at its forty-first session (New York, 16 June-3 July 2008). At that session, the Commission agreed that it would not be desirable to include at that time specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules (“UNCITRAL Arbitration Rules” or “Rules”) themselves and that any work on treaty-based investor-State arbitration that the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in treaty-based investor-State arbitration. Written observations regarding that issue were presented by one delegation (A/CN.9/662) and a statement was also made on behalf of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency was a desirable objective in treaty-based investor-State arbitration and should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (*ibid.*, para. 69) in the field of treaty-based investor-State arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based investor-State arbitration and that broad discretion should be left to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based investor-State arbitration by the Working Group at a future session, the Commission requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in treaty-based investor-State arbitration. It was emphasized that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration.<sup>1</sup>

2. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic. The Commission was informed that, pursuant to the

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<sup>1</sup> *Official records of the General Assembly, Sixty-third session, Supplement No. 17 (A/63/17)*, para. 314.

request received from the Commission at its forty-first session, the Secretariat had circulated a questionnaire to States with regard to their practice on transparency in treaty-based investor-State arbitration and that replies thereto would be made available to the Working Group.<sup>2</sup> Those replies are reproduced in document A/CN.9/WG.II/WP.159 and its addenda.

3. At the forty-third session of the Commission, support was expressed for the view that the Working Group could also consider undertaking work in respect of those issues that arose more generally in treaty-based investor-State arbitration and that would deserve additional work. The prevailing view, in line with the decision previously made by the Commission, was that it was too early to make a decision on the precise form and scope of a future instrument on treaty-based investor-State arbitration and that the mandate of the Working Group should be limited to the preparation of rules of uniform law on transparency in treaty-based investor-State arbitration. However, it was agreed that, while operating within that mandate, the Working Group might identify any other topic with respect to treaty-based investor-State arbitration that might also require future work by the Commission. It was agreed that any such topic might be brought to the attention of the Commission at its next session, in 2011.<sup>3</sup>

4. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.158, paragraphs 5-11.

## II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its fifty-third session in Vienna, from 4 to 8 October 2010. The session was attended by the following States members of the Working Group:<sup>4</sup> Argentina (2016), Armenia (2013), Australia (2016), Austria (2016), Belarus (2011), Bolivia (Plurinational State of) (2013), Botswana (2016), Brazil (2016), Canada (2013), Chile (2013), China (2013), Colombia (2016), Czech Republic (2013), Egypt (2013), France (2013), Germany (2013), Greece (2013), India (2016), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2013), Malaysia (2013), Mauritius (2016), Mexico (2013), Norway (2013), Paraguay (2016), Philippines (2016), Poland (2012), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Singapore (2013), South Africa (2013), Spain (2016), Sri Lanka (2013), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2016) and Venezuela (Bolivarian Republic of) (2016).

6. The session was attended by observers from the following States: Belgium, Croatia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland,

<sup>2</sup> Ibid., *Sixty-fifth session, Supplement No. 17* (A/65/17), para. 190.

<sup>3</sup> Ibid., para. 191.

<sup>4</sup> The following six State members elected by the General Assembly on 3 November 2009 agreed to alternate their membership among themselves until 2016 as follows: Belarus (2010-2011, 2013-2016), Czech Republic (2010-2013, 2015-2016), Poland (2010-2012, 2014-2016), Ukraine (2010-2014), Georgia (2011-2015) and Croatia (2012-2016).

Hungary, Indonesia, Iraq, Netherlands, Portugal, Romania, Slovakia, Slovenia, Sweden, Switzerland, Togo and Yemen.

7. The session was attended by observers from the following organizations of the United Nations System: International Centre for Settlement of Investment Disputes (ICSID), the World Bank, United Nations Conference on Trade and Development (UNCTAD) and United Nations Educational, Scientific and Cultural Organization (UNESCO).

8. The session was attended by observers from the following international intergovernmental organizations invited by the Commission: Asian-African Legal Consultative Organization (AALCO), *Centre du Commerce International* (CNUCED/OMC), European Union, Permanent Court of Arbitration (PCA) and Permanent Observer Office of the League of Arab States in Vienna.

9. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association (AAA), American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Arbitration Institute of the Stockholm Chamber of Commerce, Asia Pacific Regional Arbitration Group (APRAG), Association for the Promotion of Arbitration in Africa (APAA), *Barreau de Paris*, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), China International Economic Trade and Arbitration Commission (CIETAC), *Comité Français de l'Arbitrage* (CFA), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Council of Bars and Law Societies of Europe (CCBE), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Arbitration Institute (IAI), International Bar Association (IBA), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), International Law Institute (ILI), London Court of International Arbitration (LCIA), Milan Club of Arbitrators, Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration — Lagos (RCICAL), Swiss Arbitration Association (ASA) and Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC).

10. The Working Group elected the following officers:

*Chairman:* Mr. Salim Moollan (Mauritius)

*Rapporteur:* Ms. Isabel Soares da Costa (Brazil)

11. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.158); (b) notes by the Secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.159 and its addenda; and A/CN.9/WG.II/WP.160 and its addendum).

12. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a legal standard on transparency in treaty-based investor-State arbitration.
5. Other business.
6. Adoption of the report.

### **III. Deliberations and decisions**

13. The Working Group commenced its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.159 and its addenda; and A/CN.9/WG.II/WP.160 and its addendum). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The deliberations and decisions of the Working Group with respect to agenda item 5 on other business are reflected in chapter V.

### **IV. Preparation of a legal standard on transparency in treaty-based investor-State arbitration**

14. The Working Group recalled the discussion at the forty-first session of the Commission where the Commission agreed by consensus on the importance of ensuring transparency in treaty-based investor-State arbitration.<sup>5</sup> The Working Group also recalled that its mandate, as defined by the Commission at its forty-third session and referred to in paragraphs 2 and 3 above, was to focus on the preparation of a legal standard on transparency in treaty-based investor-State arbitration.<sup>6</sup>

15. The discussion of the Working Group at its current session took place on a preliminary and general basis, without any attempt to reach consensus yet. That was done in order to delineate the issues for discussion at the next session of the Working Group.

#### **A. General remarks**

16. General remarks were made regarding the policy context in which the matter of transparency in treaty-based investor-State arbitration arose. It was said that discussion on the need of ensuring transparency in treaty-based investor-State arbitration should be considered in the context of foreign direct investment as a tool for the long-term sustainable growth of developing countries. Amongst others, foreign direct investment was said to contribute to building productive capacities and improve infrastructure of countries; to enhance access to essential services such as water, education, and health care — including for the poor and marginalized; and it could also generate spill-over effects by increasing demand and encouraging

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<sup>5</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 314.

<sup>6</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 190 and 191.



domestic entrepreneurship. That, it was further said, could lead to a virtuous cycle of an increase in domestic employment, in domestic demand and, ultimately, to sustained economic growth.

17. In addition to the broader objective of promoting sustainable development through international investment law, ensuring transparency and meaningful opportunity for public participation in treaty-based investor-State arbitration was said to constitute a means to promote the rule of law, good governance, due process, fairness, equity and rights to access information. It was also seen as an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such. Those challenges were said to include, among others: an increasing number of treaty-based investor-State arbitrations, including an increasing number of frivolous claims; increasing amounts of awarded damages; increasing inconsistency of awards and concerns about lack of predictability and legal stability; and uncertainties regarding how the investor-State dispute settlement system interacted with important public policy considerations. It was said that legal standards on increased transparency would enhance the public understanding of the process and its overall credibility.

18. The fact that United Nations organs, agencies and entities, including the Special Representative of the United Nations Secretary-General on human rights and transnational corporations and other business enterprises, were working to promote transparency and address legitimacy concerns arising from the investment dispute settlement system was said to illustrate transparency and inclusiveness as expressions of core United Nations values such as human rights, good governance and the rule of law.

19. General agreement was expressed by the Working Group regarding the desirability of dealing with transparency in treaty-based investor-State arbitration, which differed from purely private arbitration, where confidentiality was an essential feature. According to principles of good governance, government activities might be subject to basic requirements of transparency and public access. A view was expressed that treaty-based investor-State arbitration might involve consideration of public policy and could lead to large potential monetary liability for public treasuries. In that light, it was said that certain investment treaties already contained provisions on transparency.

20. It was pointed out that the UNCITRAL Arbitration Rules were the second most widely used rules for resolving treaty-based investor-State disputes (after the rules of the International Centre for Settlement of Investment Disputes (ICSID)). It was said that the regulations and rules of ICSID were amended in 2006 to incorporate greater transparency and opportunity for public access to treaty-based investor-State arbitrations.

21. Views were expressed that a central feature of arbitration was its consensual nature, and that element should be kept in mind when discussing the form and content of a standard on transparency. Reservations were expressed on any standard that would seek to impose transparency as a mandatory rule, in particular, taking account of the ad hoc nature of arbitration under the UNCITRAL Arbitration Rules. Some delegations also noted that the efficiency and efficacy of the dispute settlement process needed to be borne in mind when discussing the issue of transparency in treaty-based investor-State arbitration in substance.

## **B. Form of a legal standard on transparency**

22. The Working Group proceeded with a general discussion on the possible nature of a legal standard on transparency in treaty-based investor-State arbitration, and the various forms it might take. Further discussions on that matter took place at a later stage of the session (see below, paras. 76 to 100).

23. It was said that settlement of disputes arising in the context of multilateral or bilateral investment treaties (“investment treaties”) had particular features that might lead arbitral tribunals to scrutinize the legislative, administrative or even judicial activities of a State. In addition, no appeal of decisions made by arbitral tribunals was generally allowed. Outside arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”), arbitral awards were enforceable under the conditions laid out by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). It was pointed out that treaty-based investor-State arbitration had far reaching effects and was therefore different in nature as compared to other instances of international commercial arbitration. It was further said that, when considering the form of the legal standard on transparency, it should be borne in mind that there were two different levels of consent to be considered when dealing with treaty-based investor-State arbitration: the consent between States, parties to the investment treaty, and the consent between the host State and the investor, parties to the arbitration.

### **1. At the level of multilateral or bilateral investment treaties**

24. One of the possibilities mentioned was that the Working Group could consider defining a set of rules on transparency with a normative effect for inclusion in investment treaties concluded between States. It was said that, at that level, experience had shown that, notwithstanding the existence of model investment treaties, clauses were negotiated on a case-by-case basis, and usually differed from the initial model. Consequently, it was said that it might be appropriate to draft model clauses for States to include in their investment treaties. Following that approach, any standard on transparency would only apply if States consented to it. Therefore, it would be left to the discretion of States to decide whether to amend their existing investment treaties to include those standards, and to include the relevant provisions in their future investment treaties.

25. Some delegations proposed to limit the consideration of a legal standard on transparency to a set of rules or model clauses for possible inclusion in investment treaties, while others considered that that option should be replaced or complemented by the adoption of a legal standard, for instance in the form of guidelines, applicable once a dispute arose between an investor and a State.

26. One suggestion was to prepare an annex to the UNCITRAL Arbitration Rules that would apply if the investor and the host State party to the arbitration agreed upon, or the investment treaty provided for, its application. It was said that legal standards on transparency would have more effect if associated to the Rules. The Working Group heard different views on whether such an annex should be optional or mandatory, and whether an opting-in or opting-out mechanism should be provided. It was agreed that those matters would need further consideration.

27. Questions were raised as to the binding effect legal standards on transparency might have on arbitration provisions referring to the UNCITRAL Arbitration Rules in existing investment treaties, in particular for those arbitration provisions that did not specify the applicable version of the Rules. It was said that most investment treaties referred to the application of the UNCITRAL Arbitration Rules, without any additional reference. In that context, it was said that an automatic application of any legal standard on transparency to investment treaties entered into prior to the adoption of such standards might be contrary to public international law, and the basic principle of consent in international arbitration.

28. Another view was that it was important to ensure that any legal standard on transparency applied to all existing investment treaties, and it was suggested that creative solutions should be developed to ensure a universal application of that standard. In that context, it was noted that article 1 (2) of the UNCITRAL Arbitration Rules as revised in 2010 provided for a presumption that the 2010 Rules would apply to an arbitration agreement concluded after 15 August 2010, but that that presumption would not apply where the arbitration agreement had been concluded by accepting after 15 August 2010 an offer made before that date. It was further noted that that modification had been inserted in article 1 (2) in order to cater for the effect of an unintended retroactive application (see document A/CN.9/646, para. 76) and the Working Group noted the need to provide for consistent solutions in that respect.

29. It was said that designing an annex to the UNCITRAL Arbitration Rules applying only to investment arbitration might raise difficult issues regarding the definition of investment arbitration (covered by that annex) as opposed to other types of arbitration (to which that annex would not apply), and that that matter would also need further consideration.

## **2. At the level of the relation between the host State and the investor**

30. With respect to the relation between the host State and the investor, the Working Group considered that a policy decision should be taken at a later stage as to whether the investor should be given an opportunity to refuse an offer to arbitrate under legal standards of transparency.

## **C. Possible content of a legal standard on transparency**

31. The Working Group commenced its discussion on the possible content of a legal standard to be prepared on transparency in treaty-based investor-State arbitration. There was general agreement that the substantive issues to be considered in that respect would be as follows: publicity regarding the initiation of arbitral proceedings; documents to be published (such as pleadings, procedural orders, supporting evidence); submissions by third parties (“amicus curiae”) in proceedings; public hearings; publication of arbitral awards; possible exceptions to the transparency rules; and repository of published information (“registry”).

### **1. Publicity regarding the initiation of arbitral proceedings**

32. Some delegations said that the publication of initiation of arbitral proceedings was an important step for ensuring transparency and for making other provisions on

transparency meaningful. The Working Group heard a preliminary exchange of views regarding the conditions for publicity of the initiation of proceedings.

33. Different views were expressed regarding the information to be made public at that early stage of the proceedings, in particular, whether it should be limited to the existence of a dispute, or also include publication of the notice of arbitration. It was suggested that the notice of arbitration, that triggered the commencement of arbitration under article 3 of the UNCITRAL Arbitration Rules, should be made public. A concern was expressed that publicizing the notice of arbitration might not provide balanced information on the case. In turn, that might give rise to various issues such as protection of confidential or sensitive information and risks of frivolous claims. It was suggested that providing only preliminary information regarding the parties involved, their nationality, and the economic sector concerned might be sufficient. The example of publication by the ICSID Secretariat was given. It was highlighted that for arbitration under the ICSID Convention, the Secretariat did not make the notice of arbitration public and posted on its website, after registration, the name and subject matter of the case as well as the date of registration of the case in accordance with the ICSID Convention.

34. As to timing, different views were expressed on whether the information should be made public once the arbitration started at the time the notice of arbitration was received, or when the arbitral tribunal was constituted. Providing early information to the public on the existence of proceedings was said to be important in order to allow public awareness of procedural steps of the arbitration. A practical concern was expressed that the publication at a premature stage of the proceedings would not be advisable, as at the time of the notice of arbitration, no arbitral tribunal had yet been constituted and there existed a possibility that the arbitral proceedings would never take place. Also, views were expressed that it might be preferable to provide for publication of information once the arbitral tribunal had been constituted, in order to ensure the reliability of the information published.

35. As to the person responsible for taking the initiative of publication regarding the initiation of the proceedings, various views were expressed on whether the host State or the investor should be responsible for the publication. Views were expressed that the publication of information could be undertaken jointly by the parties, based on their consent to do so.

36. The Working Group agreed to further consider whether publication of information at that stage should be made mandatory, and if so, whether there should be any sanction in case of non-compliance. It was suggested that in case the obligation of publicity would rest with the parties, and the parties did not comply with that obligation, that responsibility could then be transferred to the arbitral tribunal. In response to that suggestion, it was said that the arbitral tribunal would not have the practical means to do so. Another question raised was the treatment of the situation where the parties agreed to refrain from disclosing information, despite their obligation to do so under applicable provisions.

37. With respect to the manner in which publicity could be organized, various suggestions were made, such as leaving it to the States to publish information on the website of their relevant ministries, or other appropriate channels in the countries concerned or establishing a central registry. Regarding the first option, it was said

that there was divergence in the experience of States with treaty-based investor-State arbitration. Experienced States would have the right channels in place to publicize such information, whereas for less experienced States, that option would be practically difficult to implement. Concerning the option of establishing a central registry, it was mentioned that possible institutions for carrying out that task could be the UNCITRAL secretariat, the Permanent Court of Arbitration at The Hague, or the appointing authorities. The Working Group agreed to further consider that matter when dealing with the question of repository of published information (see below, paras. 73-75).

38. It was also highlighted that publication of information on websites of international organizations would not necessarily be sufficient to achieve the desirable level of public awareness and that information might need to be made available in other forms.

39. A general remark was made regarding the drafting of provisions on publicizing the initiation of the arbitral proceedings. The Working Group was cautioned against providing too detailed procedures as their non-fulfilment might open the door to challenges on the basis of an arbitral procedure not being in compliance with the agreement of the parties. It was suggested that the Working Group should consider using only general language in provisions on publication, with the aim of allowing publication by any appropriate and effective means. It was also pointed out that provisions on transparency should provide for a default rule in case of disagreement between the parties in order to avoid lengthy debates on that matter during the arbitral proceedings.

## **2. Documents to be published**

40. The Working Group considered the question of documents that could be published. Different views were expressed on whether and, if so, which documents should be published, and the persons responsible for publication.

41. The view was expressed that all documents submitted to, and issued by, the arbitral tribunal should be made available to the public, so as to ensure that the public was informed of the arbitral proceedings and to facilitate submission by third parties of amicus curiae briefs. An order in the case *Chemtura Corporation v. Government of Canada*<sup>7</sup> and the Canada Model Foreign Investment Protection Agreement were given as examples of documents containing provisions on publication. It was suggested that mechanisms could be designed to provide opportunity for protection of confidential or sensitive information and to resolve any dispute that might arise between the parties in relation to information to be protected from publication. The purpose of such mechanisms would be to ensure that transparency would not unduly prejudice one party. As an example of such mechanisms, it was explained that where full disclosure of documents was generally allowed, a twenty day notice of the intent to disclose a document by one party would be given to the other party. The document would be disclosed only if both parties would find an agreement on how protected information should be dealt with or the arbitral tribunal had resolved the issue. The Working Group agreed to further consider protection of confidential or sensitive information, as well as the issue of

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<sup>7</sup> *Chemtura Corporation v. Government of Canada, Confidentiality Order, January 21, 2008.*

privileged information that could not be published under applicable laws at a later stage of its discussion (see below, paras. 67-72).

42. It was said that not all documents would need to be published, in particular in view of the necessity to find the right balance between the requirements of public interest and the legitimate need to ensure manageability and efficiency of the arbitral procedure. In that respect, the publication of briefs was viewed as burdensome but still manageable, whereas the publication of witness testimonies and expert reports was viewed as potentially costly. Consequently, it was proposed to differentiate between briefs of the parties and orders by arbitral tribunals, which could be published; and other evidentiary materials or exhibits which could be excluded from publication. It was pointed out that other documents were produced by the parties or the arbitral tribunal during the proceedings. Consequently, it would also be possible to classify the relevant documents as (a) formal submissions to the arbitral tribunal; (b) exhibits, written statements, expert reports and documentation submitted in support of the formal submissions; (c) decisions and orders from the arbitral tribunal; (d) records of live testimony and submissions; and (e) communications between the parties. Therefore, it was suggested that it might be preferable to refrain from establishing a list of documents subject to publication, and instead to provide for full disclosure of documents, accompanied with a discretionary power of the arbitral tribunal to decide which documents not to publish, considering such factors as the burden on the parties of reviewing all such documents to identify information that should not be disclosed.

43. Different views were expressed on whether the parties or the arbitral tribunal should be the ones to decide on publication of documents. It was suggested that the parties were in the best position to judge the appropriateness of publication of documents, so that they should be the ones deciding on that issue. In that regard, it was further said that the consent of the parties should be the prerequisite for the publication of documents. However, it was pointed out that, as shown in document A/CN.9/WG.II/WP.159 and its addenda, a number of States did not have experience in that field and that matter should be taken into account in designing provisions on transparency.

44. Other views were expressed that the arbitral tribunal should decide the issue of publication of documents on a case-by-case basis. Therefore, any provision on that matter could provide that publication of all materials submitted to, or issued by, the arbitral tribunal, should be as directed by the arbitral tribunal. Concerns were expressed that leaving the matter fully in the hands of the arbitral tribunal would give too much discretion and power to the arbitral tribunal in the absence of any guidelines. Another concern expressed was that it might be too burdensome for the arbitral tribunal to undertake that task. It was also suggested that parties could assist the arbitral tribunal in identifying documents to be published and information to be protected.

45. Another question raised referred to the practical aspects of the publication of documents, such as the language of publication.

### **3. Submissions by third parties (“amicus curiae”) in arbitral proceedings**

46. Many delegations expressed strong support for allowing submissions by third parties, also known as *amicus curiae* submissions, in arbitral proceedings between

an investor and a State. It was said that amicus curiae submissions could be useful for the arbitral tribunal in resolving the dispute and promoted legitimacy of the arbitral process.

47. It was widely felt that there should be certain restricting criteria in place for such submissions, including the subject matter of the submission, expertise of the amicus curiae, relevance for the proceedings, appropriate page limits, and the time when such submissions would be allowed. To that end, it was proposed that it should be left to the parties to decide whether such submissions should be allowed, as they could result in additional costs and delay of the proceedings. In response, it was said that leaving the decision to the parties would not be advisable, as often amicus curiae submissions were done in favour of one side or even, as had already been the case, in favour of neither side. It was noted that the purpose of amicus curiae submissions was to enlighten the arbitral tribunal in its decision-making process. Therefore, support was expressed for the view that the arbitral tribunal itself should play a “gate-keeping” role and decide on whether to allow amicus curiae submissions based on certain criteria. It was said that there had been sufficient experience with such criteria, including in the context of the North American Free-Trade Agreement (NAFTA) with the Statement of the Free Trade Commission on Non-Disputing Party Participation and various model bilateral investment treaties.

48. The Working Group left open the question whether the arbitral tribunal would have full discretion to decide on amicus curiae submissions or whether it would have to consult the parties, in accordance with the consensual nature of arbitral proceedings.

49. It was observed that two possible types of amicus curiae should be distinguished and perhaps considered differently. The first type could be any third party that would have an interest in contributing to the solution of the dispute. A second type could be another State party to the investment treaty at issue that was not a party to the dispute. It was noted that such State often had important information to provide, such as information on *travaux préparatoires*, thus preventing one-sided treaty interpretation. In response, it was said that an intervention by a non-disputing State, of which the investor was a national, could raise issues of diplomatic protection and was to be given careful consideration. It was suggested that third parties who could contribute to the resolution of the dispute could be identified and invited by the arbitral tribunal to assist it. The home State of the investor could be one such third party.

50. It was also said that the role of amicus curiae should be considered from the point of view of domestic legal systems that were not familiar with the concept of amicus curiae. In that regard, the issue was raised whether an amicus curiae could be considered as an expert; that would in turn raise questions of the possibility of cross-examination of the amicus curiae. In response, it was said that the role of an amicus curiae was different from that of an expert, as experts were usually appointed by the arbitral tribunal in compliance with certain conditions such as impartiality and independence. The Working Group took note of the suggestion to define the term “amicus curiae” and the intended role of amicus curiae, including the issues of who could be accepted to appear as an amicus, whether it should be a person or an entity, the criteria for participation, and whether participation should be left to the arbitral tribunal’s decision or agreed to by the parties, the form of amicus

briefs, and other practical matters, such as the determination and allocation of the cost of amicus interventions.

51. In the general framework of allowing amicus curiae submissions, the importance of access to documents was emphasized, as the quality of any amicus curiae submissions would depend on the permitted level of access to documents. With respect to the role of amicus curiae, it was questioned whether there should be different levels of access to documents provided for the general public on the one hand and amicus curiae on the other hand.

#### **4. Hearings**

##### **(a) Public hearings**

52. The Working Group considered whether hearings should be opened to the public. It was clarified that the notion of “open” or “public” hearings was understood by the Working Group as allowing the public to attend the hearings, but not to actively participate in them.

53. Many delegations expressed support for public hearings for various reasons. It was said that public hearings were a fundamental feature of a transparent system that should be promoted in international investment arbitration. It was further said that the same logic that might justify public access to documents should also apply in respect of hearings. Public hearings were seen as essential for enhancing awareness and confidence of the public regarding treaty-based investor-State arbitration.

54. It was suggested that a provision on open hearings in any legal standard to be prepared on transparency should reverse the default rule contained in article 25 (4) of the 1976 UNCITRAL Arbitration Rules and article 28 (3) of the Rules as revised in 2010, and provide that hearings should be held in public, unless the parties agreed otherwise. The Working Group agreed that the question of consent by the parties to open hearings was a matter to be further discussed at a later stage.

55. A question was raised whether public hearings would encompass media attendance, and the possibility that the arbitral proceedings would be broadcast worldwide. It was said that the ability to attend public hearings would depend on the geographical location of the interested public, and broadcasting would ensure the widest public access. A view was expressed that, should the media be allowed to attend the hearings, they should, as in ordinary court proceedings, not be allowed to record or broadcast the hearings.

56. It was noted that hearings could also touch upon confidential or sensitive information, so that access by the public was not desirable as a general rule, and should not be accepted in all instances. In that regard, it was said that, in some circumstances, mechanisms should be put in place to limit public access to hearings, and logistical arrangements could be made to allow for hearings in camera when dealing with confidential or sensitive information. There was general agreement that it would be best to leave the decision to the arbitral tribunal on closed hearings in exceptional circumstances on a case-by-case basis. In support, it was said that the arbitral tribunal was best placed to balance the public interest with countervailing interests such as the need to ensure that the hearings remained manageable, and avoid aggravation of the dispute. A suggestion was made that decisions of the



arbitral tribunal on organizing open or closed hearings should be made in consultation with the parties. It was noted that reasons for holding a closed hearing could be treated as part of the possible exceptions to the transparency rules (see below, paras. 67-72).

57. Reservations of a general nature were expressed regarding public hearings, a concept that was viewed to be contrary to the very nature of arbitration, which was said to be confidential and not to allow for third-parties' access to hearings. It was said that treaty-based investor-State arbitration would often raise issues of a political nature and open hearings were likely to put additional pressure on the participating State, thus creating the risk that the involvement of the general public would not facilitate but adversely affect the settlement of the dispute. Some views were expressed in favour of keeping the general default rule as contained in the UNCITRAL Arbitration Rules, which provided that hearings were to "be held in camera unless the parties otherwise agreed". Under a different view, hearings should not be opened to public access, but the transcripts of such hearings should be made publicly available, after confidential or sensitive information had been redacted.

**(b) Transcripts of hearings**

58. There was general agreement that the decision to be made regarding transcripts should depend upon the solution adopted in respect of public access to hearings. It was suggested that transcripts would be publicly available in cases where hearings had taken place in camera only in the exceptional circumstances where the closure was decided for logistical reasons and not for reasons of protection of confidential or sensitive information. In such circumstances, the publication of transcripts would allow the public that had been unable to attend hearings to nevertheless be informed about their content. It was observed that making the transcripts publicly available would positively reinforce the effect of making the hearings public. In that regard, one delegation explained that in a reported case of public hearings, it had been its practice to publish transcripts of the hearings on the Internet.

59. The Working Group was informed that, for arbitrations under the rules of ICSID, the decision to hold open hearings was left to the arbitral tribunal, unless either party objected. In contrast, to make transcripts publicly available, the consent of the parties was needed. It was further said that the publication of transcripts was a question usually left to the respondent State at least for cases under NAFTA and that ICSID so far had not published any transcripts on its website.

**(c) Participation of third parties ("amicus curiae") in hearings**

60. It was noted that the general practice with *amicus curiae* had been to allow submissions by *amicus curiae*, but not to permit appearance or active participation in hearings. However, the view was expressed that *amicus curiae* participation should not be precluded since arbitral tribunals might in some cases wish to question an *amicus* at a hearing, and that therefore any provision on that matter should provide for a certain level of discretion. As reasons for permitting participation of *amicus curiae* in hearings, it was said that an *amicus curiae* often had special knowledge of the subject matter underlying the dispute. It was further explained that written submissions might, in certain instances, need to be complemented with oral explanations. It was further said that participation of

*amicus curiae* in hearings would give more weight to such interventions in the process, thereby positively impacting the perception of treaty-based investor-State arbitration. On the other hand, it was noted that in NAFTA proceedings, where written amici submissions could be accepted by the arbitral tribunal, no need for such participation at hearings had been found.

## **5. Publication of arbitral awards**

61. The Working Group considered the question of publication of awards and took note of the provisions on that matter contained in article 32 (5) of the 1976 UNCITRAL Arbitration Rules, and in article 34 (5) of the Rules, as revised in 2010. Both versions of the Rules required, in substance, the consent of all parties for the publication of an award.

62. Many delegations expressed support for the establishment of a general provision under which awards rendered by arbitral tribunals in treaty-based investor-State arbitration should be published, thus departing from the principle contained in the UNCITRAL Arbitration Rules. It was said that if other documents were to be released, awards should obviously also be published. Even if no other documents were published, it was said that the publication of awards would be a decisive step towards enhancing the legitimacy of the process and collecting accessible and consistent jurisprudence. Publication of awards would also contribute to providing information on treaty interpretation, which might be useful to parties to the treaty that were not parties to the dispute, or even to parties to other treaties.

63. The view was expressed that a provision on that matter could also provide that awards should be made public, unless all parties to the arbitration agreed otherwise. Should that case arise, it was suggested that, as done by the ICSID Secretariat, it might still be possible to publish excerpts of awards containing the relevant legal reasoning. It was pointed out that any agreement between the parties to keep awards confidential would raise suspicion in the public, and unless there would be reasons of public security, refusing publication of awards would not be advisable.

64. It was said that a provision on publication of awards should also contain rules for the protection of confidential or sensitive information. It was explained that difficulties could arise if the arbitral tribunal were to consult with the parties regarding information of a confidential nature that should be deleted from the award, and publication might therefore have an impact on the manner in which awards would be drafted, and their content. It was noted that the reasons for redacting or not publishing an award could be treated as part of the possible exceptions to the transparency rules (see below, paras. 67-72).

65. It was suggested to differentiate among awards rendered at different stages of the proceedings by the arbitral tribunal and to make the publication of the last award mandatory, while leaving the publication of the other awards optional at the arbitral tribunal's or the parties' initiative. In response, it was said that it was not unusual for a tribunal to render awards on different matters at different times, and the public might have an interest in any or all of them. It was also suggested that together with the publication of awards, provisions on that matter might allow publication of documents referred to in the awards, in particular if such documents were not released at an earlier stage, and were not of a sensitive nature any more.

66. As a matter of drafting, it was pointed out that there were a number of provisions dealing with awards in the UNCITRAL Arbitration Rules, and a legal standard on that matter should be made consistent with those provisions.

## **6. Possible exceptions to transparency rules**

67. The Working Group turned its attention to the possible exceptions to the transparency rules for the protection of confidential and sensitive information (referred to during the discussion as “carve outs”). The view was expressed that any provision on that matter should be drafted in a generic manner, thus circumventing the need to envisage all possible circumstances, but rather leaving a large degree of discretion to the arbitral tribunal. It was further suggested that generic definition of “confidential information” could be found in existing investment treaties. For example, “confidential information” could be defined as “any sensitive factual information not available in the public domain”. Such a definition would cover information that might be identified as sensitive by either disputing party. It was said that other categories of information might need to be protected while they were not included by such notion of “confidential information”, for example information that might be used to impede law enforcement and information otherwise protected from disclosure by the law of a party. The view was expressed that, while it was difficult to develop a comprehensive definition of confidential information, it would be useful to provide guidance to arbitral tribunals in the form of examples.

68. Another model which was said to provide useful guidance in investor-State arbitration were the IBA Rules on the Taking of Evidence in International Arbitration (2010) which contained provisions on confidentiality in paragraphs (3) and (4) of article 9 on admissibility and assessment of evidence.

69. The view was expressed that the determination of confidential and sensitive information should be handled by the arbitral tribunal. It was explained that, in the practice of certain States, it was the responsibility of a disputing party to identify confidential or other protected information to the arbitral tribunal, and that that identification to the tribunal was the trigger for the tribunal to consider the issue and make a decision.

70. General comments were made to the effect that while exceptions for reasons of protecting confidential or sensitive information were necessary, they should not be so wide as to weaken the main rules on transparency. It was also suggested that exceptions to transparency to protect confidential or sensitive information should provide clarity and guidance, in order to avoid disputes between the parties on that matter.

71. A question was raised on the conditions of enforcement of those exceptions and whether a sanction should be provided in case a party would breach confidentiality obligations. It was suggested that State immunities could be invoked as a defence. One possible sanction mentioned was related to costs. Article 9 (7) of the IBA Rules on the Taking of Evidence in International Arbitration (2010) was given as an example of a provision containing such sanction. It provided that “If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the

costs of the arbitration, including costs arising out of or in connection with the taking of evidence”.

72. A question was raised whether specific exceptions should be contemplated to deal with the question of protection of the integrity of the arbitral process. It was generally recognized that that matter was important to take into account as part of the discussions on transparency, but did not necessarily fall under the subject matter of exceptions for protection of confidential and sensitive information. It was generally agreed that protection of the integrity of the arbitral process was to be handled by the arbitral tribunal, which in any case already enjoyed a wide discretion in that respect under article 15 of the 1976 UNCITRAL Arbitration Rules and article 17 of the Rules, as revised in 2010. The general question of case management was said to be an important one, to be further considered in respect of each substantive matter.

#### **7. Repository of published information (“registry”)**

73. The Working Group recalled that a number of suggestions had been made regarding the mechanisms to be put in place to ensure the public availability of the information that might be publicized to ensure transparency in treaty-based investor-State arbitration. It was recalled that in the course of its deliberations on substantive matters, the Working Group had heard suggestions that information could be made publicly available by the parties, either the host State or the investor, or by a neutral registry. It was pointed out that the publication of information pertaining to arbitration under the UNCITRAL Arbitration Rules could be handled by the UNCITRAL secretariat and posted on its website. The Permanent Court of Arbitration at The Hague (“PCA”) was also mentioned, among other institutions, as a possible entity that could provide that service (see above, para. 37).

74. It was generally felt that there was first a need to better delineate the role that such registry would play before deciding whether parties or other entities should be entrusted with that task. It was questioned whether, with respect to the publication on the initiation of arbitral proceedings, the registry would also have to make a *prima facie* examination of the information received, in particular in case a legal standard on that matter would provide that information had to be posted before an arbitral tribunal was constituted. In that case, the registry would have to determine whether the case fell under the scope of application of the legal standard on transparency to be prepared, and for instance whether there was indeed an arbitration agreement. Other matters included whether beside cases arising from treaty-based investor-State arbitration, those resulting from contracts between States and investors, arising under investment law and other cases, would also fall in the competence of the registry. In that regard, it was further questioned whether the registry would be in a position to refuse publication of such cases.

75. The Working Group was informed that, as the UNCITRAL Arbitration Rules were an instrument of the United Nations, it would be logical for the United Nations Secretariat to provide such services to States. It was further noted that the Office of Legal Affairs of the United Nations, to which the UNCITRAL secretariat belongs, had experience in handling comparable types of services, including the publication of instruments of deposits of ratifications, access or acceptance of international conventions. The PCA confirmed its readiness to provide such services in case the UNCITRAL secretariat would not do so.

## **D. Form of a legal standard on transparency**

76. The Working Group recalled its prior discussion on the possible nature of a legal standard on transparency in treaty-based investor-State arbitration, and the various forms it might take (see above, paras. 22 to 30). As to form, many delegations expressed support for including legal standards on transparency as a supplement to the UNCITRAL Arbitration Rules, whether as an annex or, noting that the UNCITRAL Arbitration Rules did not make reference to an annex, stand-alone rules on transparency. Suggestions were made that provisions on transparency could also take the form of guidelines or model clauses.

77. With a view to facilitating discussion on the applicability of rules on transparency, it was proposed to draw a distinction between the offer to arbitrate made by State parties to a treaty, and the subsequent consent of the investor to arbitrate, at the investor-State level.

### **1. At the level of the multilateral or bilateral investment treaties**

78. In relation to the first level of consent (treaty level), a further distinction was suggested to be made between future and existing investment treaties.

#### **(a) Future multilateral or bilateral investment treaties**

79. The Working Group considered whether an express reference in future investment treaties to rules on transparency would be necessary for their application beside a reference to the UNCITRAL Arbitration Rules. Views were expressed that, in order to avoid legal uncertainty and diverging interpretations that might result from the absence of reference to rules on transparency, a preferable solution would be to provide for an express consent of the parties. It was said that States would have knowledge of the existence of new rules on transparency, and the lack of an explicit reference to them in an investment treaty should be interpreted as an agreement not to apply such rules. In particular, it was highlighted that the UNCITRAL Arbitration Rules did not contain provisions on the publication of documents, open hearings, and third parties' participation and, therefore, it would be difficult to deduce from a reference to the Rules an implied agreement also to apply additional rules on transparency.

80. However, it was pointed out that requiring a specific reference for the rules on transparency to apply in the context of future investment treaties would undermine the importance of the work currently undertaken by the Working Group. Another view expressed was that including in the rules on transparency provisions on their applicability would enhance clarity as to their application and use. For instance, it could be provided that the rules on transparency applied once reference to the UNCITRAL Arbitration Rules, as revised in 2010, was made.

81. It was suggested that a possible solution to conciliate different views expressed could consist in drafting rules reflecting a high level of transparency, but which would be applicable only if parties had expressly opted into transparent arbitration. It was generally felt that those matters should be further examined at a future session.

82. It was recalled that the mandate given by the Commission to the Working Group at its forty-third session was to provide an instrument that ensured transparency in treaty-based investor-State arbitration (see above, para. 2), leaving to the Working Group discretion how to implement that objective. It was further said that, if the instrument to be drafted would only be applicable if expressly referred to in the investment treaty, it would amount to a significant failure in the implementation of the mandate. Further, it was said that there was a need to address criticisms under which the current investor-State arbitration system was sometimes described as being closed, and not serving the public interest. It was further said that it might be timely to respond to those criticisms by adopting provisions on transparency that received the widest application in treaty-based investor-State arbitration. In that regard, the view was expressed that the Working Group should provide in any instrument it would draft on transparency, a presumption that the rules on transparency would apply in investment arbitration in the future. It was suggested that the Working Group should consider how best to create that presumption.

83. In support of that view, it was said that a presumption on application of the rules on transparency could be structured in a way that provided the needed level of certainty to parties as to whether or not they were operating under the transparency provisions in a given arbitration. For instance, it was suggested that the part of the rules on transparency dealing with their applicability could include wording along the lines of “these rules will be incorporated in the UNCITRAL Arbitration Rules for any arbitration initiated under those rules pursuant to an investment treaty hereafter ratified unless the treaty expressly provides that these rules will not apply”. It was said that such wording would have the benefit of creating a presumption in favour of transparency under the UNCITRAL Arbitration Rules.

84. There was a general agreement that the provisions to be drafted regarding application of the rules on transparency to future treaties should be clear, and provide the necessary level of certainty as to the existence of consent of parties to adopt such rules as part of their arbitration process under the UNCITRAL Arbitration Rules. It was also suggested that language adopted in respect of future treaties should be considered under the perspective of its impact on already concluded investment treaties.

**(b) Existing multilateral or bilateral investment treaties**

85. With respect to existing treaties, the Working Group considered the application of any new standard to existing investment treaties. That question was said to have an important practical impact as there were more than 2,500 investment treaties in force to date,<sup>8</sup> but less than 10 treaties had been concluded in 2010.

86. Many delegations expressed the view that it would be desirable for rules on transparency also to apply to existing investment treaties. Such application was viewed as furthering the mandate by the Commission to enhance transparency in treaty-based investor-State arbitration. However, it was questioned whether such application was practically feasible, for example, due to the wide variety of treaty

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<sup>8</sup> For an online compilation of all investment treaties, see the database of the United Nations Conference on Trade and Development (UNCTAD), available on 28 July 2010 at [www.unctadxi.org/templates/Startpage\\_718.aspx](http://www.unctadxi.org/templates/Startpage_718.aspx).

provisions referring to arbitration under the UNCITRAL Arbitration Rules, and could be achieved through any instrument prepared by the Working Group and adopted by the Commission.

87. The attention of the Working Group was drawn on the impact of article 1 (2) of the UNCITRAL Arbitration Rules, as revised in 2010, which provided that: “The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.” Further, it was recalled that the 1976 version of the Rules did not contain any presumption that the Rules would be subject to amendments.

88. The Working Group discussed various possible means to achieve certainty as to the application of rules on transparency to existing investment treaties. It was suggested that application of rules on transparency to already existing investment treaties should not imply any retroactive application of those standards.

89. It was said that the consent in the investment treaty of the State parties to investor-State arbitration under the UNCITRAL Arbitration Rules could be interpreted as consent to a system of arbitration that would develop over time. Under that view, rules on transparency would automatically apply, as they would be part of that evolving system of UNCITRAL arbitration. Under another view, it was uncertain whether it could be derived from a mere reference to the UNCITRAL Arbitration Rules in investment treaties that parties agreed automatically to be bound by any amendments thereto. It was further said that automatic application of rules on transparency to existing investment treaties referring to the UNCITRAL Arbitration Rules would be impossible, unless there were joint declarations by the State parties pursuant to article 31 of the Vienna Convention on the Law of Treaties (1969). In that regard, it was also noted that the UNCITRAL Arbitration Rules did not contain any reference to an annex or any instrument that should be read together with them.

90. The Working Group explored the question of the form that an express consent by States would take. Procedures for amendments to existing investment treaties were said to be burdensome and time-consuming.

91. It was said that UNCITRAL’s mandate included preparing or promoting the adoption of new international conventions, model laws and uniform laws,<sup>9</sup> but that UNCITRAL had no authority to create by itself legislative obligations for States without their consent. Consequently, it was said that the only possibility for the Working Group to enhance transparency in treaty-based investor-State arbitration was to formulate provisions and to encourage States to use them.

92. The view was expressed that if a legal standard on transparency would take the form of a non-binding instrument, such as guidelines, the question of applicability would not arise. The Working Group felt that it might be premature to take a firm decision on the form of the legal standard to be prepared at that stage of the discussion.

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<sup>9</sup> See General Assembly resolution 2205 (XXI), sect. II, para. 8.

93. With a view to enhancing certainty as to the applicability of the rules on transparency with respect to existing treaties, various suggestions were made, including unilateral declarations by Governments, a joint interpretation by Governments, an instrument open to signature or ratification whereby States could express consent or agree to apply the transparency rules under existing treaties. It was further said that, though unilateral declarations were possible, joint declarations would be preferable to ensure equal treatment and would correspond to existing treaty practice. The legal value of interpretative instruments was said to be limited.

94. The Working Group agreed that all suggestions would require further legal analysis, and that that matter should be further discussed at a future session.

## **2. At the level of the relation between the host State and the investor**

95. As for the second level of consent (investor-State level), it was noted that a policy decision should be made as to whether an investor would be bound by an offer by a State to arbitrate under the UNCITRAL Arbitration Rules, including the rules on transparency, or whether the investor would have discretion to refuse the offer of transparent arbitration.

96. It was said that in arbitral practice, it was possible to negotiate the applicable arbitration rules. However, it was widely felt that providing the investor with the last word on the application of the rules on transparency would unduly privilege the investor and lead to a decrease of transparency. It was said that such approach would be contrary to the Commission's mandate to enhance transparency in treaty-based investor-State arbitration. It was further pointed out that, in contrast to commercial arbitration, treaty-based investor-State arbitration was conducted on the basis of an underlying treaty between State parties, which limited the ability of the investor to depart from offers made by the host State. However, it was said that, for the purpose of ensuring the equality of parties in treaty-based investor-State arbitration, it might be advisable to provide the right for an investor to react to the host State's offer of transparent arbitration.

97. A question arose as to the extent to which the disputing parties should be allowed to depart from certain provisions of the rules on transparency, and whether they could legally be prevented from doing so. The view was expressed that the underlying treaty between State parties would prevent one State party and the investor to depart from the transparency rules. A contrary view expressed was that the disputing parties could, as a matter of law, always amend their arbitration agreements (including the reference to the transparency rules contained therein) and that it was accordingly not possible to entrench non-derogable provisions in the transparency rules. Another view expressed was that the decision on departure from the rules on transparency should be formally made by the arbitral tribunal upon the request of the parties. In response, it was said that such approach would place the arbitral tribunal in a delicate position at an early stage of the proceedings.

98. It was suggested to make certain provisions of the rules on transparency non-derogable, for example, by omitting from the transparency rules any right for the parties to amend the transparency rules by subsequent agreement, such as that contained in article 1 (1) of the UNCITRAL Arbitration Rules. In support of that suggestion, it was said that also the UNCITRAL Arbitration Rules themselves



contained non-derogable provisions. It was suggested to specify for each provision of the rules on transparency, which ones would be derogable, bearing in mind the fact that given rules might be said to confer rights on third parties.

99. The view was reiterated that those difficulties could be avoided by preparing non-binding recommendations or guidelines.

100. The Working Group agreed that all those suggestions would require further legal analysis, and that those matters should be further discussed at a future session.

## **V. Other business**

### **A. Preparation of the next session of the Working Group**

101. The Working Group requested the Secretariat to prepare for its next session working papers that would set out an analysis of the matters on form and substance discussed at its current session, including examples of provisions on transparency in treaty-based investor-State arbitration. The Working Group further requested the Secretariat to prepare, to the extent feasible and advisable, model provisions for discussion. Delegations were encouraged to provide information, including written contributions or proposals, they would deem relevant to the Secretariat on the matters discussed at the current session.

### **B. Matters for consideration by the Commission as possible work in the field of treaty-based investor-State arbitration**

102. In accordance with the decision of the Commission at its forty-third session (see above, para. 3), the Working Group proceeded on a discussion to identify other topics which arose more generally in treaty-based investor-State arbitration that would deserve additional work and thus might be brought to the attention of the Commission at a future session.

103. It was suggested to bring to the attention of the Commission at a future session the topic of the possible intervention of a non-disputing State party referred to in paragraph 49 above. After discussion, the Working Group agreed to seek guidance from the Commission on whether that topic could be dealt with by the Working Group in the context of its current work. Another suggestion was made regarding the matter of impartiality and independence of arbitrators. There was no support to report that topic to the Commission.

**B. Note by the Secretariat on settlement of commercial disputes: Transparency in treaty-based investor-State arbitration — Compilation of comments by Governments, submitted to the Working Group on Arbitration and Conciliation at its fifty-third session**

**(A/CN.9/WG.II/WP.159 and Add.1-4)**

**[Original: English/French/Russian/Spanish]**

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## **I. Introduction**

1. At its forty-first session (New York, 16 June-3 July 2008), the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with by Working Group II (Arbitration and Conciliation) as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency as a desirable objective in investor-State arbitration should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (*ibid.*, para. 69) in the field of treaty-based arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left

to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based arbitration by the Working Group at a future session, the Commission requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration.<sup>1</sup>

2. At its forty-third session (New York, 21 June–9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission entrusted the Working Group with the task of preparing a legal standard on the topic of transparency in treaty-based investor-State arbitration. The Commission was informed that, pursuant to the request received from the Commission at the forty-first session, the Secretariat had circulated a questionnaire to States with regard to their practice on transparency in investor-State arbitration and that replies thereto would be made available to the Working Group. The questionnaire as circulated to States is reproduced in part II of this note. The present document and its addenda contain in part III replies received by the Secretariat from States.<sup>2</sup>

## II. Questionnaire

### A. Questions regarding current practices with respect to transparency in treaty-based investor-State arbitration

- (1) Could you provide examples of treaty-based investor-State arbitration cases in your country involving instances of publicity or transparency of the arbitral proceedings (for example, cases where information regarding the existence of the arbitral proceedings would be made publicly available, or where the possibility would exist for the public or specific interest groups to obtain access to documents used in the arbitral proceedings, or to be present at hearings)?
- (2) Are there any examples in your country of cases where third parties have presented statements in the course of treaty-based investment arbitration (such as *amicus curiae* briefs) or have otherwise intervened in the proceedings?
- (3) Is there any provision concerning transparency or publicity regarding treaty-based investment arbitration in bilateral or multilateral treaties or agreements entered into by your country? If so, could you please provide us with the texts of such treaties or agreements, or any information relating thereto?
- (4) Is there any provision for third parties to become involved in treaty-based investment arbitration in bilateral or multilateral treaties or agreements entered into by your country? If so, could you please provide us with the texts of such treaties or agreements, or any information relating thereto?

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<sup>1</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 314.

<sup>2</sup> Report of the Commission on the work of its forty-third session (in preparation).

- (5) Do you have any comments regarding current practices with respect to publicity or transparency in treaty-based investor-State arbitration involving your country?

## **B. Reference to the questionnaire**

3. In the remainder of this note and in the addenda, the above questions are referred as follows:

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

Question 2: Amicus curiae briefs or other interventions

Question 3: Provision in treaties on transparency or publicity

Question 4: Provision in treaties on third parties' involvement

Question 5: Any other comment

## **III. Comments received from Governments on transparency in treaty-based investor-State arbitration**

### **1. Algeria**

[Original: French]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

The answer to this question lies with the Algerian Chamber of Commerce and Industry. Article 6 of Executive Decree No. 64-96 of 3 March 1996, establishing the Statute of the Algerian Chamber of Commerce and Industry, states that the Chamber may establish a conciliation and arbitration committee at the request of contracting parties for the settlement of their commercial disputes. In this regard, the Algerian Chamber of Commerce and Industry may engage in arbitration at both the national and the international level.

Question 2: Amicus curiae briefs or other interventions

There is no provision in bilateral agreements for intervention by third parties in arbitral proceedings between States and investors. Algeria has thus not mentioned or referred to such a procedure in the bilateral or multilateral agreements that it has concluded, nor in settlement mechanisms or processes. This position applies also to dispute settlement mechanisms in order to ensure that the State is not forced to deal with multiple parties in the same case.

Question 3: Provision in treaties on transparency or publicity

Bilateral investment protection treaties concluded by Algeria contain a provision referring in a general way to transparency. The provision requires the contracting parties to ensure that investors are provided with any legislation, regulations, procedures, administrative decisions and international

conventions that may benefit any of the investors or any of the contracting parties in the territory of the other party.

Algeria model agreements on the promotion and protection of investments do not, however, spell out these stages of arbitration. They simply mention the arbitration regime concerned — the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL) or the International Chamber of Commerce (ICC) — but do not go into detail as to the procedures to be followed.

**Question 4: Provision in treaties on third parties' involvement**

The reply to this question is the same as that given for question 2.

**Question 5: Any other comment**

With regard to publicizing arbitral decisions, they are generally available on the websites of the arbitration bodies mentioned above. As for the conduct of arbitral hearings, only the advisers representing the parties to the conflict can comment on their transparency, in view of the fact that the hearings are not open to the public.

## **2. Argentina**

[Original: Spanish]

**Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings**

The bilateral treaties on the promotion and reciprocal protection of investments to which the Argentine Republic is a party generally contain — with regard to the settlement of disputes — an option whereby the investor may have recourse to (1) local courts, (2) the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) and (3) arbitration under the UNCITRAL Rules.

Most investors have opted for the jurisdiction of ICSID. Pursuant to the ICSID Convention, the arbitration rules of ICSID and the practices developed by ICSID officials, after a dispute has been registered ICSID makes known, on its website and in its written publications, the existence of the dispute, the parties involved, the number of the arbitration case and the composition of the arbitral tribunal. Recently, it has begun publishing also certain procedural provisions and its decisions relating to jurisdiction and to the merits of the dispute, thereby ensuring transparency with regard to (1) the existence of the dispute and (2) the publication of decisions on matters of jurisdiction and merits. An example of such publications can be found on the website <http://icsid.worldbank.org/ICSID>.

As regards the latter, even before the revision of the arbitration rules that entered into force on 10 April 2006, ICSID used to request from both parties to a dispute their agreement to publication of its decision. Following the aforementioned revision, when the parties do not agree to publication of the decision, ICSID shall then publish a summary of the legal arguments contained in the decision.

Question 2: Amicus curiae briefs or other interventions

Two arbitration cases involving the Argentine Republic are essential links in the evolution of amicus curiae participation in arbitration proceedings. In both cases, Argentina supported the participation of the amici. The cases are AASA, Suez, Aguas de Barcelona y Vivendi v. Argentine Republic, ICSID case No. ARB/3/19 and APSF, Suez, Aguas de Barcelona e Interagua v. Argentine Republic, ICSID case No. ARB/3/17.

In the case APSF, Suez, Aguas de Barcelona e Interagua v. Argentine Republic, ICSID case No. ARB/3/17, the arbitration tribunal rejected participation of the amici.

In the case AASA, Suez, Aguas de Barcelona y Vivendi v. Argentine Republic, ICSID case No. ARB/3/19, the arbitration tribunal allowed the participation of third parties, although it limited such participation to the presentation of documents setting forth the position of the amicus. The tribunal ruled out the possibility of the third party having access to the documents of the dispute and/or participating in the hearings of the case. Also, it established a number of procedural requirements that are now reflected in Rule 37 of ICSID's arbitration rules of 2006.

This was the first case where — despite the gap in the law that existed at the time when the request for amici participation was submitted — an arbitration tribunal agreed to the participation of third parties in ICSID proceedings. As indicated earlier, this case permitted the participation of third parties and preceded a revision of ICSID's procedural rules.

Question 3: Provision in treaties on transparency or publicity

There are no specific provisions regarding transparency in the bilateral treaties entered into by the Argentine Republic.

Question 4: Provision in treaties on third parties' involvement

There are no specific provisions regarding the participation of third parties in arbitration proceedings relating to investments in the bilateral treaties entered into by the Argentine Republic.

Question 5: Any other comment

In the Argentine Republic, there are no particular rules about transparency and publication in investor-State arbitration cases. By Decree No. 1172/2003, however, the Executive has provided for the fullest possible public access to governmental papers through clear, specific mechanisms such as: public hearings involving the Executive (Art. 1); publicity with regard to the representation of interests (Art. 2); the participatory elaboration of rules (Art. 3); access to public information regarding organizations, entities, enterprises, companies, departments and any other body operating under the jurisdiction of the Executive, and also private organizations that are receiving subsidies or other financial support from the public sector, foundations or other institutions for whose administration, maintenance or preservation the State (through its judicial authorities or other entities) is responsible and private enterprises to which has been granted — by permit, licence or

concession or in some other contractual form — the right to provide a public service or exploit some property in the public domain (Art. 4).

In all cases, brief formalities have to be completed before public hearings are arranged or access is granted to governmental papers. The only exceptions as regards access are those specifically stated in the Decree, which are limited — *inter alia* — to information expressly classified as confidential, especially information relating to security, defence or foreign policy, information that could jeopardize the correct functioning of the financial or banking system, information that compromises the legitimate rights of a third party and was obtained through confidential sources, data protected by professional secrecy or that would endanger the life or safety of a person, etc.

In addition, the same Decree provides for access free of charge to the daily edition of all sections of the Official Gazette of the Argentine Republic. Lastly, it provides for the repeal of all rules running counter to the directives arising out of it.

For their part, all official organizations have announced measures for adapting their structures in order to ensure free access to public information in accordance with the Decree.

### 3. Armenia

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

The public was informed about arbitral proceedings by mass media. There is no example of treaty-based investor-State cases where it was possible for the public or specific interest groups to obtain access to documents used in the arbitral proceedings, or to be present at hearings.

Question 2: Amicus curiae briefs or other interventions

No.

Question 3: Provision in treaties on transparency or publicity

No.

Question 4: Provision in treaties on third parties' involvement

No.

Question 5: Any other comment

No.

### 4. Australia

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

Australia has not been a party to an investor-State arbitration.

Question 2: Amicus curiae briefs or other interventions

Australia has not been a party to an investor-State arbitration.

Question 3: Provision in treaties on transparency or publicity

The Chile-Australia FTA contains investor-State dispute settlement provisions (“ISDS”), which provide for a significant degree of transparency in investor-State arbitration (see article 10.22). The Chile-Australia FTA has been signed by the parties but has not yet entered into force. The text of the Chile FTA is publicly available through the website of the Department of Foreign Affairs and Trade: [http://www.dfat.gov.au/geo/chile/fta/FTA\\_Text\\_10.html](http://www.dfat.gov.au/geo/chile/fta/FTA_Text_10.html).<sup>3</sup>

Question 4: Provision in treaties on third parties’ involvement

The ISDS provisions in the Chile-Australia FTA allow the arbitral tribunal to accept written submissions from third parties that may assist the tribunal in evaluating the submissions and arguments of the disputing parties (see article 10.20.2).

Question 5: Any other comment

Australia supports transparency in treaty-based investor-State arbitration and welcomes the Commission's decision to undertake work on the issue as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules.

## 5. Bahrain

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

Bahrain has to date had no treaty-based investor-State arbitration cases involving instances of publicity or transparency of the arbitral proceedings.

Question 2: Amicus curiae briefs or other interventions

There are no examples of cases in Bahrain where third parties have presented statements in the course of treaty-based investment arbitration or have otherwise intervened in the proceedings.

Question 3: Provision in treaties on transparency or publicity

There is no provision concerning transparency or publicity regarding treaty-based investment arbitration in bilateral or multilateral treaties or agreements entered into by Bahrain.

Question 4: Provision in treaties on third parties’ involvement

There is no provision for third parties to become involved in treaty-based investment arbitration in bilateral or multilateral treaties or agreements entered into by Bahrain.

<sup>3</sup> Note by the Secretariat: A copy of the Chile-Australia Free Trade Agreement was attached to the reply by the Government of Australia. Relevant excerpts can be found in part II of document A/CN.9/WG.II/WP.160 and its addendum.



## Question 5: Any other comment

Bahrain is a party to a number of important bilateral investment treaties which are expressions of national economic policy to encourage international investment. These treaties are negotiated carefully, one by one, in light of the nature and development of our relations with individual States. Some of them open the possibility of arbitration under the UNCITRAL Rules.

Bahrain also pursues a strong policy of promoting international commercial arbitration, and the UNCITRAL Rules in particular.

If the UNCITRAL Rules were to incorporate provisions concerning transparency, publicity, and third party interventions, or to include them in a generic annex, this would be a departure from the nature of the Rules, which have never purported to establish matters of national policy. This would be prejudicial both to Bahrain's treaty practice and to our policy of promoting UNCITRAL arbitration arising generally from contracts:

(A) Our bilateral treaties are negotiated individually with regard to relations with individual States. If the UNCITRAL Rules contained provisions on such sensitive matters, Bahrain would be unlikely to refer to them. It would regret the loss of that valuable option.

(B) Contract-based arbitrations may also involve investor-State relations and indeed treaty-based arbitrations often involve contracts. This raises definitional issues of some complexity before one can even determine the scope of any proposed rules, depending on how individual States have chosen to organize the public sector. If the UNCITRAL Rules were to depart from their established framework and purport to legislate such a definition for worldwide use, the consequences would be:

- (i) possible conflict with national law,
- (ii) unpredictability, and
- (iii) a regrettable disinclination to refer to the UNCITRAL Rules.

Accordingly, in order to prevent the gradual irrelevance and desuetude of the UNCITRAL Rules, Bahrain would resist any attempt to incorporate transparency provisions into the UNCITRAL Rules, or in a generic annex to them, but would welcome the opportunity (but only after the new Rules have been finally adopted) to consider model clauses for possible use in individual instruments.

## 6. Belarus

[Original: Russian]

Courts of arbitration in the Republic of Belarus have heard no investor-State arbitration cases, whether arising out of an investment agreement (article 45 of the Investment Code) or a concession agreement (article 50 of the Investment Code) or having some other basis.

It may, however, be noted that disputes involving foreign investors, which are heard in accordance with the procedure laid down in international agreements and national legislation, generally relate to cases arising out of normal economic investment

activity under actions brought against supervisory bodies or against persons engaged in commercial activity.

In bilateral international investment protection agreements, the parties generally agree to settle disputes by conciliation or arbitration through the International Centre for Settlement of Investment Disputes, in accordance with the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Under international treaties, such disputes may be referred to any arbitration tribunal, including ad hoc tribunals set up to deal with a specific dispute. This is the position as regards agreements with Austria, the United Kingdom, Latvia, the Republic of Korea, Israel, Finland, Viet Nam, the United States, Turkey, Romania and other countries. Other arbitration centres may also be designated as having jurisdiction. Thus the agreement with Turkey designates the Court of Arbitration of the International Chamber of Commerce (ICC) as also having jurisdiction in investment disputes. In addition, where disputes arise, the parties may engage in the conciliation procedure laid down in the UNCITRAL Arbitration Rules or the ICC Rules of Arbitration.

An investment dispute may be heard in a commercial court in Belarus on the basis of an action by an investor who prefers such a court to an international arbitration body.

With regard to the procedural rules governing the procedure for hearings in arbitration and commercial courts in Belarus involving investment and other disputes, it should be noted that the legal procedure is based on the principles of openness and transparency. The legal rules governing the activities of foreign investors are freely available, while bilateral international treaties on investment protection containing provisions on the arbitral settlement of investor-State disputes are published as official documents and are available to interested parties.

## (A/CN.9/WG.II/WP.159/Add.1) (Original: Chinese/English/French)

**Note by the Secretariat on settlement of commercial disputes:  
Transparency in treaty-based investor-State arbitration — Compilation of  
comments by Governments, submitted to the Working Group on Arbitration and  
Conciliation at its fifty-third session**

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**III. Comments received from Governments on transparency  
in treaty-based investor-State arbitration**

**1. Canada**

[Original: English/French]

1. All of the documents referred to in Canada's response below are publicly available on the Internet.<sup>1</sup>

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

2. Canada is committed to ensuring that any treaty-based investor-State arbitration in which it is involved is as transparent and open to the public as possible. As it clearly expressed in its Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations in October 2003, Canada makes every effort to ensure "that hearings in Chapter Eleven disputes [are] open to the public, except [as needed] to ensure the protection of confidential information, including business confidential information."

3. As such, in all of the cases in which it is a party, whether under the UNCITRAL Arbitration Rules, or the ICSID Additional Facility Rules,<sup>2</sup>

<sup>1</sup> Note by the Secretariat: A "Book of Documents" containing documents referred to by the Government of Canada in its reply was attached to the comments received from the Government of Canada. Relevant excerpts can be found in part II of document A/CN.9/WG.II/WP.160 and its addendum.

<sup>2</sup> The investor-State dispute settlement provisions in Canada's investment treaties also typically provide for the submission of disputes pursuant to the ICSID Convention, provided that both the

Canada strives to ensure (a) that the public is given notice of the existence of the arbitration; (b) that documents submitted to the tribunal or issued by it are publicly available; (c) that hearings are open to the public; and (d) that confidential or privileged information is adequately protected.

4. In total, 10 investor-State arbitrations have been submitted against Canada pursuant to Chapter 11 of NAFTA. Four of those arbitrations have been concluded<sup>3</sup> and the remaining six are currently pending at various stages.<sup>4</sup> Canada has also received an additional 14 Notices of Intent to Submit a Claim to Arbitration pursuant to Chapter 11 of NAFTA. Seven of those are inactive or have been formally withdrawn.<sup>5</sup> In the remaining seven, the investor has yet to submit a Notice of Arbitration.<sup>6</sup>

5. Since approximately 2000, Canada has provided public notice of the existence of all of the above matters via the website of the Department of Foreign Affairs and International Trade.<sup>7</sup> This website contains a page listing all of the above matters and providing a link (titled “Archive of Legal Documents”) to relevant documents and information for each case.

6. The specific documents which Canada is permitted to publish on its website vary pursuant to each Tribunal’s Procedural Orders. In the earlier arbitrations brought against Canada pursuant to NAFTA, such as *Ethyl Corporation* (1997), *S.D. Myers* (1998), and *Pope and Talbot* (1999), the Tribunals permitted, subject to the protection of confidential information, the publication of the constitutive pleadings, including the Notice of Intent, Notice of Arbitration, Statement of Claim and Statement of Defence, as well as any decisions or awards of the Tribunal. In addition, in *Pope and Talbot*, following the submissions on damages, the Tribunal issued a revised order reflecting amendments agreed by the parties, which permitted the publication of the

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State in the dispute and the State of the investor are party to the ICSID Convention. At this time, Canada has signed but not yet ratified the ICSID Convention.

<sup>3</sup> *Ethyl Corporation v. Government of Canada*; *Pope & Talbot Inc. v. Government of Canada*; *S.D. Myers Inc. v. Government of Canada*; and *United Parcel Service of America, Inc. (UPS) v. Government of Canada*.

<sup>4</sup> *Chemtura Corp. v. Government of Canada*; *Clayton/Bilcon v. Government of Canada*; *GL Farms LLC and Carl Adams v. Government of Canada*; *Merrill & Ring Forestry L.P. v. Government of Canada*; *Mobil Investments Inc. and Murphy Oil Corporation v. Government of Canada*; and *V.G. Gallo v. Government of Canada*.

<sup>5</sup> *Albert Connolly v. Government of Canada*; *Contractual Obligation Productions, LLC, Charles Robert Underwood, Carl Paolino v. Government of Canada*; *Ketcham Investments, Inc. and Tysa Investments, Inc. v. Government of Canada*; *Peter Nikola Pesic v. Government of Canada*; *Trammer Crow Company v. Government of Canada*; *Signa S.A. de C.V. v. Government of Canada*; *Sun Belt Water, Inc. v. Government of Canada*.

<sup>6</sup> *Centurion Health Corporation v. Government of Canada*; “*David Bishop*” *v. Government of Canada*; *Dow AgroSciences LLC v. Government of Canada*; *Georgia Basin Holdings LLC v. Government of Canada*; *Gottlieb Investors Group v. Government of Canada*; *Janet Marie Broussard Shiell, William Shiell IV, and William Shiell V v. The Government of Canada*; and *William Jay Greiner and Malbaie River Outfitters Inc. v. Government of Canada*.

<sup>7</sup> See [www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/gov.aspx?lang=en](http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/gov.aspx?lang=en). Canada has yet to have an arbitration brought against it pursuant to any other of its investment treaties, but should such an arbitration be brought, it would likely publish relevant information and documents, to the extent permitted, on a similar website.

written and oral submissions of the parties and all the evidence submitted by the parties.

7. In UPS, the most recent NAFTA arbitration concluded against Canada, the Tribunal, in an April 2003 Procedural Order, permitted the public disclosure by either disputing party of the

[p]leadings and submissions of any disputing party or NAFTA Party, together with their appendices and attached exhibits, including the notice of intent, notice of arbitration, amended statement of claim, statement of defence, memorials, affidavits, responses to tribunal questions, transcripts of public hearings, correspondence to or from the Tribunal, and any awards, including procedural orders, rulings, preliminary and final awards.

In order to ensure adequate protection of confidential information, each party was given the opportunity to designate information as confidential or restricted and to produce a public version of the submission with that information redacted.

8. Subsequent to the UPS Order, NAFTA Tribunals have continued to further open investor-State arbitrations to the public. In Chemtura, the Tribunal followed the approach of UPS and ordered that either party could publicly disclose any pleadings or submissions to the Tribunal, together with any appendices thereto, all correspondence to or from the Tribunal, transcripts of public hearings, and any awards including orders, rulings and preliminary and final awards. In Merrill & Ring Forestry L.P., the Tribunal ordered, in addition to the above, that hearings be open to the public unless necessary to protect confidential business information. Similarly, in V.G. Gallo, the Tribunal left open the possibility of the disclosure of hearing transcripts despite the fact that the investor elected to proceed under the UNCITRAL Rules, and elected to have in camera hearings. In all of these cases, the Tribunal ensured that confidential information was protected by requiring that each party file a public version of all of its submissions with all information claimed to be confidential redacted.

9. Canada's experience over the past decade of NAFTA arbitrations is clear evidence that public and transparent investor-State arbitration proceedings are possible without delaying the proceedings, unduly burdening the parties or the process, or imposing excessive costs on the parties. Further, Canada's experience shows that transparency in treaty-based investor-State arbitration can be achieved without creating a danger that confidential business information will be disclosed. Indeed, Tribunals have become increasingly adept at ensuring that proceedings are transparent while at the same time ensuring that this transparency does not interfere with an orderly proceeding or jeopardize confidential or privileged information.

#### Question 2: Amicus curiae briefs or other interventions

10. In two arbitrations brought against Canada pursuant to Chapter 11 of NAFTA, amicus curiae submissions by public interest organizations have been submitted to the Tribunal.

11. In UPS, the Canadian Union of Postal Workers and the Council of Canadians, and subsequently the US Chamber of Commerce, petitioned the Tribunal for the right to participate in the arbitration, either as parties or as *amicus curiae*. The Tribunal decided that it had the power to accept *amicus curiae* submissions, but would do so only to the extent that it would not be unduly burdensome for the parties and would not unnecessarily complicate matters. In particular, the Tribunal explained that *amicus curiae* briefs were to provide assistance beyond that provided by the disputing parties and that they were to relate only to issues already raised by the disputing parties. Further, the Tribunal placed a number of important limits on the participation of *amicus curiae*, including that they could make only written submissions of not more than 20 pages in length, they could not call witness, and their submissions could only concern the merits of the dispute.

12. Subsequent to the decisions of the Tribunal in UPS described above, the NAFTA Free Trade Commission (the “FTC”), the body charged with interpretation of NAFTA, issued a Statement on Non-Disputing Party participation. That Statement provided guidelines for Tribunal’s considering *amicus curiae* briefs in Chapter 11 arbitrations similar to those established in UPS: submissions are to be written, no longer than 20 pages and concern issues within the scope of the arbitration.

13. In Merrill & Ring Forestry, the Communication, Energy and Paperworkers Union of Canada, the United Steelworkers and the British Columbia Federation of Labour all filed petitions to submit *amicus curiae* briefs. The Tribunal expressly noted its discretion to accept *amicus curiae* submissions and requested that the petitioners file a formal application, along with their submission, in the form required by the 2003 Statement of the Free Trade Commission on Non-Disputing Party Participation. Petitioners filed their application and *amicus curiae* submissions on September 26, 2008. The Tribunal is currently considering the request.

14. Canada’s experience with *amicus curiae* submissions establishes that public participation in treaty-based investor-State arbitration can be effectively managed by a Tribunal to ensure that it benefits rather than burdens the process.

15. It should also be noted that, in addition to the ability of third parties to participate as *amicus curiae*, Article 1128 of NAFTA (and similar provisions in Canada’s other investment treaties) expressly permits the non-disputing States to make submissions on matters of treaty interpretation. As such submissions are expressly contemplated by treaty, they are not *amicus curiae* submissions. Such submissions are, however, common. In each of the Chapter 11 arbitrations to which Canada has been a party, there has been at least one such submission by either the United States or Mexico.

#### Question 3: Provision in treaties on transparency or publicity

16. Canada’s Foreign Investment Promotion and Protection Agreements (FIPAs) and Free Trade Agreements (FTAs) contain provisions protecting and promoting investment. Over time, these treaties have included increasingly explicit provisions concerning the transparency of treaty-based investor-State arbitration.

17. Canada now has in force 23 FIPAs. In 2003 and 2004, Canada revised its FIPA model to update and modernize it with the goal of, in particular, bringing it into line with Canada's experience in treaty-based investor-State arbitration.

18. With respect to dispute settlement, the model was revised to promote transparency. Article 38 of the updated model requires that all documents submitted to or issued by the Tribunal, including hearing transcripts, be made public subject to redaction for confidential, privileged or third party business information. Further, all hearings are to be open to the public, subject only to closure when necessary to protect confidential business, privileged or third party information.

19. Specifically, Canada's FIPA model, Article 38: Public Access to Hearings and Documents, provides:

1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera.
2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.
3. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.
4. Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.
5. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.
6. The Parties may share with officials of their respective federal and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.
7. As provided under Article 10 (4) and (5), the Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.
8. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its

law on access to information so as to protect information designated confidential by the Tribunal.

20. Canada's updated FIPA model was used for the FIPA signed with Peru in 2007, and is the basis for Canada's position in all of its FIPA negotiations initiated since 2003. Currently, Canada is involved in the negotiation of 7 FIPAs,<sup>8</sup> with 2 additional negotiations having just concluded.<sup>9</sup>

21. In addition to its FIPAs, Canada has four FTAs in force.<sup>10</sup> In 2008, it signed three more.<sup>11</sup> Of those FTAs, NAFTA, which came into force nearly 15 years ago, is the oldest agreement. Chapter 11 of NAFTA provides for the settlement of investor-State disputes by arbitration. Article 1127 of NAFTA requires that the non-disputing NAFTA Parties receive notice of any arbitration and that they receive copies of all pleadings. Further, Article 1129 provides that the non-disputing NAFTA parties also have the right to receive all of the evidence tendered to the Tribunal as well as the written arguments of the disputing parties.

22. NAFTA also contains additional provisions providing for further publicity. Annex 1137.4 provides that "either Canada or a disputing investor that is a party to the arbitration may make an award public." Moreover, in 2001, the FTC released binding Notes of Interpretation which affirmed the commitment of the NAFTA governments to the principle of transparency generally and created a presumption of public disclosure and openness. In 2003, Canada and the United States both issued Statements supporting open hearings in NAFTA Arbitration. In 2004, the FTC again affirmed the NAFTA parties' commitment to transparency and welcomed Mexico's support of open hearings.

23. The above-described NAFTA approach towards transparency in investor-State arbitration was followed, including the Notes of Interpretation, in Canada's FTA with Chile, in force as of July 5, 1997.

24. In Canada's more recent FTAs, the model language of the FIPA has been used as the basis for negotiations concerning transparency in investor-State arbitration. For example, in the Investment chapter of the FTA with Peru, signed earlier this year, on May 29, 2008, Article 835: Public Access to Hearings and Documents, provides:

1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, the Tribunal may hold portions of hearings in camera.
2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.

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<sup>8</sup> United Republic of Tanzania, Indonesia, Madagascar, Viet Nam, Mongolia, China and Kuwait.

<sup>9</sup> India and Jordan.

<sup>10</sup> United States of America/Mexico (NAFTA), Costa Rica, Chile and Israel.

<sup>11</sup> Colombia, Peru, the European Free Trade Association.



3. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.
  4. Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.
  5. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.
  6. The Parties may share with officials of their respective national and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.
  7. As provided under Article 2202 (Exceptions — National Security) and Article 2204 (Exceptions — Disclosure of Information), the Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting the deliberative and policy-making processes of the executive branch of government at the cabinet level, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.
  8. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.
25. Similarly, the Investment chapter of the FTA Canada signed with Colombia just over one month ago, on November 21, 2008, provides in Article 830: Public Access to Hearings and Documents that:
1. Any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information. All other documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information. A disputing party providing information that it claims is confidential has the burden of designating it as confidential.
  2. Hearings held under this Section shall be open to the public. The Tribunal may hold portions of hearings in camera to the extent necessary to ensure the protection of confidential information. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.

3. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.

4. The Parties may share with officials of their respective national and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.

5. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.

6. Nothing in this Section requires a disputing Party to disclose, furnish or allow access to information that it may withhold in accordance with Article 2202 (Exceptions — National Security) or Article 2205 (Exceptions — Disclosure of Information).

26. Canada's recent experience with drafting and negotiating treaty provisions providing for transparency in investor-State arbitration establishes that such provisions need not be complicated. Transparency in treaty-based investor-State arbitration can be provided for in a relatively simple manner consisting of only several paragraphs.

#### Question 4: Provision in treaties on third parties' involvement

27. Canada's more recent FIPAs and FTAs specifically provide for the participation of third parties as *amicus curiae*. NAFTA does not address submissions by such third parties in the text of the treaty. However, in 2003, the FTC issued a statement clarifying that nothing in NAFTA prohibited submissions by non-parties as *amicus curiae*, and that the decision whether or not to accept any such submission was a matter within the Tribunal's discretion. The FTC statement also provided detailed procedural guidelines for the submissions of any *amicus curiae* materials.

28. Canada's model FIPA provides that third parties are permitted to submit *amicus curiae* briefs in investor-State arbitrations. Specifically, Article 39, Submissions by a Non-Disputing Party, of the updated model FIPA provides:

1. Any non-disputing party that is a person of a Party, or has a significant presence in the territory of a Party, that wishes to file a written submission with a Tribunal (the "applicant") shall apply for leave from the Tribunal to file such a submission, in accordance with Annex C.39. The applicant shall attach the submission to the application.

2. The applicant shall serve the application for leave to file a non-disputing party submission and the submission on all disputing parties and the Tribunal.

3. The Tribunal shall set an appropriate date for the disputing parties to comment on the application for leave to file a non-disputing party submission.
4. In determining whether to grant leave to file a non-disputing party submission, the Tribunal shall consider, among other things, the extent to which:
  - (a) The non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
  - (b) The non-disputing party submission would address a matter within the scope of the dispute;
  - (c) The non-disputing party has a significant interest in the arbitration; and
  - (d) There is a public interest in the subject-matter of the arbitration.
5. The Tribunal shall ensure that:
  - (a) Any non-disputing party submission does not disrupt the proceedings; and
  - (b) Neither disputing party is unduly burdened or unfairly prejudiced by such submissions.
6. The Tribunal shall decide whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal shall set an appropriate date for the disputing parties to respond in writing to the non-disputing party submission. By that date, the non-disputing Party may, pursuant to Article 34 (Participation by the Non-Disputing Party), address any issues of interpretation of this Agreement presented in the non-disputing party submission.
7. The Tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration.
8. Access to hearings and documents by non-disputing parties that file applications under these procedures shall be governed by the provisions pertaining to public access to hearings and documents under Article 38 (Public Access to Hearings and Documents).
29. This provision was incorporated into Canada's FIPA with Peru as Article 39 of that FIPA.
30. It has also been incorporated into certain FTAs. For example, in Canada's FTA with Peru, Article 836: Submissions by Other Persons, provides:
  1. Any person, other than a disputing party, that wishes to file a written submission with a Tribunal (the "applicant") shall apply for leave

from the Tribunal to file such a submission, in accordance with Annex 836.1. The applicant shall attach the submission to the application.

2. The applicant shall serve its application for leave to file a submission, as well as its submission, on all disputing parties and the Tribunal.

3. The Tribunal shall set an appropriate date for the disputing parties to comment on the application for leave.

4. In determining whether to grant the leave the Tribunal shall consider, among other things, the extent to which:

(a) The applicant's submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) The applicant's submission would address a matter within the scope of the dispute;

(c) The applicant has a significant interest in the arbitration; and

(d) There is a public interest in the subject-matter of the arbitration.

5. The Tribunal shall ensure that:

(a) Any applicant's submission does not disrupt the proceedings; and

(b) Neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

6. The Tribunal shall decide whether to grant leave to an applicant to file a submission. If the Tribunal grants leave, it shall set an appropriate date for the disputing parties to respond in writing to the submission. By that date, the non-disputing Party may, pursuant to Article 832, address any issues of interpretation of this Agreement presented in the submission.

7. The Tribunal that grants leave to file a submission to an applicant is not required to address the submission at any point in the arbitration, nor is the person that files the submission entitled to make further submissions in the arbitration.

8. Access to hearings and documents by persons that file applications under these procedures shall be governed by the provisions pertaining to public access to hearings and documents under Article 835.

31. Canada's FTA with Colombia follows an overall substantively similar approach, though it provides less detail than the FTA with Peru, including with respect to the factors that are to guide the Tribunal in determining whether to accept an *amicus curiae* submission. Specifically, Article 831: Submissions by a Non-Disputing Party, of the FTA with Colombia provides:

1. A Tribunal shall have the authority to consider and accept written submissions from a person or entity that is not a disputing party and that has a significant interest in the arbitration. The Tribunal shall ensure that any non-disputing party submission does not disrupt the proceedings and that neither disputing party is unduly burdened or unfairly prejudiced by it.

2. An application to the Tribunal for leave to file a non-disputing party submission, and the filing of a submission, if allowed by the Tribunal, shall be made in accordance with Annex 831.

32. Similar to Canada's experience drafting and negotiating provisions to make investor-State arbitration transparent, Canada's experience also shows that provisions allowing for public participation in investor-State arbitration can be drafted without unnecessary complication.

Question 5: Any other comment

33. Canada strives to make transparency in investor-State arbitration a foundational principle of any treaties into which it enters and an indispensable part of any arbitration in which it is involved. In all of its practices, Canada seeks to achieve the greatest openness to the public possible, while recognizing the legitimate needs of the parties to protect certain types of information and to proceed to resolve disputes quickly and efficiently.

34. Canada believes that UNCITRAL must somehow provide for transparency in investor-State arbitration, and that it must do so as soon as possible. These views have been clearly expressed in Canada's previous submissions to UNCITRAL, particularly in UN Doc. A/CN.9/662, and need not be repeated here.

35. Canada's support for transparency in investor-State arbitration is borne of principle, but shaped and guided by experience — experience both drafting treaties based on the principles of open and transparent investor-State arbitration and in participating in investor-State arbitrations governed by such principles. Canada's experience makes it clear that increased openness and transparency is a significant benefit and, if effectively managed, imposes little cost or burden on either the process or the parties.

## 2. China

[Original: Chinese]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

China acceded to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States in 1992, and has the obligation under the treaty to solve the above-mentioned disputes in

accordance with the Convention. However, so far there has been no treaty-based arbitration of investment disputes, and therefore no such cases in evidence to publicity or transparency in respect of treaty-based investor-State arbitration proceedings.

Question 2: Amicus curiae briefs or other interventions

There has been no case of treaty-based investor-State arbitration in China where third parties have presented their statements or become involved in the proceedings.

Question 3: Provision in treaties on transparency or publicity

There is no provision on transparency or publicity regarding treaty-based investment arbitration in bilateral or multi-lateral treaties entered into by China.

Question 4: Provision in treaties on third parties' involvement

There is no provision on third-party involvement in treaty-based investment arbitration in bilateral or multi-lateral treaties entered into by China.

Question 5: Any other comment

There is currently no such practice of treaty-based investor-State arbitration in China. Given the confidentiality of arbitration, we do not consider it appropriate to impose provisions of publicity and transparency on treaty-based settlement of investor-State investment disputes.

### 3. Czech Republic

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

There is only one case where information regarding the existence of the arbitral proceedings between the Czech Republic and a foreign investor is publicly available — the arbitration between Phoenix Action Ltd. and the Czech Republic under the Rules of Arbitration of the International Centre for Settlement of Investment (ICSID Case No. ARJB/06/5). With respect to the treaty-based arbitration between a foreign investor and the Czech Republic, there is no example of the arbitral proceedings where the public or specific interest groups would have possibility to obtain access to documents used in the proceedings or to be present at hearings.

Question 2: Amicus curiae briefs or other interventions

In the Czech Republic, there are no examples of cases where third parties have presented statements in the course of treaty-based investment arbitration or have otherwise intervened in the proceedings.

Question 3: Provision in treaties on transparency or publicity

In the bilateral investment treaties concluded by the Czech Republic, there are no provisions concerning transparency or publicity in relation to the treaty-based investment arbitration.

Question 4: Provision in treaties on third parties' involvement

In the bilateral investment treaties concluded by the Czech Republic, there are no provisions for third parties to become involved in treaty-based investment arbitration.

Question 5: Any other comment

With respect to the current Czech Republic's practice regarding publicity or transparency in treaty-based investment arbitration, it is possible to add that the Czech State has published several arbitral awards on the websites of the Ministry of Finance (e.g. final award in the UNCITRAL arbitration between Ronald S. Lauder and the Czech Republic, partial award in the UNCITRAL arbitration between CME Czech Republic B.V. and the Czech Republic, final award in the UNCITRAL arbitration between SALUKA Investments B.V. and the Czech Republic). In accordance with the principle of confidentiality, the publication of these awards is possible only with the approval of the other party in the dispute.

#### 4. Denmark

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

No. There have been no such cases in Denmark to our knowledge.

Question 2: Amicus curiae briefs or other interventions

Not to our knowledge.

Question 3: Provision in treaties on transparency or publicity

No.

Question 4: Provision in treaties on third parties' involvement

The Danish Bilateral Investment Treaties (BIT) do not have any special provision for third parties to become involved in arbitration proceedings.

The Danish BIT contain provisions relating to disputes between a Contracting Party and an investor and disputes between the Contracting Parties.

Question 5: Any other comment

No comments because we are not aware that Denmark has been involved in such cases.

**(A/CN.9/WG.II/WP.159/Add.2) (Original: Arabic/English/French/Spanish)****Note by the Secretariat on settlement of commercial disputes: Transparency in treaty-based investor-State arbitration — Compilation of comments by Governments, submitted to the Working Group on Arbitration and Conciliation at its fifty-third session****ADDENDUM****CONTENTS***Chapter*

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**III. Comments received from Governments on transparency in treaty-based investor-State arbitration****1. Dominican Republic**

[Original: Spanish]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

So far only the case between the Dominican Republic and TCW has been made public.

Question 2: Amicus curiae briefs or other interventions

No.

Question 3: Provision in treaties on transparency or publicity

Articles 10.14 and 10.21 of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) contain provisions relating to



transparency. Also, Article IX of the free trade agreement between the Dominican Republic and the Caribbean Community (CARICOM); Article 9.12 of the free trade treaty between Central America and the Dominican Republic; Article XI of the bilateral agreement on investments between the Dominican Republic and the Netherlands; Article 15 of the bilateral agreement between the Dominican Republic and Finland; Article XIII of the bilateral agreement between Chile and the Dominican Republic; Article IX of the bilateral agreement between the Dominican Republic and Argentina; Article XI of the bilateral agreement between Switzerland and the Dominican Republic; Article XI of the bilateral agreement between the Dominican Republic and Panama; and Article 14 of the bilateral agreement between Ecuador and the Dominican Republic.

Question 4: Provision in treaties on third parties' involvement

Article 10.20, para. 3, of CAFTA-DR.

Question 5: Any other comment

All procedures relating to the resolution of investor-State disputes should be conducted in a transparent manner.

## 2. El Salvador

[Original: Spanish]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

There was investor-State arbitration pursuant to a request that the Spanish company Inceysa Vallisoletana submitted to the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank, Washington D.C., citing the treaty on reciprocal investment protection concluded between Spain and El Salvador (ICSID Case No. ARB/03/26). Ultimately, the tribunal concluded that an investment made in a manner contrary to the laws of El Salvador was not protected by the treaty and therefore did not fall within the tribunal's competence. It stated that the activities of the investor had run counter to those general principles, concluding that an investment made illegally could not benefit from the protection afforded by the treaty concluded between Spain and El Salvador.

In El Salvador, this case was widely publicized in the press and on television.

Question 2: Amicus curiae briefs or other interventions

So far there have been no known cases of a third party presenting statements in the course of arbitral proceedings.

Question 3: Provision in treaties on transparency or publicity

There are transparency provisions in the free trade treaties concluded by our country. For example, Article 10.21 in Chapter Ten (Investment) of the Dominican Republic-Central America-United States Free Trade Agreement contains provisions relating to transparency in investment arbitration proceedings. In the other free trade treaties concluded by El Salvador there is a specific chapter regarding transparency that applies across the board to all

other chapters, so that the question of transparency in relation to investment is covered.

As regards the request for treaty texts, they are very voluminous, but they can be consulted on the website of the Ministry for the Economy ([www.minec.gob.sv](http://www.minec.gob.sv)).

In addition, there are reciprocal investment protection agreements (APRIs) concluded by El Salvador that, although not specifically regulating the arbitral proceedings, contain a clause providing that, in the event of arbitration, it shall be conducted in accordance with the UNCITRAL Model Law and/or the norms that it establishes.

**Question 4: Provision in treaties on third parties' involvement**

As regards the participation of third parties in investment arbitration, the issue of the involvement and rights of "a Party" that is not a disputing party is covered in the free trade treaties concluded by El Salvador except for the treaty concluded with Chile. In the case of the Dominican Republic-Central America-United States Free Trade Agreement, it is covered in Article 10.20, which provides for the acceptance and consideration of "amicus curiae submissions from a person or entity that is not a disputing party".

**Question 5: Any other comment**

Owing to our very limited experience in the matter, we have no additional comments to make.

**3. Finland**

[Original: English]

**Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings**

No. In fact, there are no such arbitration cases in Finland.

**Question 2: Amicus curiae briefs or other interventions**

No.

**Question 3: Provision in treaties on transparency or publicity**

No.

**Question 4: Provision in treaties on third parties' involvement**

No.

**Question 5: Any other comment**

No. As already mentioned, treaty based investor-State arbitration does not, in practice, involve Finland.

#### 4. France

[Original: French]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

There has, to date, been no arbitration case against France based on investment protection treaties.

There have, however, been at least three cases against other States, where the plaintiffs were based in Paris and the decisions were published:

- Consortium RFCC v. Kingdom of Morocco (International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/00/6)
- Champion Trading Company and Ameritrade International, Inc., v. Arab Republic of Egypt (ICSID Case No. ARB/02/9)
- Parkerings-Campagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8)

It has also frequently been the case that ICSID arbitration proceedings or at least the first sitting, and sometimes hearings also, have been held at the headquarters of the World Bank in Paris.

Question 2: Amicus curiae briefs or other interventions

There have been no cases, to our knowledge, of third parties having presented statements in the course of arbitration or otherwise intervened in the proceedings. Such practices are, however, of very recent date.

Question 3: Provision in treaties on transparency or publicity —

Question 4: Provision in treaties on third parties' involvement

Bilateral agreements entered into by France do not themselves contain provisions concerning publicity or transparency but refer to ICSID Arbitration Rules. France is party to the Washington Convention, which established ICSID, and, where the other State party is not party to the Washington Convention, a bilateral treaty refers to the UNCITRAL Arbitration Rules. The ICSID Arbitration Rules, as amended in 2006, contain provisions relating to transparency and publicity. The 2006 Rules also contain provisions relating to participation by third parties.

It should be noted that France expressed some reservations concerning the amendments to the ICSID Arbitration Rules made in 2006.

Question 5: Any other comment

The arbitration system established by the 1965 Washington Convention differs markedly from classic arbitration. Although it recognizes the authority of the traditional rules of international commercial arbitration, it also uses procedures that are of a more pronounced judicial nature. ICSID also gives the arbitrator powers of initiative and discretion, exceeding those available under ordinary arbitration law.

The justification given for this is the specific nature of investment arbitration. France nonetheless remains attached to the basic principles of arbitration,

including the consensual approach. Unlike a national court, an arbitration tribunal owes its authority only to the common will of the parties to the case. Where there is no such will, no arbitration is possible.

It may therefore seem appropriate to establish rules for publicity or transparency in investment arbitration, but this should not be allowed to detract from the principle that the will of the parties is paramount. To be more precise:

1. With regard to access to hearings by third parties:

The parties should be able to reserve the right to object.

2. With regard to the use of *amicus curiae*:

This procedure can be useful for the parties and for the judge, if the intervention of the *amicus curiae* clarifies the subject under discussion and thus contributes to the quality of the arbitration process and the settlement of the case. The procedure is, however, alien to the French legal tradition. It may, moreover, give rise to abuse and inequalities. Its use should therefore be strictly limited. The intervention of *amicus curiae* may actually extend a dispute to people not parties to the case. Such an intervention will also entail additional costs, which may be borne by both parties, even though only one party will benefit from the submissions concerned.

It would thus be appropriate for the filing of written submissions to be restricted and not left to the sole discretion of the tribunal. Thus, for example:

- The conditions for admissibility should be spelt out;
- There should be an obligation on the tribunal to maintain the progress of proceedings and to protect the parties;
- Third parties should justify the reasons for the filing of their submissions, the relevance of the issues contained in their submissions and their interest in the case, in order to avoid overloading the proceedings with an excessive number of irrelevant written submissions;
- A time limit should be set for the filing of submissions;
- The scope of submissions should be set out in detail: third parties should in no circumstances submit evidence, since this would distort the proceedings and change the number of protagonists;
- Entitlement to interventions should be restricted to private individuals: a State should not be permitted to file written submissions, for fear of upsetting the balance of forces between the parties and putting the arbitration tribunal in the position of passing judgement on a dispute between States.

Lastly, the parties should, in all cases, be entitled to object to such submissions.

3. With regard to publicity:

It is in the interests of States and investors to have at their disposal information on the results of a case and to know the legal reasoning adopted

by arbitration tribunals, if only to avoid subsequent litigation. The principle of agreement between the parties on the publication of decisions in full, however, should not be compromised.

## 5. Germany

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

We are not aware of any such cases. To the best of our knowledge, to date the parties have published their written observations on the ICSID website in only one ICSID arbitral proceeding in Germany. The proceeding in question was an arbitral proceeding in Frankfurt am Main for distribution of proceeds from the sale of 18 tons of valuable antique Chinese porcelain recovered by a British company from the wreck of a ship (“Diana”) which sank in the Strait of Malacca in 1817. However, the jurisdiction of the ICSID Arbitration Court was rejected in that case because the salvage work did not constitute an investment within the meaning of Article 25 of the ICSID Convention (decision of 17 May 2007).

Question 2: Amicus curiae briefs or other interventions

We are not aware of any examples of such cases.

Question 3: Provision in treaties on transparency or publicity

For investment protection treaties, Germany usually uses model contracts that do not contain any express provisions concerning transparency or publicity. However, the model contract does, inter alia, refer to the ICSID rules, which themselves contain relevant provisions (ICSID Arbitration Rule 32 in the version of 10 April 2006).

Question 4: Provision in treaties on third parties’ involvement

The German model contract for investment protection treaties does not contain any provision for third parties to become involved in arbitration. However, the model contract does refer to the ICSID rules, which contain a provision on the presence of third parties (ICSID Arbitration Rule 32 in the version of 10 April 2006).

Question 5: Any other comment

First of all, clarification would be needed as to what exactly is meant by the terms “transparency” and “publicity” in connection with investor-State arbitration.

The question then arises as to what interest exists in additional rules on transparency and publicity and for what reasons such rules could be necessary. Arbitral proceedings are primarily determined by agreement between the parties. This should also be the case for provisions regarding transparency and publicity. Arbitral proceedings in the field of investor-State arbitration also mainly deal with investors’ interests that are worthy of protection. In light of this, a provision on transparency and publicity should be made subject to the consent of the investor. The investor could, for example, be given a right to

choose whether to apply or waive special provisions on transparency and publicity in an arbitral proceeding.

## 6. Greece

[Original: French]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

We are not aware of any arbitration cases between the Greek State and an investor in which the proceedings and record were open or publicized. It has therefore not been possible for third parties not parties to the case or their legal counsel to observe arbitration proceedings or obtain access to the court record. Although the parties may adopt such measures, the provisions governing arbitration under Greek law (arts. 867 ff. of the Greek Code of Civil Procedure and Act No. 2735/1999 on international commercial arbitration, which is based on the UNCITRAL Model Law) are of a non-prescriptive nature. This means that it is open to the parties to agree otherwise; and such measures have never been requested by parties to a dispute, including investors, the main reason being that entrepreneurs do not like disclosing to the public the characteristics or secrets of their economic activities, for fear of helping their rivals.

The record of an arbitration case is therefore not available to third parties, without the consent of the parties, even after it has been deposited with the registry of the district court, according to article 893 of the Code of Civil Procedure; the contents of a file are considered to be personal information, protected under article 9a of the Greek and European Union Constitution (Act No. 2472/1997, which incorporated Directive 95/46/EC of the European Parliament and of the Council).

Question 2: Amicus curiae briefs or other interventions

This is not ruled out, but the consent of the parties must always be obtained. We know of no arbitration cases, for the reasons just given above.

Question 3: Provision in treaties on transparency or publicity

Greece has ratified (under Decree Law No. 608 of 1968, published in the Official Gazette No. 263/1968, Part A) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention), which provides for mediation and arbitration proceedings to be held by the International Centre for the Settlement of Investment Disputes (known under its English acronym as ICSID) as part of the International Bank for Reconstruction and Development. Under article 44 of the Convention, any arbitration proceeding heard by ICSID is conducted, except as the parties otherwise agree, in accordance with the Arbitration Rules currently in force. As far as we know, even the arbitration cases involving the Greek State and foreign investors heard at ICSID have not followed procedures that were open to third parties or transparent.

Question 4: Provision in treaties on third parties' involvement

No, there is no provision whereby third parties can interfere in an arbitration proceeding to which they are not party.

## Question 5: Any other comment

In addition to the 1968 Washington Convention mentioned above, arbitration as a way of settling disputes between the State (Greece) and investors (national or foreign) is also provided for under domestic Greek law, and specifically by Decree Law No. 2687/1953 relating to the protection of foreign capital invested in Greece. This text has additional force — it cannot be repealed by a single law — owing to the fact that it was adopted in implementation of article 112 of the 1952 Greek Constitution and continues to be reinforced by article 107 of the current Constitution, which dates from 2007. Under this legislation, the parties may agree on any ad hoc or institutional arbitration proceeding, according to their preference. No arbitration proceeding relating to investments, however, has opted for publicity or transparency.

In conclusion, we can state that, in virtually every case, publicity and transparency in arbitration proceedings are not the current practice in Greece. The only possible way for a third party to gain knowledge of an arbitration record is to contest a decision by an action for annulment before the Court of Appeal, pleading a specific legal interest (Code of Civil Procedure, arts. 898 and 899).

**7. Iraq**

[Original: Arabic]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

There are no treaty based arbitration cases between Iraq and investors.

Question 2: Amicus curiae briefs or other interventions

There are no examples of cases where third parties have presented statements in the course of treaty-based investment arbitration (such as amicus curiae briefs).

Question 3: Provision in treaties on transparency or publicity

The Law on Investment number 13/2006 stipulates that arbitration is exercised in the following cases:

- (a) At the time a contract is concluded with an investor, agreement may be reached on a conflict resolution mechanism involving arbitration according to Iraqi law or any other internationally recognized entity (m/17/14);
- (b) Any trade conflict arising between the Iraqi National Investment Organization or any non-governmental Iraqi entity and investors who are subject to the Law on Investment number 13/2006 is subject to arbitration if the contract regulating the relationship between the two parties so stipulates (m/27/5).

## 8. Lebanon

[Original: Arabic]

After perusal of the above-mentioned letter, we found out that it contained general questions relating to the transparency of arbitration between investors and States. We wish to refer in this regard to the fact that an inventory was carried out on arbitration agreements between the Lebanese State and other States, in order to find out if such treaties contained answers to the questions raised. We did not find any answers for those questions.

It is worth mentioning, however, that the Lebanese legislator had paid special attention to arbitration. It is provided for in the Lebanese Civil Procedure Law, which is in conformity with the applicable international agreements. The Lebanese law permits resorting to arbitration in matters concerning international trade; it permits, as well, internal arbitration according to article 762 and the subsequent articles.

In international arbitration, the legislator grants freedom in choosing the method of appointing arbitrators and freedom in choosing the law to be applied to settle the dispute. He also recognizes arbitration awards issued abroad or in international arbitration and established the bases for that.

## 9. Luxembourg

[Original: French]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

No, there have been no such cases, to our knowledge.

Question 2: Amicus curiae briefs or other interventions

No, there have been no such cases, to our knowledge.

Question 3: Provision in treaties on transparency or publicity

There is no evidence that any such provision exists.

A reference list of publications since May 1944 in *Le Mémorial*, the official gazette of Luxembourg, containing the words “treaty” and “arbitration” may be consulted via the Internet on the site [www.legilux.public.lu](http://www.legilux.public.lu). In view of the number of publications involved (over 200), a detailed scrutiny of all the relevant provisions could not be made. It may be noted that Luxembourg has ratified the European Convention on International Commercial Arbitration, done at Geneva on 21 April 1961, the Agreement relating to Application of the European Convention on International Commercial Arbitration, done at Paris on 17 December 1962, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958.

Question 4: Provision in treaties on third parties’ involvement

See reply to question 3.

Question 5: Any other comment

We have no comments to make on this topic.



## 10. Mauritius

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

There are no investor-state arbitration cases involving Mauritius as at present.

Question 2: Amicus curiae briefs or other interventions

In light of the answer to query 1 above, there have been no such cases to date.

Question 3: Provision in treaties on transparency or publicity

Mauritius has ratified several bilateral treaties in relation to this subject matter but none of these provide specifically for transparency or publicity of arbitral instances. Further article 25 (4) of the UNCITRAL Arbitration Rules ensures that hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses.

Question 4: Provision in treaties on third parties' involvement

Mauritius has ratified numerous bilateral investment promotion and protection agreements (IPPA) these however do not specifically cater for the participation of third parties to arbitral proceedings.

These IPPA only make provisions for the designation and setting up of the arbitral tribunal. It is common to find, within the body of these IPPA to which Mauritius is a Party, reference to international arbitration bodies such as the ad hoc arbitration instances under the UNCITRAL (Arbitration Rules/Model Law) and the ICSID. The provisions in these respective texts cater to a certain extent for the Intervention of third parties and are therefore part of our law.

For instance in the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) we may find the following relevant provisions:

1. Rule 18 provides for the presence of persons other than the parties themselves. The latter may bring along different representatives or "assistants" namely agents, counsel or advocates. However their "... names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party,"
2. Rule 32 relates to the oral procedure before the tribunal which "shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts".

Rule 32 (2) reads that "Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information."

3. Rule 37 (Submissions of Non-disputing Parties)

(1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.

(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute.

Question 5: Any other comment

It is common ground that confidentiality is one of the most appealing and advantageous traits of arbitral instances. This point of view is still very much present in relation to arbitration procedures although to date Mauritius has not been directly involved in treaty-based investor-state arbitration.

## 11. Norway

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

There have been or are no pending cases involving the State of Norway which provide instances of publicity or transparency of the arbitral proceedings.

Question 2: Amicus curiae briefs or other interventions

There are no examples in Norway where third parties have presented statements in the course of treaty-based investment arbitration.

Question 3: Provision in treaties on transparency or publicity

There is no provision concerning transparency or publicity regarding treaty-based investment arbitration in bilateral or multilateral treaties or agreements entered into by Norway.

Question 4: Provision in treaties on third parties' involvement

There is no provision for third parties to become involved in treaty-based investment arbitration in bilateral or multilateral treaties or agreements entered into by Norway.

Question 5: Any other comment

Norway is positive to the introduction of elements of transparency and the possibility for third parties to become involved in treaty-based arbitration. A draft Model Investment Agreement that was sent to public review on 28 January 2008 contains two provisions in this respect.

## (A/CN.9/WG.II/WP.159/Add.3) (Original: English/French/Russian/Spanish)

**Note by the Secretariat on settlement of commercial disputes: Transparency in treaty-based investor-State arbitration — Compilation of comments by Governments, submitted to the Working Group on Arbitration and Conciliation at its fifty-third session**

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### **III. Comments received from Governments on transparency in treaty-based investor-State arbitration**

#### **1. Poland**

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

All current arbitration cases between private investors and the Republic of Poland are based on the UNCITRAL Arbitration Rules. In these cases the parties did not decide to hold the hearings publicly available (as possible according to art. 25.4 of the Rules). In the closed cases the hearings were held in camera and the exhaustive information or documents used in the arbitral proceedings were not made available to the public. The general information relating to the case, as the parties or the subject, is usually published by the press. Other information is confidential.

Question 2: Amicus curiae briefs or other intervention

There is one example where a third party wished to join the arbitration dispute as amicus curiae. The question of its participation in the proceedings has not been settled yet.

Question 3: Provision in treaties on transparency or publicity

The treaties and agreements entered into by the Republic of Poland do not include the provisions concerning transparency or publicity in the arbitration

disputes. The majority of the treaties and agreements provide that all the cases will be settled by the arbitration tribunal *ad hoc*, established according to the UNCITRAL Arbitration Rules. Only in five treaties there are the provisions concerning the alternative or exclusive jurisdiction of the International Centre for Settlement of International Disputes (ICSID).

Question 4: Provision in treaties on third parties' involvement

There are no such provisions.

Question 5: Any other comment

The current UNCITRAL Arbitration Rules enable the parties (which wish so) to hold the hearings publicly available (art. 25.4) or/and to make public an award (art. 32.5). With the consent of both parties also the institution of *amicus curiae* can be used in the arbitral proceedings.

The possible change of the UNCITRAL Arbitration Rules can cause the risk that the parties will have to follow the revised Rules although the treaty has not been changed. The introduction of the new provisions to the Rules could mean the indirect revision of the treaty without the consent of its parties. It could cause the necessity of the quick renegotiation of the treaties if the parties do not agree with the transparency policy.

## 2. Russian Federation

[Original: Russian]

Under the Foreign Investments in the Russian Federation Act, matters relating to the settlement of disputes raised by foreign investors in connection with their investments and business activities in the Russian Federation may, in accordance with the international agreements entered into by the Russian Federation, be regulated and resolved in an ordinary court or arbitration tribunal or in an international arbitration tribunal.

The international agreements, setting out the conditions and various procedures for the settlement of investment disputes, consist mainly of bilateral intergovernmental agreements on the promotion and mutual protection of capital investments.

These agreements, concluded by the Government of the Russian Federation since June 1992, contain a number of standard provisions regarding the settlement of disputes between one Contracting Party and an investor of the other Contracting Party. The rules on the procedure for dealing with investment disputes in the agreements, also standard in nature, contain no provisions on transparency or publicity in arbitration proceedings or on the participation of third parties in such proceedings. The agreements do, however, contain a provision whereby, if a dispute cannot be settled by negotiation, the investor may opt for it to be referred for consideration to a competent court or arbitration tribunal of the Contracting Party within the territory of which the investments were made, to an *ad hoc* arbitration tribunal in accordance with the UNCITRAL Arbitration Rules, to the International Centre for Settlement of Investment Disputes, to the Arbitration Institute of the Stockholm Centre of Commerce, etc. Thus, the dispute is addressed in accordance with the legislation of a Contracting Party or under the rules of one of the aforementioned institutions.

According to the information available, in the Russian Federation there have been no investor-State arbitration proceedings involving publicity or transparency features and no cases of third-party participation in such proceedings.

This is largely due to the fact that the international agreements entered into by the Russian Federation do not contain provisions on transparency in investment dispute arbitration or on the participation of third parties in such arbitration.

The investment dispute arbitration practices in the Russian Federation show that the principle of confidentiality is observed.

The purpose of the principle of confidentiality, which is one of the basic procedural principles of arbitration, is to protect the parties' trade secrets and business reputations. This principle takes on particular significance in investor-State arbitration, since cases often involve matters of public order and national interests of the State in which the investment was made.

Accordingly, it may be argued that, when, within the UNCITRAL framework, a model law or some other instrument regulating questions relating to arbitration in connection with possible disputes between a State and a foreign investor is being developed, careful consideration should be given to the question of the advisability of replacing (or supplementing) the principle of confidentiality by the principle of transparency in investment dispute arbitration, in view of the importance of maintaining a balance between public and private interests.

### 3. Spain

[Original: Spanish]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

There is no case involving investors and the Spanish State covered by treaties entered into by Spain in which elements of publication or transparency of the proceedings are included.

According to the website of the International Centre for Settlement of Investment Disputes (ICSID), the Kingdom of Spain has been involved in only one case: Emilio Agustín Maffezini (claimant) v. Kingdom of Spain (respondent), Case No. ARB. 97/7, in which, in accordance with Article 48.5 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), the parties agreed to the publication of the decision.

Question 2: Amicus curiae briefs or other intervention

There has been no case in Spain where third parties have made statements during treaty-based arbitration with respect to investments.

Question 3: Provision in treaties on transparency or publicity

In none of the bilateral treaties entered into by Spain is there any provision relating to the transparency or publication of treaty-based arbitration procedures with respect to investments.

Question 4: Provision in treaties on third parties' involvement

In none of the bilateral treaties entered into by Spain is there any provision relating to the participation of third parties in treaty-based arbitration with respect to investments.

#### 4. Tunisia

[Original: French]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

In response to the questionnaire from the United Nations Commission on International Trade Law (UNCITRAL) on arbitration practices in the event of disputes between States and foreign investors, it should be recalled that Tunisia was the first State to sign the 18 March 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the Washington Convention”), which established the arbitration system of the International Centre for Settlement of Investment Disputes (ICSID). Also, it has signed a significant number of agreements, both regional (inter-Arab and covering the Maghreb region) and bilateral (almost 60). Foreign investors from every continent have invested in Tunisia, the traditional ones being from European and Arab countries. Tunisia has, however, had very few disputes with foreign investors. Amicable settlements are preferred, differences of point of view generally being resolved thanks to the understanding attitude of the Tunisian party. The few disputes that have arisen and gone before ICSID or an ad hoc arbitration tribunal are as follows:

A. *Ghaith R. Pharaon v. Tunisia and National Tourism Office*. This case, which was initiated by a Saudi Arabian investor in 1986, was heard by ICSID, where it was registered as case No. ARB/86/1. An arbitration tribunal was set up, but the dispute was settled amicably. The case is mentioned on the ICSID website, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded>. The case was heard on the basis of the provisions of the Washington Convention and the bilateral investment agreement between Tunisia and Saudi Arabia.

Outcome of Proceeding: Settlement agreed by the parties and proceeding discontinued at their request (Order taking note of the discontinuance issued by the Tribunal on November 21, 1988 pursuant to Arbitration Rule 43(1)).

B. *Tanmiah for Management & Marketing Consultancy v. Tunisia and the Organizing Committee of the Tunis 2001 Mediterranean Games*. The claimant instituted proceedings before an ad hoc arbitration board, but the suit was dismissed. The claimant instituted fresh proceedings before the Arab Investment Court, which operates under the auspices of the League of Arab States. The case, which was registered as case No. 1/1 Q, IIC 238 (2006), was dismissed on 12 October 2006. See [http://www.investmentclaims.com/IIC\\_238\\_\(2006\).pdf](http://www.investmentclaims.com/IIC_238_(2006).pdf). Decision: dismissal of the case. “The Court has decided: first: to reject the request of the First Defendant (the State of Tunisia represented in the person of its Government the Prime Minister) for it to be removed from the action; second: to reject the pleas advanced by the Second Defendant (the Organizing Committee of the Tunis 2001 Mediterranean Games); third: to reject in its entirety the action of

the Claimant against the First and the Second Defendants, and to hold the Claimant liable for the costs of the action before the Arab Investment Court; fourth: to hold inadmissible the interlocutory request put forward by the Second Defendant (the Organizing Committee of the Tunis 2001 Mediterranean Games); fifth: each party to bear its own attorneys' fees."

It should, however, be pointed out that the Arab Investment Court is officially an inter-State court established by an international agreement and not an arbitration institution.

C. ABCI Investments N.V. v. Republic of Tunisia (ICSID No. ARB/04/12). Subject matter: acquisition of shares in a bank; registration date: 6 April 2004; date of constitution of the Tribunal: 5 October 2007. The case is still pending. On 2 July 2008, the Tribunal issued a procedural order concerning the respondent's representation (right of the Head of a State's Litigation Department to represent the State) and the validity of the respondent's nomination of an arbitrator. On the same day, the Tribunal issued a procedural order concerning the parties' requests for bank guarantees.

The suit is based on the provisions of the Arab League Convention on the Investment of Arab Capital in Arab Countries (1980).

#### Question 2: Amicus curiae briefs or other interventions

There have been no cases in which third parties have presented statements in the course of treaty-based investment arbitration as amicus curiae or intervened in the proceedings in any way.

#### Question 3: Provision in treaties on transparency or publicity

Tunisia was the first country to sign the Washington Convention, which established a transparent arbitration proceedings system, with the publication of information on proceedings as they moved forward and the posting online of all decisions by arbitral tribunals, including final awards.

At the bilateral and the regional level (Maghreb and inter-Arab), Tunisia has opted for a standard bilateral agreement on the protection and promotion of investments that does not contain special provisions for ensuring the publicity of proceedings.

#### Question 4: Provision in treaties on third parties' involvement

The Tunisian standard bilateral agreement on the protection and promotion of investments does not provide for third parties to become involved in investment arbitration.

#### Question 5: Any other comment

The publication of arbitral awards by institutions such as ICSID is important for enabling States to follow the development of a case and get to know the interpretations put on the provisions of treaties, including the Washington Convention (18 March 1965), by international arbitrators. States are able to foresee the results of litigation and, possibly, avoid engaging in useless litigation. On the other hand, the case law of ICSID is not entirely consistent, with the result that those who study its judgements in an attempt to gain a clear understanding of the state of positive law and ICSID's jurisprudential

position on the issues submitted to it are unable to obtain sufficient guidance. This failing has nothing to do with publicity of arbitral proceedings, but arises out of the arbitral proceedings system itself.

## 5. Turkey

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

As Turkey has recourse mainly to the International Centre for Settlement of Investment Disputes (ICSID) regarding treaty-based investor-State arbitration, publicity and transparency issues are considered within the framework of the aforementioned arbitration system. Public access to the information on the cases involving Turkey, through the website (<http://icsid.worldbank.org/ICSID/Index.jsp>) of the Centre is possible. On the other hand, in accordance with Law No. 4982 of 09.10.2003, on Obtaining Information, individuals can obtain information from relevant authorities on the cases involving Turkey, upon their written request.

Question 2: Amicus curiae briefs or other intervention

There are no examples in Turkey of cases where third parties have presented statements in the course of treaty-based investment arbitration or have otherwise intervened in the proceedings.

Question 3: Provision in treaties on transparency or publicity

Bilateral or multilateral treaties or agreements to which Turkey is a Party, do not contain provisions concerning transparency or publicity, regarding treaty-based investment arbitration. However, as these agreements refer to the institutional arbitration such as ICSID or International Chamber of Commerce (ICC), Turkey is committed to the principle of confidentiality as foreseen by these systems.

Question 4: Provision in treaties on third parties' involvement

There is no provision for third parties to become involved in treaty-based investment arbitration in bilateral and multilateral treaties or agreements to which Turkey is a Party. However, as these treaties generally refer to institutional arbitration such as ICSID or sometimes ICC, proceedings involving third parties are applied, as provided by these institutions.

Question 5: Any other comment

Even though we consider that the current practices of the Centre for Settlement of Investment Disputes constitute a good example of publicity and transparency in treaty-based investor-State arbitration, we are of the view that, since the party autonomy is a prevailing rule in arbitral proceedings, these issues (publicity and transparency) should be determined in accordance with the common consent of the parties.



## 6. United States of America

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

The United States is committed to ensuring the transparency of its investor-State arbitrations. The United States makes available to the public all documents submitted in disputes against it under Chapter Eleven of the North American Free Trade Agreement (“NAFTA”), subject to the redaction of protected information. Information protected from disclosure under Chapter Eleven includes, as set out in the interpretation of the NAFTA Free Trade Commission (“FTC”), confidential business information as well as information otherwise protected from disclosure under a Party’s domestic law or the relevant arbitral rules.<sup>1</sup> As a practical matter, the U.S. Department of State posts to its website submissions, orders, and decisions in disputes against the United States under Chapter Eleven.<sup>2</sup>

The United States also supports open hearings in its NAFTA Chapter Eleven disputes. As stated in 2003, the United States “will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information.”<sup>3</sup>

The United States participated in the first NAFTA Chapter Eleven merits hearing to be open to the public in the landmark case of *Methanex v. United States*. In *Methanex* and in two subsequent NAFTA Chapter Eleven cases brought against the United States, *Glamis Gold Ltd. v. United States* and the consolidated *Cases Regarding the Border Closure due to BSE Concerns*, proceedings were open to the public via closed-circuit television feed.<sup>4</sup> Transcripts of the *Methanex*, *Glamis*, and *BSE* hearings are available on the U.S. Department of State website.<sup>5</sup>

Question 2: Amicus curiae briefs or other intervention

Third parties have presented amicus curiae briefs in three cases against the United States under NAFTA Chapter Eleven. First, in *Methanex v. United States*, the International Institute for Sustainable Development and Earthjustice (on behalf of Bluewater Network, Communities for a Better Environment

<sup>1</sup> See Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions (July 31, 2001), available at <http://www.state.gov/documents/organization/38790.pdf>. See also NAFTA Article 2105 (protecting against the disclosure of information which would impede law enforcement or be contrary to a Party’s law protecting personal privacy or certain financial information).

<sup>2</sup> See <http://www.state.gov/s/l/c3741.htm>.

<sup>3</sup> See Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations (Oct. 7, 2003), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Regional/NAFTA/asset\\_upload\\_file143\\_3602.pdf](http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf).

<sup>4</sup> Arrangements were made in the *Glamis* hearing to close the proceedings for brief periods to accommodate the presentation of confidential information.

<sup>5</sup> See <http://www.state.gov/s/l/c5818.htm> (*Methanex*), <http://www.state.gov/s/l/c10986.htm> (*Glamis*), and <http://www.state.gov/s/l/c14683.htm> (*BSE*).

and the Center for International Environmental Law) were granted leave to file written submissions. The submissions are available at [www.state.gov/s/l/c5818.htm](http://www.state.gov/s/l/c5818.htm).

In *Glamis Gold, Ltd. v. United States*, the Quechan Indian Nation, the National Mining Association, Friends of the Earth, Sierra Club and Earthworks were granted leave by the Tribunal in that arbitration to file amicus submissions. The submissions are available at <http://www.state.gov/s/l/c10986.htm>.

More recently, the Office of the National Chief of the Assembly of First Nations presented an amicus curiae submission, without an accompanying application for leave to file, in *Grand River Enterprises v. United States*, which is available at <http://www.state.gov/documents/organization/117812.pdf>. The Grand River Tribunal has not decided whether to accept the Assembly of First Nations submission, and has invited the parties to comment on the proposed submission in their respective reply and rejoinder briefs, which are due in the next few months.

### Question 3: Provision in treaties on transparency or publicity

In Annex 1137.4 of the NAFTA, United States specified that where it “is the disputing Party, either the United States or a disputing investor that is a party to the arbitration may make an award public.” Additionally, the NAFTA Free Trade Commission (“FTC”) in 2003 adopted the following interpretation of Chapter Eleven of the NAFTA:

Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.<sup>6</sup>

The NAFTA Parties also have agreed “to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of: (1) confidential business information; (2) information which is privileged or otherwise protected from disclosure under the Party’s domestic law; and (3) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.”<sup>7</sup>

Similarly, the 2004 U.S. Model Bilateral Investment Treaty (“U.S. Model BIT”) requires a respondent to make available to the public “pleadings, memorials, and briefs submitted to the tribunal” by disputing or non-disputing parties, as well as amicus submissions.<sup>8</sup> A respondent is also required, under the U.S. Model BIT, to make available to the public “orders, awards, and decisions of the tribunal,” as well as hearing transcripts “where available.”<sup>9</sup> In addition, under the U.S. Model BIT, hearings must be “open to the public,”

<sup>6</sup> Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions (July 31, 2001), available at <http://www.state.gov/documents/organization/38790.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> See U.S. Model BIT Art. 29(1), available at [http://www.ustr.gov/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file\\_847\\_6897.pdf](http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file_847_6897.pdf).

<sup>9</sup> See U.S. Model BIT Art. 29(1).

subject to “appropriate arrangements” for the non-disclosure of protected information.<sup>10</sup>

Concerning the non-disclosure of protected information generally, Article 29(3) of the U.S. Model BIT provides that “[n]othing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article].”<sup>11</sup> Under the U.S. Model BIT, when a disputing party submits a document containing (in the party’s view) protected information, the disputing party must also submit a redacted version of the document.<sup>12</sup> Under such circumstances, only the redacted version of the document is made available to the public.<sup>13</sup> Also under the U.S. Model BIT, any objection concerning the designation of certain information as protected would be decided by the tribunal.<sup>14</sup>

The investment agreements negotiated by the United States since 2002 reflect the provisions of the U.S. Model BIT with respect to transparency.<sup>15</sup>

#### Question 4: Provision in treaties on third parties’ involvement

Article 28 (3) of the U.S. Model BIT provides that “The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party.” Like the transparency provisions discussed in the response to Question 3 above, the investment agreements negotiated by the United States since 2002 reflect the provisions of the U.S. Model BIT with respect to amicus curiae submissions.<sup>16</sup>

<sup>10</sup> See U.S. Model BIT Art. 29(2).

<sup>11</sup> The U.S. Model BIT defines “protected information” as “confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law.” See U.S. Model BIT Art. 1. Article 18 of the U.S. Model BIT provides, in relevant part, that nothing in the treaty shall be construed “to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests.” Article 19 of the U.S. Model BIT protects against disclosure of information which would “impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.”

<sup>12</sup> U.S. Model BIT Art. 29(4).

<sup>13</sup> U.S. Model BIT Art. 29(4).

<sup>14</sup> U.S. Model BIT Art. 29(4).

<sup>15</sup> See, e.g., U.S. – Uruguay Bilateral Investment Agreement, Art. 29; U.S. – Rwanda Bilateral Investment Agreement, Art. 29 (both available at [http://www.ustr.gov/Trade\\_Agreements/BIT/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/BIT/Section_Index.html)). The investment chapters of the following free trade agreements, available at [http://www.ustr.gov/Trade\\_Agreements/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Section_Index.html), include similar transparency provisions: Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR), Article 10.21; United States – Chile Free Trade Agreement, Art. 10.20; United States – Colombia Trade Promotion Agreement, Art. 10.21; United States – Peru Trade Promotion Agreement, Art. 10.21; United States – Korea Free Trade Agreement (KORUS FTA), Art. 11.21; United States – Morocco Free Trade Agreement, Art. 10.20; U.S. – Oman Free Trade Agreement, Art. 10.20; United States – Panama Trade Promotion Agreement, Art. 10.21; United States – Singapore Free Trade Agreement, Art. 15.20.

<sup>16</sup> See, e.g., U.S. – Uruguay Bilateral Investment Agreement, Art. 28; U.S. – Rwanda Bilateral Investment Agreement, Art. 28. The investment chapters of the following free trade agreements include similar provisions on amicus curiae submissions: Dominican Republic – Central

In addition, the NAFTA FTC has stated, with respect to third-party participation in NAFTA Chapter Eleven arbitrations, that “[n]o provision of the [NAFTA] limits a Tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party.”<sup>17</sup>

The FTC has recommended that specific guidelines be adopted by Chapter Eleven tribunals when considering proposed amicus submissions.<sup>18</sup> The FTC guidelines provide that any proposed amicus submission be accompanied by an application for leave to file, specify the information that is to be included in the application, impose limitations on the length and scope of amicus submissions, and set out various factors to be considered by Chapter Eleven tribunals when deciding whether to grant a third party leave to file. In addition, under the FTC guidelines, a tribunal should ensure that an amicus submission does not disrupt the proceedings and does not unduly burden or unfairly prejudice a disputing party.

Question 5: Any other comment

The United States favours the transparent conduct of investor-State arbitration, as reflected in U.S. practice. Such transparency includes timely publication of submissions and decisions in investor-State arbitration, as well as conducting hearings that are open to the public, subject to the non-disclosure of protected information. Such transparency also includes the participation of third parties, where such participation is appropriate and so long as it does not disrupt the proceedings or unduly burden or unfairly prejudice a disputing party.

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America-United States Free Trade Agreement (CAFTA-DR), Article 10.20; United States – Chile Free Trade Agreement, Art. 10.19; United States – Colombia Trade Promotion Agreement, Art. 10.20; United States – Peru Trade Promotion Agreement, Art. 10.20; United States – Korea Free Trade Agreement (KORUS FTA), Art. 11.20; United States – Morocco Free Trade Agreement, Art. 10.19; U.S. – Oman Free Trade Agreement, Art. 10.19; United States – Panama Trade Promotion Agreement, Art. 10.20; United States – Singapore Free Trade Agreement, Art. 15.19.

<sup>17</sup> Statement of the Free Trade Commission on Non-Disputing Party Participation (Oct.7, 2003), available at <http://www.state.gov/documents/organization/38791.pdf>.

<sup>18</sup> Id.

## (A/CN.9/WG.II/WP.159/Add.4) (Original: Spanish)

**Note by the Secretariat on settlement of commercial disputes:  
Transparency in treaty-based investor-State arbitration — Compilation  
of comments by Governments, submitted to the Working Group on Arbitration and  
Conciliation at its fifty-third session**

**ADDENDUM**

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- III. Comments received from Governments on transparency in treaty-based investor-State arbitration .....
1. Chile .....

**III. Comments received from Governments on transparency in treaty-based investor-State arbitration**

**1. Chile**

[Original: Spanish]

Question 1: Examples of publicity or transparency of arbitral proceedings; access to documents or hearings

The three requests for arbitration submitted by a foreign investor against Chile invoked bilateral agreements relating to investment protection and promotion. Those agreements, unlike some of the free trade agreements signed recently by Chile, contained no provisions relating to the publicity or transparency of proceedings. There are therefore no examples of such requirements with regard to international arbitration proceedings brought against Chile in connection with foreign investment. However, Chile maintains a policy of making public the awards made in such cases.

Question 2: *Amicus curiae* briefs or other interventions

For the same reason as is indicated in the response above, Chile has no experience of intervention by third parties in international arbitration proceedings relating to foreign investment.

Question 3: Provision in treaties on transparency or publicity

Yes. All investment-related chapters negotiated as part of a free trade agreement contain such provisions. Chile has concluded such agreements with Canada (1997), Mexico (1999), the United States of America (2003), the Republic of Korea (2004), Japan (2007), Peru (2009), Australia (2009) and Colombia (2009).

The texts of the agreements can be viewed at <http://rc.direcon.cl/acuerdo/list> or at [www.direcon.cl/acuerdo/list](http://www.direcon.cl/acuerdo/list).

Question 4: Provision in treaties on third parties' involvement

Yes. All investment-related chapters negotiated as part of a free trade agreement contain *amicus curiae* provisions. Chile has concluded such agreements with Canada (1997), Mexico (1999), the United States of America (2003), the Republic of Korea (2004), Japan (2007), Peru (2009), Australia (2009) and Colombia (2009).

Question 5: Any other comment

Chile considers it appropriate to retain clauses of this type in international investment agreements. Within the framework of the mechanism for the settlement of investor-State disputes, it is established that, among other documents, the following should be made available to the public: the pleadings, statements of claim and files submitted to the tribunal by a disputing party, the records or transcripts of the tribunal's hearings and the orders, decisions and awards issued by the tribunal. It is also established that the tribunal's hearings shall be open to the public except where a disputing party intends to use during a hearing information that is protected from disclosure under the party's domestic law. That requirement is set out in the following agreements: United States, article 10.20; Australia, article 10.22; Colombia, article 9.21; and Peru, article 11.2.

Furthermore, in both statements issued by the North American Free Trade Agreement (NAFTA) Free Trade Commission in relation to public hearings of investor-State arbitration proceedings, it is established that the parties shall consent, and shall request the consent of disputing investors and, as applicable, that of the tribunal, that hearings to which they are parties be open to the public, except to ensure the protection of confidential information, including business confidential information.

**C. Note by the Secretariat on settlement of commercial disputes:  
preparation of rules of uniform law on transparency in treaty-based  
investor-State dispute settlement, submitted to the Working Group on Arbitration  
and Conciliation at its fifty-third session  
(A/CN.9/WG.II/ WP.160 and Add.1)**

**[Original: English]**

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#### Annex

- I. Figure: Known investment treaty arbitrations (cumulative and newly instituted cases), 1989-2009 .....

### I. Introduction

1. At its forty-first session (New York, 16 June-3 July 2008), the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. As to the scope of such work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency as a desirable objective in investor-State arbitration should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (*ibid.*, para. 69) in the field of treaty-based arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based arbitration by the Working Group at a future session, the Commission requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration.<sup>1</sup> Replies by States to a questionnaire circulated by the Secretariat on States' practices with respect to transparency in investor-State arbitration pursuant to the request of the Commission can be found in document A/CN.9/WG.II/WP.159 and its addenda (see paragraph 6 below).

<sup>1</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 314.



2. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission entrusted the Working Group with the task of preparing a legal standard on the topic of transparency in treaty-based investor-State arbitration.<sup>2</sup> Support was expressed for the view that the Working Group could also consider undertaking work in respect of those issues that arose more generally in treaty-based investor-State arbitration, and that would deserve additional work. The prevailing view, in line with the decision previously made by the Commission, was that it was too early to make a decision on the precise form and scope of a future instrument on treaty-based arbitration and that the mandate of the Working Group should be limited to the preparation of rules of uniform law on transparency in treaty-based investor-State arbitration. However, it was agreed that, while operating within that mandate, the Working Group might identify any other topic with respect to treaty-based investor-State arbitration that might also require future work by the Commission. It was agreed that any such topic might be brought to the attention of the Commission at its next session, in 2011.<sup>3</sup>

3. An international investment agreement is a treaty between States for the reciprocal encouragement, promotion and protection of investments. International investment agreements include, for example, bilateral treaties for the promotion and protection of investment (or bilateral investment treaties (“BITs”)), treaties for the avoidance of double taxation (or double taxation treaties), other bilateral and regional trade and investment agreements as well as various multilateral agreements that contain a commitment to liberalize, protect and/or promote investment. The provisions contained in chapters on investment protection of international investment agreements typically cover the following areas: scope and definition of investment and the investor, rules on admission and establishment referring either to the domestic laws and regulations of the host State or to special rights of establishment granted by the treaty, most-favoured treatment provisions and protection provisions such as fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds, stabilization clauses and mechanisms for the settlement of both State-State and investor-State disputes. There are at present more than 2,500 international investment agreements.<sup>4</sup>

4. Investor-State dispute settlement provisions in international investment agreements aim at establishing a mechanism for the settlement of disputes allowing an investor from a State party to a treaty to submit to international arbitration a claim against another State party for the breach of an obligation under the treaty. International investment arbitration is one of the fastest growing areas of international dispute settlement. The United Nations Conference on Trade and Development (UNCTAD) reported that, as of the end of 2009, 350 treaty-based

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<sup>2</sup> Report of the 43rd session of the Commission, in preparation.

<sup>3</sup> Ibid.

<sup>4</sup> For an online compilation of all international investment agreements, see the database of the United Nations Conference on Trade and Development (UNCTAD), available on 28 July 2010 at [http://www.unctadxi.org/templates/Startpage\\_\\_\\_\\_718.aspx](http://www.unctadxi.org/templates/Startpage____718.aspx).

investment arbitration claims had been initiated. Seventy per cent of treaty-based investor-State claims had been filed since 2000 (see annex I).<sup>5</sup>

5. International investment agreements traditionally did not include transparency provisions. A majority of international investment agreements, particularly bilateral investment treaties were concluded in the 1990s and the issue of procedural transparency was not discussed at that time. Furthermore, many international investment agreements refer to mechanisms inspired by international commercial arbitration as the main option for investor-State dispute settlement, which is by nature based on confidentiality of the proceedings. With the increase of cases involving investor-State disputes under international investment agreements, and particularly with the first cases under the North American Free-Trade Agreement (NAFTA) in early 2000, issues such as availability of information regarding cases, access to investor-State dispute settlement awards, access of the public to hearings were raised. States started addressing issues relating to procedural transparency in their national legislation and in investor-State dispute settlement provisions of their investment agreements, while international arbitration institutions began discussing how to address the matter of transparency in arbitration rules and arbitral proceedings. It is only in the international investment agreements negotiated after 2004 that these issues have been addressed.<sup>6</sup>

6. For the purpose of this note, transparency in treaty-based investor-State dispute settlement is understood as a general principle that may pertain to various aspects of the arbitral proceedings. The source for transparency obligations in treaty-based investor-State arbitration may be found in different legal texts, such as the dispute settlement provisions contained in international investment agreements, designated arbitration rules, legislation on arbitration at the place of arbitration and arbitral tribunals' decisions. This note and its addendum seek to provide the Working Group with information on the extent to which transparency is addressed under those legal texts. In order to assist the Working Group in its determination of the possible content and form of its work on transparency in treaty-based investor-State dispute settlement, the concluding remarks, contained in the addendum to this note, provide questions and suggestions for the Working Group's consideration. This note complements document A/CN.9/WG.II/WP.159 and its addenda, which contain a compilation of comments by Governments on their practices or experience with respect to transparency in treaty-based investor-State arbitration received pursuant to the questionnaire circulated by the Secretariat on that matter (see paragraph 1 above).

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<sup>5</sup> United Nations Conference on Trade and Development, *International Investment Arrangements: World Investment Report, 2010*, United Nations publication, Sales No. E.10.II.D.2.; at p. 84, available on 28 July 2010 at: [http://www.unctad.org/en/docs/wir2010\\_en.pdf](http://www.unctad.org/en/docs/wir2010_en.pdf). This statistic included only claims that had actually been submitted to arbitration. It did not include cases in which only a notice of an intention to submit a claim to arbitration had been filed. It should be noted that there is no complete public record of such cases.

<sup>6</sup> See *International Investment Arrangements: Trends and emerging issues*, UNCTAD Series on International Investment Policies for Development, Part II. Key Issues in New Generations IIAs, J. Investor States Dispute settlement (New York and Geneva 2006), pp. 46-54; available on 28 July 2010 at [http://www.unctad.org/en/docs/iteiit200511\\_en.pdf](http://www.unctad.org/en/docs/iteiit200511_en.pdf).

## **II. Transparency in treaty-based investor-State dispute settlement**

### **A. Dispute settlement provisions in international investment agreements**

7. As discussed in this section, where dispute settlement provisions in international investment agreements address transparency, they usually contain provisions on matters of public access to procedural documents and hearings, and publication of awards. Examples of such provisions that can be found in model international investment agreements or in international investment agreements actually concluded are contained in this section. It may be noted that a number of international investment agreements are silent on that question and do not contain any provision on transparency, leaving that matter to be resolved by applicable rules.

#### **1. Public access to procedural documents and arbitral awards**

##### **(a) General remarks**

8. Dispute resolution clauses in international investment agreements that deal with public access to procedural documents and awards usually provide that documents submitted to, or issued by, the arbitral tribunal shall be publicly available, unless the disputing parties agree otherwise, subject to the deletion of confidential information. Confidential information is usually described as information that is not generally known or accessible to the public and, if disclosed, would cause or threaten to cause prejudice to an essential interest of any individual or entity, or to the interest of a party or would be contrary to personal privacy.

9. Provisions on public access to procedural documents most often include either a general statement on publicity of all procedural documents or a list of procedural documents that should be made publicly available. In that latter case, the following documents have been listed: request for arbitration, notice of arbitration, pleadings, briefs submitted to the tribunal by a disputing party and any written submissions, minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal. Some international investment agreements leave the decision on publication of documents to the parties to the dispute.<sup>7</sup>

10. The responsibility for making that information available to the public lies in certain instances with the arbitral tribunal, in others with the parties. Where parties are authorized to make information public, certain international investment agreements provide that either party may make all information public whereas others limit the right of a party to publicize only its own statements or submissions.

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<sup>7</sup> See, for instance, the Agreement between the United Mexican States and the Government of the Republic of Iceland on the Promotion and Reciprocal Protection of Investments, signed 24 June 2005, which states the following:

“Article 17 — Awards and Enforcement (...) (4) The final award will only be published with the written consent of both parties to the dispute.”; available on 28 July 2010 at [http://www.unctad.org/sections/dite/ia/docs/bits/Mexico\\_Iceland.PDF](http://www.unctad.org/sections/dite/ia/docs/bits/Mexico_Iceland.PDF).

In general, agreements do not provide details on the manner in which the information is to be conveyed to the public.

11. Concerning the timing for publication, certain international investment agreements provide that the information shall be made available “immediately” or “in a timely manner”, whereas others are silent on that question.

**(b) Examples of dispute settlement provisions in international investment agreements addressing public access to procedural documents and awards**

*(i) Energy Charter Treaty*

12. The 1994 Energy Charter Treaty<sup>8</sup> contains a comprehensive system for settling disputes on matters covered by the Treaty. Article 26 provides various options for investors to have recourse to international arbitration in the event of an alleged breach of the Treaty’s investment provisions. It does not contain specific provisions on public disclosure of the existence of proceedings. The Model Host Government Agreement (HGA) for agreements between an individual State and the project investors for cross-border pipelines presented to the Energy Charter Conference in 2007 contains in its article 19 (11) a provision on dispute settlement, which states that “A copy of the award shall be deposited with the Energy Charter Secretariat, which shall make it generally available.”<sup>9</sup>

*(ii) Model international investment agreements proposed by States*

13. Article 38, paragraphs (3) to (8), of Canada’s Model Foreign Investment Promotion and Protection Agreement 2004 (FIPA),<sup>10</sup> which has also been used in concluded BITs,<sup>11</sup> provides that:

“(3) All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information. (4) Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information. (5) A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents. (6) The Parties may share with officials of their respective federal and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents. (7) [...] the Tribunal shall not require a Party to furnish or allow access to information the

<sup>8</sup> Available on 28 July 2010 at <http://www.encharter.org/>.

<sup>9</sup> Ibid.

<sup>10</sup> Available on 28 July 2010 at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf>. See also the comments of Canada in document A/CN.9/WG.II/WP.159/Add.1.

<sup>11</sup> See for instance the agreement between Canada and the Republic of Peru for the Promotion and Protection of Investment, signed on 14 November 2006 which contains, in its article 38 on “Public Access to Hearings and Documents” provisions similar to Canada’s FIPA. Available on 28 July 2010 at [http://www.unctad.org/sections/dite/ia/docs/bits/canada\\_peru.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/canada_peru.pdf). See also the comments of Canada in document A/CN.9/WG.II/WP.159/Add.1.

disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security. (8) To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal."

14. The United States of America Model Treaty concerning the Encouragement and Reciprocal Protection of Investment ("US Model BIT"),<sup>12</sup> adopted in 2004 contains, in its section B, specific provision on transparency of arbitral proceedings. Article 29 (1) provides that:

"(1) Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28 (2) [Non-Disputing Party submissions] and (3) [Amicus Submissions] and Article 33 [Consolidation]; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal."

15. Regarding protected information, article 29 (3) provides that "Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article]." Article 29 (5) of the US Model BIT deals with potential conflict with a party's national law on access to information and provides that "nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws."

(iii) *Regional investment agreements*

16. The North American Free Trade Agreement ("NAFTA") came into force in January 1994, creating a free trade area between Canada, Mexico and the United States of America. NAFTA Chapter 11 contains details on access for non-disputing NAFTA parties to procedural documents and awards.<sup>13</sup> Article 1127 provides that the non-disputing NAFTA parties shall receive written notice of any arbitration and copies of all pleadings. Article 1129 (1) specifies that the non-disputing NAFTA parties also have the right to receive all the evidence submitted to the tribunal as well as the written arguments of the disputing parties. Under Article 1129 (2) any information received under paragraph (1) must be treated as if the recipient were a disputing Party. In relation to disclosure of award details, article 1137 (4) states that

<sup>12</sup> Available on 28 July 2010 at <http://www.state.gov/documents/organization/117601.pdf>. See also the comments of the United States of America in document A/CN.9/WG.II/WP.159/Add.3.

<sup>13</sup> Available on 28 July 2010 at <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpid=142>. See also the comments of Canada in document A/CN.9/WG.II/WP.159/Add.1 and the comments of the United States of America in document A/CN.9/WG.II/WP.159/Add.3.

“Annex 1137 (4) applies to the Parties specified in that Annex with respect to publication of an award”. Annex 1137 (4) provides that, in an arbitration involving either Canada or the United States, either one of those countries or a disputing investor that is a party to the arbitration may make an award public. In the case of Mexico, the applicable arbitration rules apply to the publication of an award.

17. The “Notes of Interpretation of Certain Chapter 11 Provisions” published by the NAFTA Free Trade Commission (FTC) on 31 July 2001 clarify the question of access to documents as follows:

“(a) Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration and, subject to the application of Article 1137 (4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal. (b) In the application of the foregoing: (i) In accordance with Article 1120 (2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.” [The remaining subparagraphs and paragraph (c) of the Notes contain provisions on protection of confidential information.]

18. The Free Trade Agreement between the United States, Central America and the Dominican Republic (CAFTA-DR)<sup>14</sup> signed on 5 August 2004 contains under chapter 10, article 10.21 on “Transparency of Arbitral Proceedings” the following provisions:

“1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal. [...] 3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 21.2 (Essential Security) or Article 21.5 (Disclosure of Information). 4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures: (a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b); (b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal; (c) A disputing party shall, at the same time that it submits a document containing information claimed to be protected information, submit

<sup>14</sup> Available on 28 July 2010 at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>. See also the comments of the Dominican Republic and El Salvador in document A/CN.9/WG.II/WP.159/Add.2.

a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Parties and made public in accordance with paragraph 1; and (d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information. 5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws."

19. The Agreement Establishing the Asean-Australia-New Zealand Free Trade Area (AANZFTA),<sup>15</sup> signed on 27 February 2009, contains under chapter 11, article 26 on "Transparency of Arbitral Proceedings" the following provisions:

"1. Subject to Paragraphs 2 and 3, the disputing Party may make publicly available all awards and decisions produced by the tribunal. [...] 3. Any information specifically designated as confidential that is submitted to the tribunal or the disputing parties shall be protected from disclosure to the public. 4. A disputing party may disclose to persons directly connected with the arbitral proceedings such confidential information as it considers necessary for the preparation of its case, but it shall require that such confidential information is protected. 5. The tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security. 6. The non-disputing Party shall be entitled, at its cost, to receive from the disputing Party a copy of the notice of arbitration, no later than 30 days after the date that such document has been delivered to the disputing Party. The disputing Party shall notify all other Parties of the receipt of the notice of arbitration within 30 days thereof."

(iv) *Examples of bilateral investment agreements*

20. The Agreement between Japan and the United Mexican States, for the strengthening of the economic partnership signed on 17 September 2004 ("Japan-Mexico FTA")<sup>16</sup> contains specific provisions concerning public access to procedural documents and awards. Article 94 (4) provides that:

"Either disputing party may make available to the public in a timely manner all documents, including an award, submitted to, or issued by,

<sup>15</sup> Available on 28 July 2010 at <http://www.dfat.gov.au/trade/fta/asean/aanzfta/contents.html>.

<sup>16</sup> Available on 28 July 2010 at <http://www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf>

a Tribunal established under this Section, subject to redaction of: (a) confidential business information; (b) information which is privileged or otherwise protected from disclosure under the applicable law of either Party; and (c) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.”

21. In addition, article 94 includes a note that specifies that:

“For greater certainty, it is confirmed by both Parties that a Party may share with officials of its central or local government in the case of Japan, and its federal or state government in the case of Mexico, all relevant documents in the course of dispute settlement under this Section, including confidential information and that the disputing parties may disclose to other persons in connection with the arbitral proceedings the documents submitted to, or issued by, a Tribunal established under this Section, as they consider necessary for the preparation of their cases; provided that they shall ensure that those persons protect the confidential information in such documents.”

22. The Singapore-Australia Free Trade Agreement, signed on 17 February 2003,<sup>17</sup> allows a party to disclose its own procedural documents to the public subject to protection of designated confidential information. Article 7 (2) of section 16 “Dispute Settlement” of the Agreement provides that:

“2. The deliberations of an arbitral tribunal and the documents submitted to it shall be kept confidential. Nothing in this Article shall preclude a Party from disclosing statements of its own positions or its submissions to the public; provided that a Party shall treat as confidential information submitted by the other Party to the arbitral tribunal which that Party has designated as confidential. Where a Party submits a confidential version of its written submissions to the arbitral tribunal, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.”

## **2. Open hearings**

### **(a) General remarks**

23. Dispute resolution provisions in international investment agreements favouring transparency provide that hearings shall be open to the public, subject to the protection of confidential information. Logistical arrangements are usually left to the arbitral tribunal to be determined, in consultation with the disputing parties.

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<sup>17</sup> Available on 28 July 2010 at <http://www.austlii.edu.au/au/other/dfat/treaties/2003/16.html>.



**(b) Examples of dispute settlement provisions in international investment agreements addressing open hearings**

*(i) Model international investment agreements proposed by States*

24. Article 38 (1) of Canada's FIPA,<sup>18</sup> which has also been used in concluded BITs,<sup>19</sup> provides as follows:

"1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera. 2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties."

25. The US Model BIT<sup>20</sup> includes in article 29 (2) a provision, which explicitly provides for public hearings and which has been used in concluded BITs:<sup>21</sup>

"2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure."

26. In addition, article 29 (1) of the U.S. Model BIT provides that the respondent should make the minutes or transcripts of hearings of the tribunal available to the public.

*(ii) Regional investment agreements*

27. The CAFTA-DR provides for hearings in its article 10.21.2 "open to the public" and for the tribunal to determine "in consultation with the disputing parties, the appropriate logistical arrangements", as follows:

"2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal."

<sup>18</sup> Available on 28 July 2010 at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf>. See also the comments of Canada in document A/CN.9/WG.II/WP.159/Add.1.

<sup>19</sup> See for instance the agreement between Canada and the Republic of Peru for the Promotion and Protection of Investment, signed on 14 November 2006 which contains, in its article 38 on "Public Access to Hearings and Documents" provisions similar to Canada's FIPA. Available on 28 July 2010 at [http://www.unctad.org/sections/dite/ia/docs/bits/canada\\_peru.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/canada_peru.pdf).

<sup>20</sup> Available on 28 July 2010 at <http://www.state.gov/documents/organization/29030.doc>.

<sup>21</sup> See, for example, article 29 (2) of the Treaty between the United State of America and Uruguay concerning the Encouragement and Reciprocal Protection of Investment, signed 4 November 2005, which is available at: [http://www.unctad.org/sections/dite/ia/docs/bits/US\\_Uruguay.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/US_Uruguay.pdf).

The tribunal shall make appropriate arrangements to protect the information from disclosure.”<sup>22</sup>

(iii) *Examples of bilateral investment agreements*

28. Article 10.22.2, contained in chapter 10 of the Australia-Chile Free Trade Agreement, signed on 30 July 2008,<sup>23</sup> provides that hearings shall be open to the public, provided that confidential information is protected. It provides that:

“2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure including closing the hearing for the duration of any discussion of confidential information.”

## **B. Arbitration rules used in treaty-based investor-State dispute settlement**

29. With the exception of the arbitration rules of the International Centre for the Settlement of Investment Disputes (ICSID), arbitration rules in general do not provide for, nor prohibit, public access to procedural documents or hearings and publication of the award(s), and leave those matters to the agreement of the parties, or to the arbitral tribunal’s determination based on the agreement of the parties, the applicable arbitration rules, and the law applicable to arbitral procedure.<sup>24</sup> As reported by UNCTAD in a 2010 report on “Latest Developments in Investor-State Dispute Settlement”, “of the total 357 known disputes, 225 were filed with the International Centre for Settlement of Investment Disputes (ICSID) or under the ICSID Additional Facility, 91 under the United Nations Commission on International Trade Law (UNCITRAL) Rules, 19 with the Stockholm Chamber of Commerce, eight were administered by the Permanent Court of Arbitration in The Hague, five with the International Chamber of Commerce (ICC) and four are ad hoc cases. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration. In four cases the applicable rules are unknown so far.”

<sup>22</sup> Available on 28 July 2010 at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>. See also the comments of the Dominican Republic and El Salvador in document A/CN.9/WG.II/WP.159/Add.2.

<sup>23</sup> [http://www.dfat.gov.au/GEO/chile/fta/FTA\\_Text.html](http://www.dfat.gov.au/GEO/chile/fta/FTA_Text.html). See also the comments of Australia in document A/CN.9/WG.II/WP.159.

<sup>24</sup> See *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note No. 1 (2010), International Investment Agreements, p. 2; available on 28 July at [http://www.unctad.org/en/docs/webdiaeia20103\\_en.pdf](http://www.unctad.org/en/docs/webdiaeia20103_en.pdf).

**1. ICSID Convention, Regulations and Rules<sup>25</sup>****(a) Public access to procedural documents and arbitral awards**

30. Regulation 22 of the ICSID Administrative and Financial Regulations provides that:

“1. The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding. 2. If both parties to a proceeding consent to the publication of: (a) reports of Conciliation Commissions; (b) arbitral awards; or (c) the minutes and other records of proceedings, the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments.”

31. The publication mentioned in Regulation 22 (1) of the ICSID Administrative and Financial Regulations is done on the ICSID website.

32. While it is not clear whether the parties themselves are allowed to disclose procedural documents, there are clear rules governing the Centre and the arbitrators. Article 48 (5) of the ICSID Convention provides that:

“5. The Centre shall not publish the award without the consent of the parties.”

33. This prohibition is repeated in Rule 48 (4) of the ICSID Arbitration Rules and extends to ICSID arbitrators by the declarations they must make under Rule 6 (2) of the ICSID Arbitration Rules. The second part of Rule 48 (4) (revised in 2006), however, provides that, even without the parties’ consent, “The Centre shall [...] promptly include in its publications excerpts of the legal reasoning of the tribunal.”

**(b) Open hearings**

34. Rule 32 (2) of the ICSID Arbitration Rules relates to third parties’ presence at hearings and provides that:

“2. Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.”

**2. UNCITRAL Arbitration Rules<sup>26</sup>****(a) Public access to procedural documents and arbitral awards**

35. The 1976 UNCITRAL Arbitration Rules as well as the Rules as revised in 2010 do not address the issue of public access to procedural documents. It therefore

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<sup>25</sup> Available on 28 July 2010 at [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf).

remains a matter to be agreed by the parties and, failing such agreement, to be decided by the arbitral tribunal.

36. Regarding publication of an award, article 32, paragraph (5), of the 1976 UNCITRAL Arbitration Rules provides that: “The award may be made public only with the consent of both parties.” Article 34, paragraph (5), of the UNCITRAL Arbitration Rules (as revised in 2010) provides as follows:

“5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.”

**(b) Open hearings**

37. Article 25, paragraph (4), of the 1976 version of the UNCITRAL Arbitration Rules and article 28, paragraph (3), of the UNCITRAL Arbitration Rules, (as revised in 2010) provides that: “Hearings shall be held in camera unless the parties agree otherwise. [...]”.

**3. Rules of international arbitration institutions**

**(a) International Chamber of Commerce — Rules of Arbitration (“ICC Arbitration Rules”)<sup>26</sup>**

38. The ICC Arbitration Rules contain no specific provision on public disclosure of the existence of proceedings, or public access to procedural documents. There is also no provision requiring the parties to keep confidential the information related to the arbitration. It may be noted that article 20 (7) authorizes the arbitral tribunal to take measures to protect trade secrets and confidential information.

39. Under article 21 (3) of the ICC Arbitration Rules, “[...] Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted”.

**(b) London Court of International Arbitration (LCIA) Rules<sup>28</sup>**

40. Article 30.1 expresses the principle of non-disclosure of procedural documents and awards, as follows:

“1. Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain — save and to the extent

<sup>26</sup> For the 1976 version of the UNCITRAL Arbitration Rules, see *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, para. 57. For UNCITRAL Arbitration Rules (as revised in 2010), see Annex I of the report of the 43rd session of the Commission. Also available at <http://www.uncitral.org>.

<sup>27</sup> Available on 28 July 2010 at [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_arb\\_english.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf).

<sup>28</sup> Available on 28 July 2010 at [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration\\_Rules.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx).

that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority”.

41. Article 30.3 provides that:

“3. The LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.”

42. Under article 19.4, “[a]ll meetings and hearings shall be in private unless the parties agree otherwise in writing or the Arbitral Tribunal directs otherwise.”

**(c) Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC Arbitration Rules”)<sup>29</sup>**

43. The SCC Arbitration Rules contain a general principle on confidentiality, stated in article 46 as follows:

“Unless otherwise agreed by the parties, the SCC Institute and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.”

44. Article 27, paragraph (3), of the SCC Arbitration Rules provides that:

“Unless otherwise agreed by the parties, hearings will be held in private.”

**(d) International Arbitration Rules of the American Arbitration Association (“AAA International Arbitration Rules”)<sup>30</sup>**

45. The AAA International Arbitration Rules provide in their article 27 that:

“An award may be made public only with the consent of all parties or as required by law.”

46. Article 34 on confidentiality provides that:

“[...] unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.”

**(e) Arbitration Rules of the Permanent Court of Arbitration (“PCA”) involving States<sup>31</sup>**

47. The PCA Optional Rules for Arbitrating Disputes Between Two States (1992) are based on the 1976 UNCITRAL Arbitration Rules, with modifications to reflect the public international law character of inter-States disputes. According to article 32, paragraph (5), an award may only be made public with the consent of the parties. In accordance with article 25, paragraph (4), hearings are held in camera,

<sup>29</sup> Available on 28 July 2010 at <http://www.sccinstitute.se/filearchive/3/33776/Skiljedomsregler%20eng%202010%20-%20utan%20modellklausulsidan.pdf>.

<sup>30</sup> Available on 28 July 2010 at <http://www.adr.org/sp.asp?id=33994#INTERNATIONAL%20ARBITRATION%20RULES>.

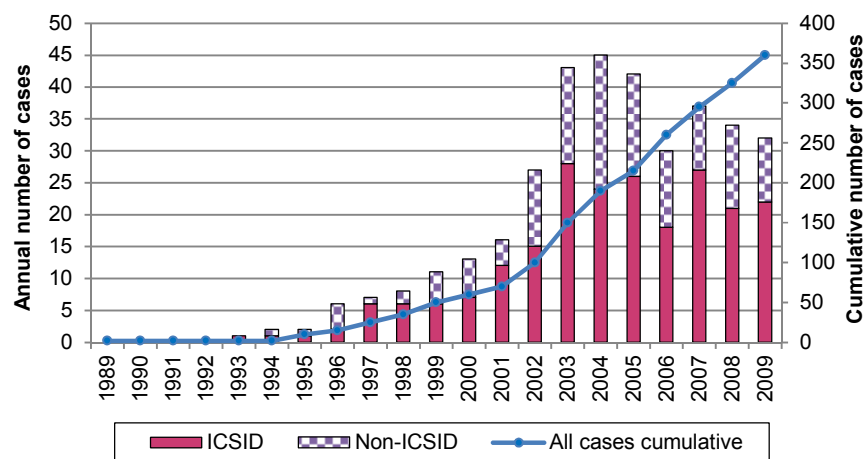
<sup>31</sup> The PCA Optional Rules for Arbitrating Disputes Between Two States (1992) were available on 28 July 2010 at <http://www.pca-cpa.org/upload/files/2STATENG.pdf> and at the PCA Optional Rules for Arbitrating a Dispute Between Two Parties, Of Which Only One Is a State were available (1993) on 28 July 2010 at <http://www.pca-cpa.org/upload/files/1STATENG.pdf>.

unless the parties agree otherwise. The same provisions are contained in the PCA Optional Rules for Arbitrating a Dispute Between Two Parties, Of Which Only One Is a State (1993).

## Annex I

Figure 1

**Known investment treaty arbitrations (cumulative and newly instituted cases), 1989-2009**



Source: UNCTAD.

## (A/CN.9/WG.II/WP.160/Add.1) (Original: English)

**Note by the Secretariat on settlement of commercial disputes:  
preparation of rules of uniform law on transparency in  
treaty-based investor-State dispute settlement, submitted to the  
Working Group on Arbitration and Conciliation at its  
fifty-third session**

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## **II. Transparency in treaty-based investor-State dispute settlement (*continued*)**

### **C. Legislation on international commercial arbitration**

1. In addition to the chosen rules of arbitration, the arbitration procedure will be governed by the law on international commercial arbitration at the place of arbitration. Arbitration between two private parties is the main focus of legislation on international commercial arbitration, and the manner in which procedural transparency is addressed is not necessarily tailored to address the specific needs of investor-State arbitration.

#### **1. The UNCITRAL Model Law on International Commercial Arbitration**

2. The UNCITRAL Model Law on International Commercial Arbitration does not include provisions on confidentiality, nor disclosure, and therefore does not provide for a uniform solution on that matter.

#### **2. Legislation favouring privacy and confidentiality**

3. Where confidentiality is addressed in national laws on international commercial arbitration, there is no single approach to the scope of the obligation of confidentiality in terms of the information that is to be treated as confidential, the persons to whom the obligation attaches, or permissible exceptions to prohibitions on disclosure and communication. In terms of the material or information that is to be kept confidential, some provisions include a general description of facts or other information relating to the dispute or arbitral proceedings. Other provisions adopt a more particular description of the information to be kept confidential and include various categories of information, which are accorded different treatment. These categories include, for example, the fact that the arbitration is taking place; the identity of the arbitrators; written and oral arguments; reference to the evidence given by a party or a witness; communications between parties themselves or their advisors prior to, or in the course of, the arbitration; information that is inherently confidential, such as trade secrets and commercial-in-confidence information; and the contents of the award. As to the persons to whom the duty of confidentiality is to extend, a range of persons are covered such as the arbitrators; the staff of the arbitration institution (where the arbitration is institutional); parties and their agents; witnesses, including experts; and counsel and advisors.

#### **3. Legislation favouring procedural transparency**

4. Some of the circumstances covered by legislation where disclosure of information is permitted in arbitral proceedings include the following: where the parties consent to disclosure; where the information is in the public domain; where disclosure is required by law or a regulatory body; where there is a reasonable need for the protection of a party's legitimate interests; and where it is in the interest of justice or in the public interest. Some provisions also deal with special conditions that attach to the disclosure. Such conditions may vary with the time at which disclosure occurs. If information is to be disclosed, for example, during the arbitral proceedings, one approach is to require that notice of the disclosure be given to both

the arbitral tribunal and the other party. Where disclosure occurs once the arbitration has been concluded, only notice to the other party may be relevant.

## **D. Decisions of arbitral tribunals involving procedural transparency**

5. Decisions of arbitral tribunals involving procedural transparency generally illustrate the ad hoc approach to that matter adopted by tribunals, in the absence of consistent guidelines in international investment agreements, applicable arbitration rules or applicable legislation.

### **1. Procedural documents and arbitral awards**

6. In a case governed by the ICSID Additional Facility Rules,<sup>1</sup> the arbitral tribunal held that: “Neither the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties [...]. Though, it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is free to speak publicly of the arbitration. [...] It still appears to the Arbitral Tribunal that it would be of the advantage of the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the parties if during the proceedings they were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound.”<sup>2</sup> In another case governed by the ICSID Arbitration Rules,<sup>3</sup> the claimant (the investor) complained about unilateral disclosure of the minutes of the first meeting of the arbitral tribunal and of a procedural order by the respondent (the State) who publicized those documents on the Internet. The claimant requested that the arbitral tribunal issue an order to ensure the confidentiality of those and other documents in the proceeding.<sup>4</sup> The Tribunal held that there was neither any general duty of confidentiality nor any general rule of transparency in ICSID arbitral proceedings. Consequently, the arbitral tribunal found that it was the responsibility of each arbitral tribunal to find the appropriate balance between confidentiality of the documents and transparency of the proceedings.<sup>5</sup> The Tribunal held that, due to the significant media coverage of that case, there was a sufficient risk of aggravation of exacerbation of the dispute. Therefore, it decided that both parties should refrain from disclosing minutes or records of hearings, documents produced by either party in disclosure procedures and pleadings and correspondence. However, to balance its decision, it held that the parties were free to engage in general discussion about the case in public, provided that “any such public discussion was restricted to what was necessary, and was not used as an instrument to antagonize the parties, exacerbate their differences, unduly

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<sup>1</sup> *Metalclad Corp. v. Mexico*, Case No. ARB(AF)/97/, Award, 30 August 2000, 16 ICSID Review 168 (2001); 40 ILM 36 (2001), award available on 29 July 2010 at <http://www.worldbank.org/icsid/cases/awards.htm>.

<sup>2</sup> *Ibid.*, para. 13.

<sup>3</sup> *Biwater GAUFF (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, award available on 29 July 2010 at <http://www.worldbank.org/icsid/cases/awards.htm>.

<sup>4</sup> *Ibid.*, paras. 45-51.

<sup>5</sup> *Ibid.*

pressure one of them, or render the resolution of the dispute potentially more difficult or circumvent the terms of this procedural order.”<sup>6</sup>

7. In a case governed by the 1976 UNCITRAL Arbitration Rules,<sup>7</sup> a NAFTA arbitral tribunal held, with respect to transparency, that “[...] whatever may be the position in private consensual arbitrations between commercial parties, it has not been established that any general principle of confidentiality exists in an arbitration such as that currently before this tribunal.”<sup>8</sup> In a first order, the arbitral tribunal ordered that certain documents, including the notice of arbitration and the statements of claim and defence could be released into the public domain under the 1976 UNCITRAL Arbitration Rules. In a further temporary order, the arbitral tribunal ordered that all transcripts and other records of the hearings be kept confidential and only be disclosed according to the conditions required for “Protected Documents”. In another NAFTA case also governed by the 1976 UNCITRAL Arbitration Rules,<sup>9</sup> certain third parties petitioned the arbitral tribunal to be permitted to intervene as *amici curiae* and, as part of that claim, sought copies of all documents filed in the arbitration. The arbitral tribunal held that disclosure or confidentiality was to be determined by the agreement of the disputing parties as recorded in the order regarding disclosure and confidentiality. Pursuant to that order, “either party was at liberty to disclose the major pleadings, orders and awards of the Tribunal into the public domain” (subject to deletion of trade secret information).<sup>10</sup> In another case,<sup>11</sup> where third parties petitioned the arbitral tribunal requesting, *inter alia*, the disclosure of the statement of claim and defence, memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the arbitral tribunal,<sup>12</sup> the arbitral tribunal held that under NAFTA Chapter 11 and the 1976 UNCITRAL Arbitration Rules, provision was made for the communication of pleadings, documents and evidence to the other disputing party, the other NAFTA Parties, the arbitral tribunal and the secretariat — and to no one else. The matter was also subject to any agreement between the parties or order in respect of confidentiality. The arbitral tribunal found that while principles of transparency might support the release of some of the documentation, that was not a matter which could be the subject of a general ruling. Some

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<sup>6</sup> Ibid.

<sup>7</sup> *S.D. Myers Inc. v. Government of Canada*, available on 29 July 2010 at [http://www.naftaclaims.com/disputes\\_canada\\_sdmyers.htm](http://www.naftaclaims.com/disputes_canada_sdmyers.htm). See also the comments of Canada contained in document A/CN.9/WG.II/WP.159/Add.1.

<sup>8</sup> Ibid.

<sup>9</sup> *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as *amici curiae*, 15 January 2001. The petitions and all the documents relevant to this case were available on 29 July 2010 at <http://www.state.gov/s/l/c5818.htm>. See also the comments of the United States of America in document A/CN.9/159/Add.3.

<sup>10</sup> Ibid., para. 46.

<sup>11</sup> *United Parcel Service of America, Inc. v. Government of Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, available on 29 July 2010 at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/IntVent\\_oct.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/IntVent_oct.pdf). See also the comments of Canada contained in document A/CN.9/WG.II/WP.159/Add.1.

<sup>12</sup> Ibid., para. 1.

documentation might be available in the public domain through any agreement or confidentiality order that might be made, or otherwise lawfully.<sup>13</sup>

## 2. Hearings

8. In an arbitration case under the 1976 UNCITRAL Arbitration Rules,<sup>14</sup> petitions submitted to the arbitral tribunal by different organizations contained requests for permission to, inter alia, have observer status at oral hearings. The arbitral tribunal came to the conclusion that because article 25, paragraph (4), of the 1976 UNCITRAL Arbitration Rules provided that hearings were to be held in camera, the petitioners could not be granted the right to attend oral hearings of the arbitration. The arbitral tribunal held that the phrase “in camera” was clearly intended to exclude members of the public, i.e., non-party third persons such as the petitioners.<sup>15</sup> However, at a later stage of the proceedings, the parties agreed to make the hearings open to the public and the hearings were broadcasted live. In addition, transcripts of hearings on the merits as well as the final award were published. Along the same lines, in another case,<sup>16</sup> while examining both Chapter 11 of NAFTA and the 1976 UNCITRAL Arbitration Rules, the arbitral tribunal considered whether those Rules allowed public access to hearings. It noted that article 25, paragraph (4), of 1976 UNCITRAL Arbitration Rules, under which hearings were held in camera unless otherwise agreed by the parties, prevented third parties or their representatives from attending the hearings in the absence of both parties agreeing thereto.<sup>17</sup> The parties agreed to make the proceedings open to the public and the hearings were broadcasted live. In addition, the final award and dissenting opinion were published. Similarly, in another case initiated under Chapter 11 of the NAFTA and governed by the 1976 UNCITRAL Arbitration Rules, the parties agreed to make the hearings open to the public. At the request of the parties and the arbitral tribunal, ICSID accepted to host the hearings. The hearings were broadcasted live and hearing transcripts were published.<sup>18</sup>

<sup>13</sup> Ibid., para. 68.

<sup>14</sup> *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as amici curiae, 15 January 2001, available on 29 July 2010 at <http://www.state.gov/s/l/c5818.htm>. See also the comments of the United States of America in document A/CN.9/159/Add.3.

<sup>15</sup> Ibid., para. 41.

<sup>16</sup> *United Parcel Service of America, Inc. v. Government of Canada*, Decision of the tribunal on petitions for intervention and participation as amici curiae, 17 October 2001, available on 29 July 2010 at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/IntVent\\_oct.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/IntVent_oct.pdf).

<sup>17</sup> Ibid., para. 67.

<sup>18</sup> ICSID Release News, “Canfor Corporation v. United States of America NAFTA/UNCITRAL Arbitration Rules Proceeding” (December 2, 2004), available on 29 July 2010 at: [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive\\_%20Announcement13](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement13).

### **III. Concluding remarks and questions for possible consideration by the Working Group**

#### **A. Policy considerations on transparency**

9. The question of transparency in treaty-based investor-State arbitration arises from the presence of a State in the arbitration, the subject-matter of the dispute, which often raises questions of public policy, public interest and the amount of potential liability. Transparency has been viewed as one of the central aspects of good governance claims directed against States and is also considered by private parties as an important characteristic of corporate social responsibility. The underlying functions fulfilled and values protected by transparency apply also to dispute settlement methods. However, confidentiality is generally regarded as an important feature of arbitration. The need to protect business or governmental secrets seems to be largely admitted, as is the need to protect proceedings from any outside pressures on the parties or on the arbitral tribunals. Confidentiality, at least during arbitral proceedings, may be seen as contributing to the de-politicization of investment disputes.

10. Taking into account that both transparency and confidentiality can be considered as legitimate interests of investor-State treaty-based arbitration, the Working Group may wish to consider whether a right balance should be found to protect both interests and whether it would be useful to formulate policy considerations on principles underlying transparency in treaty-based investor-State arbitration.

#### **B. Matters for possible consideration regarding transparency**

##### **1. General remarks**

11. The examples taken from international investment agreements, arbitration rules and case law regarding the question of transparency in treaty-based investor-State arbitration and reflected in part II of this note illustrate possible responses to the general question of how to achieve transparency, while balancing the public interest and the need to protect confidentiality.

12. It may be recalled that at the forty-first session of the Commission, a delegation made suggestions that work on transparency should seek to accomplish five objectives: “(1) creating public knowledge of the initiation of an investor-State arbitration; (2) allowing third parties to make submissions to the tribunal where such submissions would be helpful and relevant and would not unduly delay, interfere with, or increase the costs of, the proceeding; (3) allowing open hearings; (4) making the decisions and award of the tribunal public; and (5) preserving the existing power of an arbitral tribunal to allow closed proceedings and restrict access to documents, or portions thereof, when necessary to protect confidential business information and/or information that is privileged or otherwise protected from disclosure under the domestic law of the disputing State” (see document A/CN.9/662, para. 17). The Working Group may wish to consider the following questions in relation to the scope of work on procedural transparency.

## **2. Persons or institutions concerned**

13. The Working Group may wish to consider how provisions on transparency should determine the rights and obligations of each of the persons involved in the arbitration proceedings, i.e., the States parties to international investment agreements, the parties to the dispute and their representatives, the arbitration institution, if any, and the arbitral tribunal. The rights and obligations of third parties are discussed in paragraphs 20 and 21 below.

14. In particular, it should be clarified whether it would be more appropriate that the parties to the dispute, the arbitral tribunal or an institution be in charge of conveying information to the public. The extent to which the parties may engage in general discussion about the case in public, or make disclosures, and the time at which this would be authorized may also need to be clarified. The Working Group may also wish to determine whether publication should be automatic, left to the parties' discretion or be subject to prior permission by the arbitral tribunal, taking into account the intent of the parties, or should be organized in any other manner.

## **3. Information subject to publicity**

15. The Working Group may wish to consider whether there should be a general rule regarding public access to procedural documents and arbitral awards or the extent to which those matters should be left for individual decisions to be made by the parties or the arbitral tribunal. The Working Group may also wish to consider whether cost elements should be addressed and, in the affirmative, how.

16. Another matter for possible consideration is whether provisions on public access to procedural documents should be drafted in the form of a general statement or should instead contain a list of procedural documents to be made publicly available. In that latter case, the Working Group may wish to decide whether documents to be publicized should include some or all of the following: the notice of arbitration and the response thereto, the minutes or records of hearings; any of the documents produced in the arbitral proceedings by the parties, whether pursuant to a disclosure exercise or otherwise; any of the pleadings or written memorials (and any attached witness statements or expert reports); correspondence between the parties and/or the arbitral tribunal exchanged in respect of the arbitral proceedings, decisions, orders or directions of the arbitral tribunal; and awards.

17. In case the Working Group would consider that a provision on transparency should include publication of procedural documents, it may also wish to consider whether and to what extent documents revealing business secrets or other confidential information should be exempt from possible public disclosure and consider whether additional guidance should be provided.

## **4. Recipients of information**

18. The Working Group may wish to consider the various possible approaches for the determination of recipients of disclosed information which could be limited to the non-disputing governments, or broadened so as to include the public at large.

## **5. Open hearings**

19. The Working Group may wish to consider whether open hearings should be permitted, and in the affirmative, whether guidance to arbitral tribunals should be provided on the organization of open hearings, taking account of the possible need to protect, to the extent required, confidential information.

## **6. Submissions by third parties**

20. Certain international investment agreements include in their dispute resolution clause the possibility for non-disputing individuals or organizations to make their views known on the matters at issue in the arbitration. Guidelines for the acceptance of such written *amicus curiae* submissions by an arbitral tribunal have been established, in certain instances, in legislation and case law and provided for an assessment by the arbitral tribunal of the relevance of the proposed submissions. The question of submissions by third parties is closely connected to the question of access to procedural documents so that third parties' submissions may adequately address matters within the scope of the dispute. The Working Group may wish to decide whether that matter should be included in its consideration of the issue of transparency.

21. In case the Working Group would decide that that matter should be dealt with, it may wish to consider formulating specific rules and guidelines applying to third parties' intervention addressing, *inter alia*, possible criteria for acceptance of third parties' submissions, such as assessing the legitimate interest of the third parties, ensuring that they are accountable, independent and not backed by any of the disputing parties. The extent of their possible intervention might need to be determined: for instance, existing rules on that matter allow third parties to submit *amicus* briefs but not necessarily to call witnesses, or to have the possibility to amend the claims or independently affect the process. The form and content of the third parties' submissions may also need to be determined (pages limitation, questions to be addressed (facts and/or law)). The Working Group may wish to consider whether the arbitral tribunal should be requested to provide grounds for refusal of third parties' submissions and arguments contained in the submissions. A question to be considered would also be the conditions for allowing publicity of the *amicus curiae* briefs.

## **C. Possible form of work on transparency**

22. The Working Group may wish to consider the following possible options concerning the form of its work on transparency in treaty-based investor-State arbitration.

### **1. Model clause for inclusion in the dispute settlement provision of international investment agreements**

23. The Working Group may wish to consider whether, with a view to encouraging and facilitating transparency, it would be useful to prepare a model clause on transparency for inclusion in dispute settlement provisions of international investment agreements. It may be noted that dispute settlement provisions in international investment agreements are often premised on the commercial

arbitration model and, in most cases, do not address such issues as the disclosure of the existence of the proceedings, the disclosure of any procedural document, and open hearings or interventions by non-arbitrating parties. The objective of preparing such a model clause would be to harmonize States' practices in that field, consistent with UNCITRAL's mandate.<sup>19</sup> By adopting such a clause in international investment agreements, States would demonstrate their willingness to promote transparency in arbitration.

24. If the option of providing a model clause for adoption in international investment agreements would be retained, the Working Group may wish to note that, as highlighted in a report by UNCTAD, a new generation of international investment agreements has tended to address in advance a series of specific matters related to the arbitral proceedings such as submission of the same dispute to local courts, the place of arbitration, appointment of experts and remedies available, including interim measures.<sup>20</sup> Under that option, the Working Group may wish to decide whether its work should be limited to offering a model clause on transparency or if it should also encompass other matters on which States might wish to receive guidance for drafting dispute settlement provision in their international investment treaties.

## 2. Specific arbitration rules

25. The Working Group may wish to consider the option of drafting specific arbitration rules addressing transparency in treaty-based investor-State arbitration, either in the form of separate arbitration rules or as an annex to the UNCITRAL Arbitration Rules. In either case, the existence of a specific set of distinct rules applying only to investment arbitration may raise difficult issues regarding the definition of investment arbitration (covered by those rules) as opposed to other types of arbitration (to which those specific rules would not apply).

### *Previous discussions of the Working Group*

26. At the forty-sixth session of the Working Group (New York, 5-9 February 2007), a suggestion had been made to include specific provisions in the UNCITRAL Arbitration Rules to ensure transparency in the procedure for arbitration involving a State.<sup>21</sup> The Working Group had decided to follow a generic approach in the revision of the Rules that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference

<sup>19</sup> General Assembly resolution 2205 (XXI) [Yearbook 1968-1970, part one, chap. II, sect. E]. It may be recalled that the mandate is based on the consideration that "international trade cooperation among States is an important factor in the promotion of friendly relations, and consequently, in the maintenance of peace and security", that the "interests of all peoples, and particularly those of developing countries, demand the betterment of conditions favouring the extensive development of international trade", and "that divergences arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade."

<sup>20</sup> See *International Investment Arrangements: Trends and emerging issues*, UNCTAD Series on International Investment Policies for Development, Part II. Key Issues in New Generations IIAs, J. Investor States Dispute settlement (New York and Geneva 2006), pp. 49-50; available on 29 July 2010 at [http://www.unctad.org/en/docs/iteiit200511\\_en.pdf](http://www.unctad.org/en/docs/iteiit200511_en.pdf).

<sup>21</sup> Report of the Working Group on International Arbitration and Conciliation on the work of its forty-sixth session, A/CN.9/619, para. 61.



to dealing with specific situations.<sup>22</sup> At that session, the Working Group had further considered whether it was appropriate to include a general provision regarding confidentiality of proceedings or of materials including pleadings before the arbitral tribunal.<sup>23</sup> After discussion, the Working Group agreed not to include a provision on confidentiality of proceedings.<sup>24</sup>

27. The Working Group may also wish to recall the discussions at its forty-eighth session (New York, 4-8 February 2008) regarding transparency in investor-State arbitration and may wish to note that annexes I to III of the report on the work of that session reproduce statements made by delegations on that matter.<sup>25</sup>

#### *Separate rules for investment arbitration*

28. In case the Working Group would decide to adopt separate rules on transparency in the context of treaty-based investor-State arbitration, it may wish to consider the extent to which that approach would preserve the general applicability of the UNCITRAL Arbitration Rules. Furthermore, the Working Group may wish to consider whether limiting the drafting of new rules for investment arbitration to issues of transparency would be appropriate, taking account of additional matters that would be expected to be addressed in arbitration rules on investment.

#### *Annex to the UNCITRAL Arbitration Rules*

29. In case the Working Group would decide that the UNCITRAL Arbitration Rules should be supplemented with an annex addressing procedural transparency for use in the context of investor-State arbitration, that annex could contain either specific rules on transparency or recommendations aimed at providing guidance to arbitral tribunals.

30. Under that option, the extent to which parties would be bound by such an annex (taking account of the consensual nature of arbitration) might need to be considered.

### **3. Guidelines**

31. Another possible option to deal with transparency in treaty-based investor-State arbitration would consist in drafting guidelines to provide guidance to States when negotiating international investment treaties, to arbitral tribunals having to decide on such issues, to parties to arbitration and to other parties with a legitimate interest in the outcome of the arbitration.

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<sup>22</sup> Ibid, para. 62.

<sup>23</sup> Ibid, para. 127.

<sup>24</sup> Ibid, paras. 128-133. Views in favour of including a provision on confidentiality referred to a number of existing international arbitral rules such as the LCIA Arbitration Rules and WIPO rules which contained specific provisions on confidentiality. Against inclusion, it was suggested that inclusion of such a general provision would run counter to the current trend toward greater transparency in international proceedings. It was also said that the underlying aim of the revision of the Rules was to provide flexibility so as to accommodate evolving law and practices. In that respect, it was noted that confidentiality was an area where law and practices were still developing.

<sup>25</sup> Report of the Working Group on International Arbitration and Conciliation on the work of its forty-eighth session, A/CN.9/646, paras. 54-69.

**D. Report of the Working Group on Arbitration and Conciliation on the work of its  
fifty-fourth session (New York, 7-11 February 2011)  
(A/CN.9/717)**

**[Original: English]**

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## I. Introduction

1. The Commission considered the question of transparency in treaty-based investor-State arbitration at its forty-first session (New York, 16 June-3 July 2008). At that session, the Commission agreed that it would not be desirable to include at that time specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules (“UNCITRAL Arbitration Rules” or “Rules”) themselves and that any work on treaty-based investor-State arbitration that the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in treaty-based investor-State arbitration. Written observations regarding that issue were presented by one delegation (A/CN.9/662) and a statement was also made on behalf of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency was a desirable objective in treaty-based investor-State arbitration and should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (*ibid.*, para. 69) in the field of treaty-based

investor-State arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based investor-State arbitration and that broad discretion should be left to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based investor-State arbitration by the Working Group at a future session, the Commission requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in treaty-based investor-State arbitration. It was emphasized that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration.<sup>1</sup>

2. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic. The Commission was informed that, pursuant to the request received from the Commission at its forty-first session, the Secretariat had circulated a questionnaire to States with regard to their practice on transparency in treaty-based investor-State arbitration and that replies thereto would be made available to the Working Group.<sup>2</sup> Those replies are reproduced in document A/CN.9/WG.II/WP.159 and its addenda.

3. At the forty-third session of the Commission, support was expressed for the view that the Working Group could also consider undertaking work in respect of those issues that arose more generally in treaty-based investor-State arbitration and that would deserve additional work. The prevailing view, in line with the decision previously made by the Commission, was that it was too early to make a decision on the precise form and scope of a future instrument on treaty-based investor-State arbitration and that the mandate of the Working Group should be limited to the preparation of rules of uniform law on transparency in treaty-based investor-State arbitration. However, it was agreed that, while operating within that mandate, the Working Group might identify any other topic with respect to treaty-based investor-State arbitration that might also require future work by the Commission. It was agreed that any such topic might be brought to the attention of the Commission at its next session, in 2011.<sup>3</sup>

4. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.161, paragraphs 5-12.

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<sup>1</sup> *Official records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 314.

<sup>2</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 190.

<sup>3</sup> *Ibid.*, para. 191.

## II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its fifty-fourth session in New York, from 7 to 11 February 2011. The session was attended by representatives of the following States members of the Working Group:<sup>4</sup> Algeria (2016), Argentina (2016), Armenia (2013), Australia (2016), Austria (2016), Belarus (2011), Benin (2013), Brazil (2016), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2016), Czech Republic (2013), Egypt (2013), El Salvador (2013), France (2013), Germany (2013), India (2016), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2013), Kenya (2016), Malaysia (2013), Mauritius (2016), Mexico (2013), Morocco (2013), Norway (2013), Pakistan (2016), Paraguay (2016), Philippines (2016), Poland (2012), Republic of Korea (2013), Russian Federation (2013), Singapore (2013), Spain (2016), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2016) and Venezuela (Bolivarian Republic of) (2016).

6. The session was attended by observers from the following States: Angola, Belgium, Cuba, Democratic Republic of the Congo, Ecuador, Finland, Indonesia, Iraq, Kuwait, Madagascar, Myanmar, Netherlands, Panama, Peru, Sierra Leone, Slovakia, Switzerland, Syrian Arab Republic and Zambia.

7. The session was attended by observers from the following organizations of the United Nations System: International Centre for Settlement of Investment Disputes (ICSID), Office of the High Commissioner for Human Rights (OHCHR), United Nations Conference on Trade and Development (UNCTAD) and the World Bank.

8. The session was attended by observers from the following international intergovernmental organizations invited by the Commission: Asian-African Legal Consultative Organization (AALCO), Energy Charter Secretariat, European Union (EU), Organization for Economic Cooperation and Development (OECD) and the Permanent Court of Arbitration (PCA).

9. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), American Bar Association (ABA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asociación Americana de Derecho Internacional Privado (ASADIP), Association for the Promotion of Arbitration in Africa (APAA), Association of the Bar of the City of New York (ABCNY), Barreau de Paris, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), China International Economic Trade and Arbitration Commission (CIETAC), Comité Français de l'Arbitrage (CFA), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Council of Bars and Law Societies of Europe (CCBE), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Arbitration

<sup>4</sup> The following six State members elected by the General Assembly on 3 November 2009 agreed to alternate their membership among themselves until 2016 as follows: Belarus (2010-2011, 2013-2016), Czech Republic (2010-2013, 2015-2016), Poland (2010-2012, 2014-2016), Ukraine (2010-2014), Georgia (2011-2015) and Croatia (2012-2016).

Institution (IAI), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Council for Commercial Arbitration Institutions (IFCAI), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), International Law Institute (ILI), Milan Club of Arbitrators, Moot Alumni Association (MAA), Queen Mary University of London School of International Arbitration (QMUL), Swedish Arbitration Association (SAA), Swiss Arbitration Association (ASA) and Tehran Regional Arbitration Centre (TRAC).

10. The Working Group elected the following officers:

*Chairman:* Mr. Salim Moollan (Mauritius)

*Rapporteur:* Mr. Shane Spelliscy (Canada)

11. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.161); (b) a note by the Secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.162 and its addendum); (c) notes by the Secretariat reproducing (i) comments of the Governments of Canada and of the United States of America on transparency in treaty-based investor-State arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA) (A/CN.9/WG.II/WP.163); and (ii) proposals by Governments and International Organizations (A/CN.9/WG.II/WP.164).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a legal standard on transparency in treaty-based investor-State arbitration.
5. Other business.
6. Adoption of the report.

### III. Deliberations and decisions

13. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.162 and its addendum; A/CN.9/WG.II/WP.163; and A/CN.9/WG.II/WP.164). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The deliberations and decisions of the Working Group with respect to agenda item 5 on other business are reflected in chapter V.

## IV. Preparation of a legal standard on transparency in treaty-based investor-State arbitration

### A. General remarks

14. General remarks were made regarding the policy context in which the matter of transparency in treaty-based investor-State arbitration arose. General agreement was expressed regarding the desirability of dealing with transparency in treaty-based investor-State arbitration, which differed from purely private arbitration, where confidentiality was an essential feature. According to principles of good governance, government activities were subject to basic requirements of transparency and public access. It was pointed out that transparency in treaty-based investor-State arbitration was only one aspect of the broader notion of transparency in the treatment of investment. Beyond treaty-based investor-State arbitration, transparency was said to be essential (i) for the conduct of States' investment-related administrative procedures, (ii) for the design and implementation of domestic investment laws and regulations, (iii) for investment promotion and States' efforts to attract development enhancing investment, and (iv) for States' specific interactions with individual investors.

15. The Working Group heard a statement made on behalf of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises that adequate transparency in arbitration processes with investors where human rights, including access to clean water, affirmative action policies and the protection of indigenous peoples' rights, were concerned was essential if societies were to be aware of proceedings that might affect the public interest and therefore their own welfare. The statement further expressed the hope that appropriate rules for transparency would not be limited solely to disputes arising under future investment treaties, but would apply also to already existing investment treaties referring to UNCITRAL Arbitration Rules, so as to avoid setting two tiers of practice. Further, it was pointed out that, in limited and well-defined circumstances, there could be legitimate exceptions to transparency, but that attention should focus on ensuring that any limitation on transparency did not defeat its very purpose with regard to good governance.

16. The view was expressed that the right of access to information was an integral component of the freedom of expression under international human rights law. It was further said that the need for access to information was recognized and the decisions in *Claude Reyes v. Chile*<sup>5</sup> and *Társaság v. Hungary*<sup>6</sup> were given as examples for such recognition. In that light, it was said that the legal standard on transparency must give full effect to the mandatory character of human rights.

17. The Working Group took note of the statements made regarding the impact of human rights on its current work and agreed that further consideration would be given to that question at a later stage of its discussion.

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<sup>5</sup> *Claude Reyes et. al. v. Chile*, Inter-Am. Ct. H.R. (ser.C) No. 151 (19 September 2006).

<sup>6</sup> *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05, Eur. Ct. H.R. (14 April 2009).

## **B. Possible forms and scope of application of a legal standard on transparency regarding future investment treaties**

18. The Working Group recalled that, at its fifty-third session, it generally discussed the possible nature of a legal standard on transparency in treaty-based investor-State arbitration and the various forms it might take (A/CN.9/712, paras. 22-30 and paras. 76-100), and decided that all suggestions in that regard would require further legal analysis (A/CN.9/712, para. 94).

### **1. Express consent or presumption of application in the context of future investment treaties (“opt-in” or “opt-out” solutions)**

19. The Working Group resumed discussion on the scope of application of a legal standard on transparency with the aim of identifying policy considerations underlying the various options that had been discussed at the fifty-third session of the Working Group. There was a general agreement that the key issue for the application of a legal standard on transparency to future investment treaties was that of consent. Therefore, the main question to be further considered related to the manner in which that consent would be expressed. In that context, consent could be expressed in two different manners. There could be a presumption in the legal standard on transparency that the standard would apply to future treaties referring to the UNCITRAL Arbitration Rules. Under that approach, the legal standard on transparency would apply, unless States otherwise provided by opting out of the legal standard on transparency (“opt-out” solution). A second option would be to require express consent of States that the legal standard on transparency would apply. Under that option, States would be required to expressly opt into the legal standard on transparency for it to come into application (“opt-in” solution).

20. Regarding the option of presumption of application of the legal standard on transparency (opt-out solution), it was said that that approach would be similar to the one adopted under article 1, paragraph (2) of the 2010 UNCITRAL Arbitration Rules. It would ensure a wider application of the legal standard on transparency, and thereby ensure that the mandate given by the Commission to the Working Group to promote transparency in treaty-based investor-State arbitration would be better fulfilled. One aspect specifically discussed was the extent to which that option would require amendment of the 2010 UNCITRAL Arbitration Rules. A number of delegations that expressed support for that option were of the view that that raised two questions: from a legal perspective, it was not clear whether the amendment would be necessary; however, from a practical perspective, the amendment would achieve clarity (see below, para. 31).

21. In support of an application of the legal standard on transparency based on an express consent of States (opt-in solution), it was said that that solution would ensure that States had taken the conscious decision to apply that standard, and as a matter of policy, States should be made aware of the rules that would be applicable.

22. The Working Group agreed that discussion on opt-in or opt-out solutions were made on a preliminary basis, with the aim to identifying the policy considerations underlying both options, and that no decision in favour of one of the options was intended to be made at the current session. The question would have to be revisited once the content of the legal standard on transparency became clearer.



## **2. Guidelines or stand-alone rules on transparency**

23. The Working Group discussed the possible forms that a legal standard on transparency might take, based on options mentioned in document A/CN.9/WG.II/WP.162, paragraphs 7 to 21, focusing in particular on whether the legal standard on transparency should take the form of guidelines or of stand-alone rules.

24. In support of a legal standard on transparency in the form of guidelines, reference was made to the arguments presented in document A/CN.9/WG.II/WP.164. It was highlighted that guidelines would adopt a different drafting style than stand-alone rules as they would be more discursive, detailed, providing explanations to parties and could lay out various options that parties could choose. Guidelines could also apply where States had consented thereto. In that respect, the option of guidelines would come very close to that of stand-alone rules on transparency that would apply if parties expressly agreed to their application (opt-in solution, see above, para. 21). Examples were given of texts that were drafted as rules or principles but were nevertheless used as guidelines applicable when the parties had agreed thereto, including the IBA Rules on the Taking of Evidence in International Arbitration and the Unidroit Principles of International Commercial Contracts (2004).

25. The view was expressed that high standards on transparency in treaty-based investor-State arbitration should be established because transparency contributed to promoting the rule of law, good governance, due process and rights to access information. It was also seen as an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such. It was said that the legal standard on transparency should take the form of detailed rules of procedure rather than as discursive guidelines, as such guidelines would not provide the certainty contemplated by the objective of UNCITRAL to harmonize international trade law.

26. In a spirit of cooperation, those delegations that had thenceforth expressed a strong preference for guidelines agreed to approach the drafting exercise on the basis that the legal standard on transparency be drafted in the form of clear rules rather than looser and more discursive guidelines. That was done on the strict understanding that their prior insistence on guidelines was motivated by a desire to ensure that the legal standard on transparency would only apply where there was clear and specific reference to it (opt-in solution) (see below, para. 58).

## **3. Legal standard on transparency applicable as a supplement to the UNCITRAL Arbitration Rules, or more generally to treaty-based investor-State arbitration, irrespective of the applicable arbitration rules**

27. The Working Group further considered whether stand-alone rules on transparency should be made applicable to treaty-based investor-State arbitration, irrespective of the applicable arbitration rules (see document A/CN.9/WG.II/WP.162, paras. 20 and 21).

28. The Working Group was reminded of its forty-eighth session (New York, 4-8 February 2008), in which it had decided to first complete the revision of the 1976 UNCITRAL Arbitration Rules. It was said that the topic of treaty-based investor-State arbitration had been postponed to be dealt with after the completion

of the revision of the 1976 UNCITRAL Arbitration Rules on the understanding that consideration of the topic was closely linked to the Rules. On that basis, it was said that the Working Group should first consider drafting rules on transparency under the UNCITRAL Arbitration Rules and then consider a possible broader application of the legal standard. It was also said that the legal standard on transparency, even if made applicable in relation to the UNCITRAL Arbitration Rules, would constitute a model for other arbitration rules, for disputing parties to adopt in particular non-UNCITRAL arbitral proceedings, or even for States to adopt in their investment treaties.

29. In response, it was pointed out that the need for transparent proceedings would apply generally to treaty-based investor-State arbitration, without being limited to ad hoc arbitration under the UNCITRAL Arbitration Rules. Not all treaty-based investor-State arbitrations took place under the UNCITRAL Arbitration Rules, and therefore, the Working Group should consider developing a legal standard on transparency of general application. It was further said that the mandate of UNCITRAL<sup>7</sup> was to further the harmonization of international trade law, and under that mandate, UNCITRAL should aim at establishing a unified legal framework for the fair and efficient settlement of disputes arising in international commercial arbitration.

30. To the question whether applying the legal standard on transparency to treaty-based investor-State arbitration generally would be feasible, it was explained that when a treaty contained rules on transparency, those rules would be applied by arbitral institutions despite their rules containing different provisions. It was also said that the International Centre for the Settlement of Investment Disputes (“ICSID”) had so far not had difficulties in applying specific rules on transparency contained in treaties in conjunction with its own rules. As an illustration, it was said that arbitration under the United States — Dominican Republic — Central America Free Trade Agreement (“CAFTA”) included mandatory open hearings, and that kind of specific requirement in treaties had worked in tandem with the applicable arbitration rules.

31. A question was raised whether the 2010 UNCITRAL Arbitration Rules should be amended to refer to any legal standard on transparency that might be added to the Rules (see above, para. 20). It was said that there could be clarity in amending article 1 on scope of application of the UNCITRAL Arbitration Rules to refer to the legal standard on transparency. Other views were expressed that it might be confusing to propose three different sets of UNCITRAL Arbitration Rules (1976 Rules, 2010 Rules, and those revised to address the specific matter of transparency in treaty-based investor-State arbitration). After discussion, it was decided to defer that question to a later stage depending on decisions to be made regarding the manner in which consent of the parties would be expressed, and whether the legal standard on transparency would be drafted as a supplement to the UNCITRAL Arbitration Rules, or more generally as a legal standard of a general application covering all instances of treaty-based investor-State arbitration.

32. The Working Group agreed that the questions raised regarding the scope of application of the legal standard on transparency would be further considered at a later stage.

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<sup>7</sup> General Assembly resolution 2205 (XXI) of 17 December 1966.

## **C. Applicability of a legal standard on transparency regarding existing investment treaties**

### **1. General information on existing investment treaties**

33. The Working Group heard information on data and trends relating to the UNCITRAL Arbitration Rules in investment treaties and their use in treaty-based investor-State arbitration. A review conducted in 2010 by the United Nations Commission on Trade and Development (UNCTAD) of 100 investment treaties showed that 60 per cent of the investment treaties referred to ad hoc arbitration under the UNCITRAL Arbitration Rules. A review conducted in January 2011 by UNCTAD of 42 available model investment treaties indicated that 76 per cent of the model investment treaties referred to the UNCITRAL Arbitration Rules. It was pointed out that some States referred to the UNCITRAL Arbitration Rules in their respective laws or investment contracts, providing the example of a State that included in new oil contracts the possibility of ad hoc arbitration under the UNCITRAL Arbitration Rules.

34. With respect to the investor's choice of arbitration rules for treaty-based investor-State arbitration, the Working Group was informed that ICSID was the forum used with the greatest frequency (in 62 per cent of the cases on average) followed by the UNCITRAL Arbitration Rules (with an average of 27.4 per cent of the cases) over the last 10 years. There was no empirical evidence that the introduction of transparency had deterred States from offering ICSID arbitration in international investment treaties or investors from accepting such offers, as the share of ICSID cases had remained stable over the last 10 years. It was further mentioned that the absence of transparency did not seem to provide a competitive advantage for a particular set of arbitration rules, whether in the offer under investment treaties or in the conduct of arbitration.

35. Regarding the content of transparency provisions in investment treaties, the Working Group was informed that, of available investment treaties concluded in 2009, 47 per cent included general transparency provisions and 25 per cent included transparency provisions related specifically to treaty-based investor-State arbitration. Some investment treaties included "soft" transparency provisions in the wider context of investment promotion provisions, whereas others included transparency provisions that were legally binding obligations and might require important reform or proactive policies by the parties involved.

### **2. Automatic application of a legal standard on transparency to existing investment treaties**

36. The Working Group considered the extent to which the legal standard on transparency could be made applicable to existing investment treaties, a matter that had already been considered at the fifty-third session of the Working Group (A/CN.9/712, paras. 85-100).

37. Different views were expressed on whether the legal standard on transparency could be made automatically applicable to arbitrations arising under existing investment treaties. It was pointed out that the applicability of the legal standard on transparency could depend not only on the language of the treaty, but also on the intent of the parties to the treaty. The view was expressed that a reference in treaties

to the “UNCITRAL Arbitration Rules” without any further indication of a version of the Rules could be interpreted as a “dynamic reference”, encompassing further possible evolutions of the Rules (A/CN.9/WG.II/WP.162, para. 30). Concern was expressed that any automatic application of the legal standard on transparency to existing treaties would have a retroactive effect, forbidden under the law of treaties. A different view was expressed that the law of treaties did not prohibit retroactivity *per se*, making it conditional on the intention of the parties, but that, in any case, a dynamic reference raised the question of applicability and not one of retroactivity under the law of treaties. The ICSID Rules and the World Trade Organization (“WTO”) Sanitary and Phytosanitary Measures (“WTO-SPS”) Agreement were given as examples of standards, to which a dynamic reference could be made in practice. It was further said that a dynamic reference for the legal standard on transparency would only be possible if the legal standard would take the form of a supplement to the UNCITRAL Arbitration Rules. It was also said that the applicability of the legal standard by a dynamic reference would also imply addressing the issue raised by the presumption in article 1, paragraph (2) of the 2010 UNCITRAL Arbitration Rules.

38. Concerns were expressed on such automatic application through a dynamic reference. It was stated that the reference to the UNCITRAL Arbitration Rules had to be interpreted in the light of public international law, as it was included in a treaty, and that therefore the Vienna Convention on the Law of Treaties (“Vienna Convention”) was applicable. In that light, it was pointed out that the different options to make the legal standard applicable to existing investment treaties were laid out in document A/CN.9/WG.II/WP.162. It was said that any application of the legal standard on transparency would not be possible without the consent of the States parties to the investment treaty and that UNCITRAL did not have the authority to impose on States application of UNCITRAL texts (A/CN.9/WG.II/WP.162, para. 29). In that regard, it was emphasized that an investment treaty was the outcome of negotiations between States based on their consent.

39. With respect to the issue of “retroactivity” or “applicability”, it was said that the decisive factor was treaty interpretation and that an attempt to establish, as a general rule, the automatic application through a dynamic reference would open the door in particular cases to possible legal challenges. It was further said that such an approach would create confusion and legal uncertainty and that the Working Group should rather focus on drafting an instrument to be adopted by States aimed at ensuring that the legal standard on transparency would apply to existing investment treaties. It was also said that any automatic application would be impossible where the investment treaty expressly referred to the 1976 version of the UNCITRAL Arbitration Rules.

40. It was further said that it was not for UNCITRAL to determine whether and how the legal standard on transparency would apply to existing treaties. It was also highlighted that that application would depend on whether the legal standard on transparency would operate on the basis of an opt-in or opt-out mechanism (see above, paras. 19-22).

41. After discussion, the Working Group agreed to revisit that matter in the context of its discussion on whether the legal standard on transparency would apply on an opt-in or opt-out basis, taking into account the facts that (i) if the solution of

an opt-in was favoured, that could foreclose any argument that a reference to the UNCITRAL Arbitration Rules in an existing investment treaty would bring into operation the new legal standard on transparency; and (ii) conversely, if an opt-out solution was favoured, it would leave open that argument but could in turn create uncertainty as to whether or not that standard was applicable.

**3. Possible UNCITRAL instruments on the application of a legal standard on transparency to existing investment treaties**

42. The Working Group then discussed whether it should consider making the legal standard on transparency applicable to existing treaties by an instrument that would either include joint interpretative declarations pursuant to article 31 (3) (a) of the Vienna Convention (A/CN.9/WG.II/WP.162, paras. 32-35), by which States would express their interpretation of the reference to arbitration in their investment treaty to include the legal standard on transparency, or a convention, whereby States could express consent or agree to apply the legal standard on transparency to arbitration under their existing and future investment treaties (A/CN.9/WG.II/WP.162, paras. 23-25). Such new convention, however, would make the legal standard on transparency applicable only to investment treaties between such States parties that were also parties to the new convention. In that context, the Working Group also considered whether the Secretariat should be mandated to explore the different options further and to prepare some drafting proposals for such options for consideration at a future session.

43. Different views were expressed on whether such instruments, including joint declarations or a convention, should be prepared to make the legal standard applicable to existing treaties. It was said that joint interpretative declarations were usually made with respect to the substantive provisions of a treaty and that any instrument, including a model declaration to refer to the interpretation of any investment treaty, would be of questionable validity and value.

44. It was also said that the development of such an instrument would be premature and outside the current mandate of the Working Group. Also, a concern was expressed that many existing investment treaties contained provisions on amendment, and amendments of those treaties must be in accordance with those provisions and not by another instrument. It was further said that it would be for States to consider how to make the legal standard applicable to existing treaties as a matter of public international law. It was further said that such work would be premature until the substance of the legal standard had been considered and that, at that stage of the deliberations, the Working Group was not in a position to provide the Secretariat with adequate directions. The Working Group was reminded of its deliberations on the 2006 Recommendation regarding the interpretation of article II (2) and article VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), where the Working Group had first worked on the substance and then on the applicability of the interpretation.

45. Views were expressed in favour of pursuing further the option to prepare an instrument that, once adopted by States, could make the legal standard on transparency applicable to existing treaties. It was said that the options of making the legal standard applicable to existing treaties by joint interpretative declarations pursuant to article 31 (3) (a) of the Vienna Convention, by amendment or

modification pursuant to articles 39-41 of the Vienna Convention or by a subsequent agreement between States pursuant to article 30 of the Vienna Convention were interesting and practically possible options, which should be further explored. It was further said that, under public international law, States were permitted to amend or modify their existing treaties and that joint interpretative declarations were accepted in international practice. Another view expressed was that the preparation by the Secretariat of some drafting proposals for a future session would facilitate the deliberations of the Working Group.

46. After discussion, the Working Group agreed to request the Secretariat to further explore the options of making the legal standard on transparency applicable to existing treaties and to prepare some drafting proposals for such instruments for consideration at a later stage.

#### **D. Relation between the host State and the investor, parties to the arbitration**

47. The Working Group considered (i) whether the investor should be given the option in the legal standard on transparency to refuse an offer for transparent arbitration or accept it partially only, and (ii) whether both disputing parties could agree not to apply the rules on transparency once the dispute had arisen.

##### **1. Option for the investor to refuse the legal standard on transparency**

48. At its fifty-third session, the Working Group had considered the question whether the investor should be given the option to deviate from the legal standard on transparency (A/CN.9/712, paras. 30 and 95-96).

49. At the current session, it was said that the investor would express acceptance to arbitrate under terms of an offer to arbitrate, as contained in the treaty, and that that offer could not be varied. Once the offer had been accepted, the investor was bound by the terms and conditions contained in that offer.

50. It was underlined that there should not be a provision allowing the investor to vary the offer for transparent arbitration in the legal standard. It was further said that providing the investor with the last word on the application of the legal standard on transparency would unduly privilege the investor, lead to a decrease in transparency and would be contrary to the Commission's mandate to enhance transparency in treaty-based investor-State arbitration. It was pointed out that the legal standard on transparency was not meant to benefit only the investor and the host State but also civil society, so it was not for the investor alone to decide on such matters.

51. However, it was also said that it might be advisable to provide an opportunity for an investor to express its opinion to the host State's offer of transparent arbitration. In that regard, it was explained that there were two separate elements to consider: one being the body of rules on transparency, and the other being the mechanism triggering their application. Depending on whether the legal standard on transparency would contain an opt-in or opt-out mechanism, it would be up to the State to formulate the offer it wished to make to the investor.

52. In response to a concern, it was clarified that the need to protect sensitive and confidential information would be covered by limitations to be further defined under the rules on transparency (see below, paras. 129 to 147) (referred to as “limitations to transparency set out in section 6”).

53. After discussion, there was broad consensus in the Working Group that the legal standard on transparency should not include a right for the investor to derogate from the offer for transparent arbitration.

## **2. Agreement to depart from the legal standard on transparency after the dispute had arisen**

54. The Working Group agreed to further consider the issue outlined in paragraph 53 of document A/CN.9/WG.II/WP.162, whether the disputing parties could deviate from the legal standard on transparency (see also A/CN.9/712, paras. 97-98).

55. The Working Group noted that treaty-based investor-State arbitration, contrary to commercial arbitration where the will of the arbitrating parties was decisive, was conducted on the basis of an underlying treaty between States Parties, which limited the ability of the disputing parties to depart from the prescribed route of the underlying treaty. It was also said that the expectations of third parties who stood to benefit from the legal standard on transparency had to be taken into due consideration.

## **E. Possible content of a legal standard on transparency**

56. At its fifty-third session, the Working Group generally agreed that the substantive issues to be considered in respect of the possible content of the legal standard on transparency would be as follows: publicity regarding the initiation of arbitral proceedings; documents to be published (such as pleadings, procedural orders, supporting evidence); submissions by third parties (“amicus curiae”) in proceedings; public hearings; publication of arbitral awards; possible exceptions to the transparency rules; and repository of published information (“registry”) (A/CN.9/712, para. 31).

57. At its current session, the Working Group agreed to resume its discussion on each of the identified matters. The Working Group took note of the suggestion that the current list of items regarding the content of the legal standard on transparency did not appear to address a question related to the procedure for appointment of arbitrators in treaty-based investor-State arbitration. In that light, it was suggested that the Working Group should consider whether specific transparency rules for appointment of arbitrators should be defined, in particular when appointment was made by appointing authorities. That suggestion did not receive support (see below, para. 153).

58. The Working Group agreed to proceed with a discussion on developing the content of highest standards on transparency, on the basis that the legal standard on transparency be drafted in the form of clear rules, taking account of the understanding contained in paragraph 26 above. It was said that the content of the legal standard on transparency might need to be reconsidered, and its content

possibly diluted in case the Working Group would at a later stage decide that the application of the legal standard would be based on a presumption (opt-out solution, see above para. 20).

## 1. Publicity regarding the initiation of arbitral proceedings

### *Timing of the publication and documents to be published*

59. At the fifty-third session of the Working Group, different views were expressed on whether the existence of arbitral proceedings should be made public once the arbitral proceedings commenced, or when the arbitral tribunal was constituted (A/CN.9/712, para. 34). Different views were expressed regarding the information to be made public prior to the constitution of the arbitral tribunal, in particular, whether it should be limited to the existence of a dispute, or also include publication of the notice of arbitration (A/CN.9/712, para. 33). It was suggested that providing only preliminary information regarding the parties involved, their nationality, and the economic sector concerned might be sufficient (A/CN.9/712, para. 33).

60. At its current session, the Working Group focused its attention on whether and when the notice of arbitration should be made public. It was pointed out that the decision on that matter would be guided by policy consideration on whether civil society should play an active role at that stage of the proceedings.

61. The Working Group generally agreed that the notice of arbitration should be disclosed. It was said that as most of the important documents of the proceedings would be disclosed, the notice of arbitration and the response thereto should also be published.

62. However, diverging views were expressed on the question whether the notice of arbitration should be published before the constitution of the arbitral tribunal, taking account in particular of the fact that the UNCITRAL Arbitration Rules were ad hoc rules, without any institution to handle issues that might arise before the constitution of the arbitral tribunal.

63. Views were expressed that the notice of arbitration, and more generally publicity on the existence of the arbitral proceedings, should be made public after the arbitral tribunal was constituted. In support of that view, it was said that the arbitral tribunal would be best placed to police matters of confidential and sensitive information that might be contained in the notice of arbitration. Publication of the notice of arbitration at a later stage, it was said, would also protect the parties to the arbitration from possible pressures of civil society, in particular on matters such as the appointment of arbitrators, which was said to be a right of the disputing parties. It was pointed out that the respondent State needed time to organize its defence and to prepare its response to the notice of arbitration. With a view to ensuring fairness, details of the dispute contained in the notice should be made public only when the respondent State had an opportunity to present its own position in the response to the notice. It was said that during the time following the notice of arbitration and until the response to the notice was filed, there were possibilities for settling the dispute which would be compromised once the parties' positions as expressed in the notice of arbitration and the response would be published. In response, it was said that treaties usually provided for a period prior to the commencement of arbitration proceedings where parties could try to resolve disputes amicably.



64. Opposing views were that publication after constitution of the arbitral tribunal would not permit civil society to be informed of the commencement of the proceedings, to express their views at an early stage of the proceedings, and to possibly express views on the composition of the arbitral tribunal. It was said that prompt publication of the notice of arbitration best served the interest of transparency. Under that approach, there should be full disclosure of the notice of arbitration, once served, with possible solutions to address the need to protect sensitive and confidential information. An illustration of practical ways to deal with that matter were given: when a State was put on notice that an investor was commencing an arbitration, the State would, before publishing the notice of arbitration, request the investor to consider whether it wished to redact certain information, and the defendant State would also decide whether some information would need to be redacted. In case of disagreement between the parties on the information to be redacted, the most redacted version of the notice of arbitration would be published. A similar procedure could be adopted in the legal standard on transparency, as in the experience of States having adopted such an approach, no difficulties had arisen. It was pointed out that pressures from the public were inherent in publication and transparency. It was suggested that a procedure could be devised in the rules on transparency, whereby the notice of arbitration could be published, subject to the parties' agreement to redact sensitive and confidential information. In case of disagreement between the parties on the information to be redacted, the most redacted version of the notice of arbitration would be published. After its constitution, the arbitral tribunal could decide on the disputed information to be made public and, if necessary, order publication of a revised notice of arbitration.

65. It was pointed out that, as the legal standard to be drafted was meant to establish clear rules of universal application, a simple procedure would be preferable. The determination of what would constitute the most redacted version of a notice of arbitration in the example given in paragraph 64 above might not be easy to determine in all instances. Under that view, it would be preferable to publish the notice of arbitration after constitution of the arbitral tribunal, so that the arbitral tribunal could assist in determining confidential and sensitive information that should not be published. However, the need to provide information to civil society as soon as the proceedings commenced was also acknowledged.

66. As a compromise solution, it was suggested that the notice of arbitration should be published once the arbitral tribunal was constituted and there should also be disclosure of information on the existence of the proceedings, along the lines of the ICSID procedures, promptly upon the receipt of the notice of arbitration. For instance, Regulation 22(1) of the ICSID Administrative and Financial Regulations provides that "[t]he Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding".

67. The attention of the Working Group was drawn to a proposal contained in paragraph 45 of document A/CN.9/WG.II/WP.162/Add.1, which provided that: "Information regarding the name of the parties, their nationalities and the economic sector involved shall be made publicly available once [the notice of arbitration has been received by the respondent] [the arbitral tribunal has been constituted]."

68. Some support was expressed for the proposal mentioned in paragraph 67 above, with the understanding that the text appearing in the first bracket would be retained and the text in the second bracket deleted. It was said that that proposal was in line with the current procedure at ICSID, and constituted therefore a procedure with which many States were already familiar. As a matter of drafting, it was suggested to refer to “a brief description of the subject matter of the claim” instead of the “economic sector involved” in order to convey more precise information to the public.

69. With a view to providing a procedure for the parties to publish the notice of arbitration before the constitution of the arbitral tribunal, a further proposal was made, along the following lines: “Once the notice of arbitration has been received by the respondent, the respondent shall promptly make publicly available (i) information regarding the name of the parties, their nationalities and the economic sector involved; and (ii) the notice of arbitration, except with respect to any portion of the notice to which either the claimant (at the time it submits the notice) or the respondent objects on the ground that it contains protected information.”

70. That proposal also received some support. It was said to provide a simple and clear procedure regarding the information to be published at an early stage of the procedure, and the conditions for publication of the notice of arbitration, thereby addressing concerns expressed in the Working Group (see above, para. 65). It was explained that it was for the claimant to identify, when sending the notice of arbitration, the information to be redacted, and the respondent would have an opportunity to proceed in the same manner. It was further explained that the draft had been prepared based on the hypothesis that the respondent was responsible for making the information public, but that could be modified if the Working Group subsequently decided to establish a repository of published information. It was further explained that that proposal clarified that the only information that could be withheld was the information falling in the category of limitations to transparency set out in section 6.

71. It was suggested that the proposal contained in paragraph 69 above be amended to allow either the claimant or the respondent to object to the publication of the notice of arbitration without conditioning the objection on limitations to transparency set out in section 6. It was suggested that, at the early stage of the proceedings, there might be various reasons why a party would not wish to have information contained in the notice of arbitration made public. It was also suggested to reverse the presumption regarding the publication of the information and provide that the notice of arbitration should not be published, unless both parties agreed to its publication. A number of concerns were reiterated on the publication of the notice of arbitration before the constitution of the arbitral tribunal.

72. With a view to striking a better balance between the need for a transparent procedure and the protection of sensitive and confidential information, a suggestion was made that “any publication of information relating to the notice of arbitration should comply with the duty of confidentiality under applicable law”. That proposal did not receive support, in particular as it was seen as potentially allowing either party to publish information without the consent of the other party, and did not provide for a harmonized procedure.

73. A question was raised whether the discussion on the time for publication would need to include also consideration of the party or the institution responsible for the publication and possible sanctions if any obligation to publish was not complied with. In response, it was clarified that the Working Group would address those matters when considering whether a central repository should be established.

74. After discussion, the Working Group agreed that there was support for the proposal contained in paragraphs 67 and 68 above. The Working Group took note of concerns expressed regarding that proposal by those in favour of publishing information after the constitution of the tribunal. The Working Group requested the Secretariat to prepare a draft based on that proposal, and to also prepare alternative drafts reflecting the proposals contained in paragraphs 69 and 71 above for consideration by the Working Group at a future session.

## **2. Documents to be published**

75. The Working Group recalled that, at its fifty-third session, different views were expressed on whether, and if so which, documents should be published (A/CN.9/712, paras. 40 to 42). The view was expressed that all documents submitted to, and issued by, the arbitral tribunal should be made available to the public. A contrary view was that not all documents would need to be published, in particular in view of the necessity to find the right balance between the requirements of public interest and the legitimate need to ensure manageability and efficiency of the arbitral procedure.

76. At its current session, the Working Group considered proposals contained in document A/CN.9/WG.II/WP.162/Add.1, paragraphs 46 and 47 aimed at reflecting the different views expressed by the Working Group at its fifty-third session.

77. It was clarified that “section 6” mentioned in the proposals under consideration referred to the possible limitations to transparency to be further defined in the legal standard on transparency. It was also clarified that the bracketed text referring to the right of parties to agree otherwise would be further considered in the light of the decision to be made on whether the disputing parties were free to agree to depart from the legal standard on transparency after the dispute had arisen (see above, paras. 54 and 55), and would therefore not be extensively discussed in the context of each proposal. It was further clarified that the publication of the arbitral award would be dealt with separately (see below, paras. 93 to 100).

78. An observation was made that none of the options was indicating the time when the documents should be published. It was explained that the understanding was that publication would be made once the documents were available. In that regard, a view was expressed that publication of documents during the arbitration could put in danger the integrity of the proceedings. According to that view, the aim of transparency could also be achieved through publication of the main documents after the proceedings. In that regard, a comment was made that, in some jurisdictions, the law prohibited an arbitral tribunal from disclosing information until the proceedings were terminated.

79. In response to a general question whether there should be an analysis of the applicable law under which the arbitral tribunal would exercise any power conferred to it under the provision on publication of documents, it was said that the approach would be very similar to that adopted under article 15 of the 1976 UNCITRAL

Arbitration Rules, or article 17 of the 2010 UNCITRAL Arbitration Rules, and that the question of applicable law was not intended to be dealt with under the rules on transparency. A view was expressed that investment treaties usually contained provisions on applicable law that would be relevant to that determination.

*Option 1, variant 1*

80. The first proposal, referred to as option 1, variant 1 in paragraph 46 of document A/CN.9/WG.II/WP.162/Add.1, provided that “[A]ll documents submitted to, or issued by, the arbitral tribunal shall be made publicly available [unless all parties agree otherwise,] subject to section 6 below.”

81. Various views were expressed on option 1, variant 1. It was said that providing access to all documents, subject to the limitations to transparency set out in section 6 was an optimal solution, ensuring that the public would have sufficient access to documents. The Working Group recalled that, at its fifty-third session, it considered that, in the general framework of allowing amicus curiae submissions, the importance of access to documents was emphasized, as the quality of any amicus curiae submissions would depend on the permitted level of access to documents (A/CN.9/712, para. 51).

82. While the proposal under option 1, variant 1 was considered as an option favouring full transparency, the attention of the Working Group was drawn to the cost and burden that such an approach might entail. It was said that, in many cases, evidentiary records were extensive, and it would be a cumbersome exercise for parties and the arbitral tribunal to redact sensitive and confidential information therefrom. In response to that concern, it was explained that, if for practical reasons not all documents could be published, the documents not published could be made available to third parties upon their request.

*Option 1, variant 2*

83. The second proposal, referred to as option 1, variant 2 in paragraph 46 of document A/CN.9/WG.II/WP.162/Add.1, provided a defined list of documents that should be published, and read as follows: “The following documents shall be made publicly available: the notice of arbitration; pleadings, submissions to the tribunal by a disputing party and any written submissions by the non-disputing party and amicus curiae; minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal [unless the disputing parties otherwise agree,] subject to section 6 below.”

84. That option received support on the basis that it provided a good balance between the principles of transparency and necessary exceptions thereto. It was noted that, in the list of documents, there was no reference to documentary evidence, witness statements, expert witness reports, and further consideration should be given to the list contained under option 1, variant 2. It was also questioned whether written submissions by non-disputing State(s) Party(ies) and amicus curiae should be in the list of documents to be disclosed, as such documents might be to the detriment of one party. It was further said that the most interesting information for the public might not necessarily be contained in any of the documents listed, as such information might be contained in an attachment or annex to a document. A limited list of documents might deprive third parties of essential

pieces of information for understanding the case. It was suggested to provide under that option for a more flexible approach and to permit the tribunal to make an order for publication of further specific documents following an application by a third party.

#### *Option 2*

85. The third proposal, referred to as option 2 in paragraph 47 of document A/CN.9/WG.II/WP.162/Add.1, provided that “The arbitral tribunal shall decide, in consultation with the parties, which documents to make publicly available.”

86. In support of that proposal, it was said that the arbitral tribunal would be best placed to determine the documents that should be published, as well as issues of public interest that should be brought to the attention of civil society. It was suggested that instead of consulting the parties, the arbitral tribunal should obtain their approval for the publication or, as a variant, that if a party objected, the arbitral tribunal should then refrain from publishing the documents. It was said that that provision would allow publication to be dealt with on a case-by-case basis, and would come close to the procedure followed by ICSID regarding publication of documents in the course of proceedings. Doubts were expressed on whether that option would be sufficient to enhance transparency in treaty-based investor-State arbitration. It was said that the current proposal was very close to current practice in commercial arbitration, and might therefore not sufficiently promote transparency. It was pointed out that that option placed complete discretion on the arbitral tribunal but gave no indication as to how to exercise that discretion. It was considered desirable to provide some guidance to the arbitral tribunal in that regard, either in the specific rule on access to documents or in a general rule. A view was expressed that consultation of the parties by the arbitral tribunal should also be provided for.

87. After discussion, the Working Group took note of four new approaches that emerged from its consideration of the matter that could be summarized as follows.

88. Under a first approach, the arbitral tribunal should decide which documents to make publicly available, unless a party was opposed to the publication. It was pointed out that under that first approach, the arbitral tribunal would have in fact less discretionary power than it currently enjoyed under the UNCITRAL Arbitration Rules, which provided under articles 15 of the 1976 Rules and 17 of the 2010 Rules that “the arbitral tribunal may conduct the arbitration in such manner as it considered appropriate [...]”. It was further said that, under the UNCITRAL Arbitration Rules, the arbitral tribunal might order publication of documents if it considered it appropriate without any party having a right to oppose. It was therefore questioned whether that first approach was consistent with the mandate of the Working Group to provide for rules on transparency.

89. Under a second approach, all documents should be made publicly available; however, if as a matter of practicability, they were not all published, third parties would still have the right to access the information, upon request, applying the limitations to transparency set out in section 6.

90. Under a third approach, a defined list of documents would be made available in any case while the arbitral tribunal would have the ability to order publication of any other documents it deemed relevant. Under that option, third parties would also have a right to request access to additional information but, contrary to the second

approach, would not have an entitlement to such access. The limitations to transparency set out in section 6 would also apply under that proposal.

91. A fourth approach would consist in providing a list of documents that could be made publicly available. The arbitral tribunal in its discretion would decide which documents to publish on a case-by-case basis, subject to the limitations to transparency set out in section 6.

92. The Working Group requested the Secretariat to prepare alternative draft proposals to reflect the discussion of the Working Group for consideration at a future session.

### **3. Publication of arbitral awards**

93. The Working Group recalled the deliberations at its fifty-third session, where many delegations had expressed support for the establishment of a general provision whereby awards rendered by arbitral tribunals in treaty-based investor-State arbitration should be published (A/CN.9/712, para. 62), and proceeded to consider the issue of publication of arbitral awards at its current session.

94. The Working Group was informed that the Investment Committee of the Organization for Economic Cooperation and Development (OECD) had issued a statement in June 2005, which expressed the general understanding among the members of the Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to the necessary safeguards for the protection of confidential business and governmental information, was desirable to enhance effectiveness and public acceptance of investment arbitration and to contribute to the further development of jurisprudence.

95. In that light, some support was expressed for having a simple rule on the publication of arbitral awards in treaty-based investor-State arbitration, which would provide for arbitral awards to be published. Such publication, it was said, would enhance transparency in treaty-based investor-State arbitration and would best serve the mandate given by the Commission to the Working Group.

96. It was explained that the publication of the arbitral award would also be subject to the limitations to transparency set out in section 6. The Working Group noted that any rule it would craft on the publication of arbitral awards would have to be considered in light of article 32 (5) of the 1976 UNCITRAL Arbitration Rules and article 34 (5) of the 2010 Rules that made the publication of arbitral awards subject to the consent of all parties, in particular if the legal standard was to constitute a supplement or annex to the UNCITRAL Arbitration Rules.

97. Some support was also expressed for a rule on publication of arbitral awards based on the proposal in document A/CN.9/WG.II/WP.162/Add.1, paragraph 17, which read as follows: "Awards shall be published unless all parties agree otherwise. In case the parties do not agree to the publication of an award, the arbitral tribunal shall promptly make publicly available excerpts of the legal reasoning of the tribunal." With respect to that proposal, it was clarified that the reference to "parties" included only the disputing parties and neither interested third parties nor the other State(s) Party(ies) to the underlying investment treaty. It was further clarified that the reference to "In case the parties do not agree to the

publication of an award” was to be understood as requiring all parties to agree not to publish.

98. Doubts were expressed on whether that proposal would contribute to enhancing transparency as it was very close to the corresponding provision of the UNCITRAL Arbitration Rules.

99. It was noted that the draft proposals contained in paragraphs 17 and 46 of document A/CN.9/WG.II/WP.162/Add.1 used varying terminology to refer to decisions made by the arbitral tribunal, such as “orders”, “awards” and “decisions of the tribunal”. The Working Group agreed that there should be consistency in terminology and a common rule on publication of all decisions made by the arbitral tribunal should be established.

100. After discussion, broad support was expressed in the Working Group for a simple provision whereby awards would be made publicly available, with those delegations which had expressed reservations in that respect requesting that the Working Group ensured adequate protection of confidential or sensitive information in order to address their concerns. The Working Group requested the Secretariat to prepare draft proposals on publication of awards taking account of the discussions of the Working Group for consideration at a future session.

#### **4. Hearings and transcripts thereof**

##### *Public hearings*

101. At its fifty-third session, the Working Group had considered whether hearings should be open to the public (A/CN.9/712, para. 52). Both support and reservations had been expressed regarding public hearings. It had been suggested that a provision on open hearings in any legal standard to be prepared on transparency should provide that hearings should be open to the public, unless the parties agreed otherwise (A/CN.9/712, paras. 53-55). In contrast, reservations of a general nature had been expressed regarding public hearings, a concept that had been viewed to be contrary to the very nature of arbitration, which had been said to be confidential and not to allow for third parties’ access to hearings (A/CN.9/712, para. 57).

102. At its current session, the Working Group considered a draft proposal contained in document A/CN.9/WG.II/WP.162/Add.1, para. 50, which read as follows: “In the event of oral hearings, the tribunal shall conduct hearings open to the public [unless either party objects] and shall determine, in consultation with the parties, the appropriate logistical arrangements.” Support was expressed for the suggestion to include in that text a reference to the limitations to transparency set out in section 6.

103. It was said that open hearings were a fundamental feature of transparent arbitral proceedings. The proposal reflected in paragraph 102 above was considered as providing a simple and adequate rule on open hearings. However, it was said that that proposal only covered logistical arrangements but did not address the power of the tribunal to limit public access.

104. Diverging views were expressed on whether to delete the bracketed text in paragraph 102 above, which permitted either party to object to open hearings. Those favouring deletion of the bracketed text pointed out that rules on transparency were crafted mainly to benefit civil society, and the parties should not be involved in that

determination. Further, it was questioned whether designing a rule on open hearings that parties could defeat at their own discretion would be in accordance with the mandate of the Working Group to promote transparency.

105. A contrary view was expressed that the right of either party to object to open hearings should be asserted. It was suggested that Rule 32 (2) of the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”), with necessary adjustments, be considered by the Working Group as a possible option to deal with that issue, as it included a right for either party to object to open hearings. Rule 32 (2) of the ICSID Arbitration Rules read as follows: “Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.”

106. With the view to conciliating the diverging opinions on whether parties should have a right to object to open hearings, a proposal was made that the arbitral tribunal should decide whether to hold open hearings, “in consultation with the parties”. A view was expressed that not all hearings were necessarily of public interest, and that the arbitral tribunal would be best placed to determine which hearings or which parts of the hearings to make public. That option would also preserve the possibility for the parties to express their views, but where the public interest would be at stake, the arbitral tribunal would have the power to overrule any objection by the parties, and hold open hearings.

107. The proposal reflected in paragraph 106 received some support. It was suggested that it could be complemented by a sentence clarifying that, as a matter of principle, hearings should be held in public.

108. It was questioned whether more guidance should be provided on how the tribunal would decide to hold open or closed hearings. Some expressed the view that it was neither desirable nor possible to provide guidance to the arbitral tribunal. However, several suggestions were made on possible ways to provide such guidance.

109. It was suggested that the limitations to transparency set out in section 6 should guide the arbitral tribunal. It was questioned whether the exceptions to transparency that related mainly to the protection of confidential and sensitive information would cover all the instances where hearings would need to be held in private. It was suggested that the arbitral tribunal might need the discretion to decide that hearings would be held in private for practical reasons. The view was also expressed that not all hearings necessarily involved matters of public interest.

110. In response to a suggestion that the existence of public interest issues should guide the arbitral tribunal in its decision, it was said that treaty-based investor-State arbitration involved, by nature, public interest because such arbitration implicated a State’s exercise of discretionary powers. Others said that the public interest in a case might not always be immediately apparent to the arbitral tribunal, which should not be burdened with the task of identifying whether or not matters were of public interest. It was questioned whether the purpose of the rule on open hearings was to



allow access of the public or to limit it to hearings where matters of public interest were at stake.

111. In response to a suggestion that the arbitral tribunal could obtain guidance by consulting the parties, it was stated that the parties, having their own personal interests in the matter, might not be best placed to advise the arbitral tribunal on that matter.

112. A suggestion was made to clarify in a preamble to the rules on transparency the purpose they were intended to serve along the lines of: “[W]ith the purpose of enhancing the legitimacy of treaty-based investor-State arbitration and of fostering the public interest inherent in treaty-based investor-State arbitration, these rules on transparency have been developed to apply in treaty-based investor-State arbitrations. These purposes shall guide arbitral tribunals in the application of these Rules.”

113. In response to a question whether the disputing parties could decide that hearings should be held in private despite the legal standard providing for open hearings, it was said that that matter should be considered at a later stage of the deliberations.

114. After discussion, the Working Group took note of the various views expressed, and requested the Secretariat to prepare draft proposals for consideration at a future session. The views expressed in the Working Group were summarized as follows. A first group of views was that either disputing party should have a right of veto as to whether to hold public hearings. Questions were raised as to whether that was compatible with the mandate of the Working Group. A second group was of the view that discretion should be left to the arbitral tribunal in that respect. That raised the question whether relevant guidance should be given to the arbitral tribunal, and if so, which. A third group was of the view that there should be a simple rule that hearings were to be public, subject only to exceptions on the grounds of logistical arrangements and limitations to transparency set out under section 6. It was stated that there might not be much difference between the second and third groups as both accepted that, in principle, the arbitral tribunal had some discretion in the matter. The question was the extent of the discretion: unfettered, with some guidance or restrained with some limitations. That matter could be usefully explored further once the limitations to transparency set out in section 6 became clearer.

#### *Transcripts of hearings*

115. It was noted that the decision to be made regarding transcripts of hearings should depend upon the solution adopted in respect of public access to hearings (see also A/CN.9/712, para. 58). Some delegations questioned that interpretation. It was agreed to further consider that matter in conjunction with the various drafting proposals that would be prepared by the Secretariat for consideration at a future session.

### **5. Submissions by third parties (*amicus curiae*) in arbitral proceedings**

116. The Working Group recalled its consideration of the matter of submissions by third parties, also known as *amicus curiae* submissions, at its fifty-third session where many delegations had expressed strong support for allowing *amicus curiae* submissions on the ground that they could be useful for the arbitral tribunal in

resolving the dispute and promoted the legitimacy of the arbitral process (A/CN.9/712, para. 46).

*Restricting criteria for amicus curiae submissions*

117. At the fifty-third session of the Working Group, it had been widely felt that certain restricting criteria should be put in place for amicus curiae submissions, including the subject matter of the submission, expertise of the amicus curiae, relevance for the proceedings, appropriate page limits, and the time when such submissions would be allowed (A/CN.9/712, para. 47). At the current session, the Working Group continued its deliberation on which criteria should apply to amicus curiae submissions.

118. One proposal made to determine criteria for amicus curiae submissions was based on a provision used in certain investment agreements, which was said to reflect an evolution in practice, and which read as follows: “[T]he tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party.”

119. Although the proposal reflected in paragraph 118 above was found to be a clear and straightforward rule, it was suggested that a provision on that matter might need to be more detailed, in order to provide guidance to parties and the arbitral tribunal, taking account of the fact that a number of States had little experience in the field. In that light, it was proposed to consider whether a provision on amicus curiae submissions as that included in the interpretative document produced by the NAFTA Free Trade Commission’s “Statement of the Free Trade Commission on non-disputing party participation of 7 October 2004” (“FTC Statement”) could be a useful model.

120. In support of the latter proposal, it was said that any provision the Working Group would draft should provide sufficient guidance to the arbitral tribunal on how to deal with amicus curiae submissions. Further, such provision should foresee the possibility that the parties should be consulted by the tribunal, so that the issue of acceptance of amicus curiae submission should not be left to the arbitral tribunal alone. Any provision on that matter should clarify that there would not be an automatic entitlement for amici to have their submissions accepted.

121. As an intermediate solution between the proposal contained in paragraph 118 above, and the provision in the FTC Statement which was very detailed, it was suggested to consider drafting a provision along the lines of Rule 37 (2) of the ICSID Arbitration Rules. In support of that approach, it was said that it would provide appropriate guidance without being as long as the provision on submission of amicus curiae briefs in the FTC Statement.

122. It was noted that Rule 37 (2) of the ICSID Arbitration Rules did not include the requirement of revealing the identity of the non-disputing party, the nature of its membership if it was an organization, and the nature of its relationships, if any, to the parties in the dispute, including whether the non-disputing party had received financial or other material support from any of the parties or from any person connected with the parties in that case. Those points were dealt with in detail in paragraph B.2 of the FTC Statement referred to in paragraph 119 above. As those points were found important, it was suggested that they should be included in a provision on that matter.

123. After discussion, the Working Group requested the Secretariat to prepare draft provisions based on proposals mentioned in paragraphs 118 and 122 above, for consideration by the Working Group at a future session.

*Intervention by non-disputing State(s)*

124. The Working Group recalled that, at its fifty-third session, it had been observed that another State Party to the investment treaty at issue that was not a party to the dispute could also wish, be invited, or have a treaty right to make submissions. It had been noted that such State often had important information to provide, such as information on *travaux préparatoires*, thus preventing one-sided treaty interpretation (A/CN.9/712, para. 49). The Working Group further recalled and reiterated its decision to bring that matter to the attention of the Commission and ask its guidance on whether that matter should be made part of the scope of the current work (A/CN.9/712, para. 103).

*Decisions on amicus curiae submissions*

125. In the light of its deliberation on restrictions of submissions by amicus curiae, the Working Group agreed that, if detailed procedures were to be provided, the arbitral tribunal should be required to consult the parties before rendering its decisions on amicus curiae submissions.

*Levels of access to documents*

126. The Working Group recalled its deliberation at the fifty-third session where, in the general framework of allowing amicus curiae submissions, the importance of access to documents had been emphasized, as the quality of any amicus curiae submissions would depend on the permitted level of access to documents (A/CN.9/712, para. 51). At the current session, the Working Group considered, with respect to the role of amicus curiae, whether there should be a rule providing for different levels of access to documents for the general public on one hand and amicus curiae on the other hand.

127. It was noted that three categories of potential third parties had to be considered with respect to access to documents. The first category was the general public. The second category included third parties that had an interest in the subject matter of the dispute that might need access to wider information in order to make submissions that could benefit the arbitral tribunal in its decision making if those parties were granted leave to make submissions as amici. A third category included parties that had a personal interest in the outcome of the proceedings (for instance, a person that would receive benefits of an alleged expropriation) and might therefore be said to have an interest in participating in the proceedings. It was said that a different level of access of information might need to be provided in respect of each category identified. A different view was that it might be difficult in practice to differentiate the category of amici from that of the general public before a submission was accepted, and that there should not be different levels of access provided in a provision on that matter.

128. After discussion, the Working Group agreed that participation in the arbitral process of the third category of persons mentioned in paragraph 127 above raised matters of joinder, which might require specific rules in the context of treaty-based

investor-State arbitration. However, the Working Group agreed that that matter was not part of the current mandate of the Working Group to deal only with transparency (see below, para. 153). Further, it was noted that the decision on the level of access to be granted to amici was closely linked to the provision on publication of documents. Against that background, the Working Group agreed to further consider that matter at a later stage of its deliberations, based on draft proposals to be submitted in relation to the provision on documents to be published (see above, paras. 75 to 92).

## **6. Possible limitations to transparency rules**

129. The Working Group recalled that, at its fifty-third session, it had agreed that there should be possible limitations to transparency. Various categories of possible exceptions or limitations were mentioned: (i) protection of confidential and sensitive information, (ii) protection of the integrity of the arbitral process, and (iii) ensuring manageability of the arbitral proceedings (A/CN.9/712, paras. 67 to 72).

### *Protection of confidential and sensitive information*

130. At the fifty-third session of the Working Group, it had been generally recognized that the question of protection of confidential and sensitive information was important to take into account as part of the discussion on transparency.

131. Against that background, a proposal was made to request the Secretariat to prepare a draft that would take into account both transparency and confidentiality as legitimate interests and to find a right balance to protect both interests. The Working Group agreed that, though the concept of confidential or sensitive business information was quite clear, the Secretariat should be given more guidance for drafting a proposal on the protection of confidential information pertaining to States. It was further said that there often was national legislation to protect certain information and the question of applicable law would have to be taken into account by the Secretariat when drafting proposals on the protection of confidential and sensitive information for future deliberations of the Working Group. In response, it was said that the legal standard on transparency would, when finalized, probably also include a rule similar to that of article 1 (2) of the 1976 UNCITRAL Arbitration Rules or article 1 (3) of the 2010 Rules, which provided that the legal standard was not intended to derogate from any mandatory applicable law.

132. It was said that the model bilateral investment treaty of one delegation and the “Notes of Interpretation of Certain Chapter 11 Provisions” published by the NAFTA Free Trade Commission (FTC) on 31 July 2001 referred to the redaction of “information which is privileged or otherwise protected” from disclosure under the party’s domestic law to the public. The Working Group agreed that the notion of “privileged information”, which might not be understood in the same manner in all jurisdictions, might need further consideration in order to determine whether a provision on the protection of confidential and sensitive information should also refer to privileged information.

133. After discussion, the Working Group agreed to request the Secretariat to prepare draft proposals on a provision for the protection of confidential and sensitive information for consideration at a future session of the Working Group.

134. The Working Group recalled that the determination of confidential and sensitive information could be handled by the arbitral tribunal or the parties (A/CN.9/712, para. 69). It was noted that paragraph 40 of document A/CN.9/WG.II/WP.162/Add.1 included a proposal that the parties should agree on the determination of confidential and sensitive information and that only in case an agreement could not be found, the arbitral tribunal would make that decision. A further proposal was made that the parties would be given a margin of discretion for the determination of the confidential and sensitive nature of information. The role of the arbitral tribunal would then be limited to controlling whether the parties exercised their obligations in good faith.

135. The Working Group agreed to consider that matter at a future session, in light of draft proposals to be prepared by the Secretariat.

*Protection of the integrity of the arbitral process*

136. The Working Group recalled that, at its fifty-third session, it had been generally recognized that the question of protection of the integrity of the arbitral process should be taken into account as part of the discussion on limitations to transparency (A/CN.9/712, para. 72).

137. It was felt by the Working Group that the “integrity of the arbitral process” would need to be defined, as it could otherwise become an overly broad category, and exceptions to transparency should be concisely defined.

138. It was said that the integrity of the arbitral process included the protection of the parties to the proceedings, their counsel, the witnesses and the arbitral tribunal from intimidation and physical threats. It was pointed out that there might be other examples falling in that category, such as disruption to hearings by members of the audience. Other examples were given of matters external to the arbitral proceedings, including general politicization of the proceedings and manipulation by the mass media.

139. Concerns were expressed regarding the nature and scope of that category of possible exceptions to transparency because it seemed overly broad and vague and might inappropriately limit transparency. It was further said that any exception to transparency for the protection of the integrity of the arbitral process should be based on a high threshold, and should be limited to the examples given of protection from intimidation or physical threat to persons involved in the arbitral proceedings. Language referring to the “risk of aggravation of the dispute” or “rendering the resolution of the dispute difficult or impossible” would be too broad.

140. It was said that issues of due process or disturbance of the hearings should not be understood as falling under the category of the protection of the integrity of the arbitral process, and some of the concerns could be addressed by appropriate language in the provision on the conduct of hearings.

141. It was suggested that one of the threshold measure against the objective of ensuring that hearings were open should be the fairness and efficiency of the proceedings.

142. It was also suggested that the arbitral tribunal already enjoyed wide discretionary power under the UNCITRAL Arbitration Rules (articles 15 of the 1976 Rules and 17 of the 2010 Rules) to conduct the proceedings as appropriate and

that protection of the integrity of the arbitral process might already be covered by that discretionary power. It was suggested that the Secretariat could make further research on cases in international arbitration under the UNCITRAL Arbitration Rules to analyse how that discretionary power had been used by tribunals to protect the integrity of the arbitral process.

143. After discussion, the Working Group agreed that the questions for further consideration on that matter would include: (i) whether a provision on protection of the integrity of the arbitral process should be in the form of a general formulation or should contain specific instances that were meant to be specifically addressed, (ii) the interplay between the protection of the integrity of the arbitral process and the provisions in the UNCITRAL Arbitration Rules already dealing with that issue; and (iii) how to determine the threshold for a limitation to transparency based on the ground of the need to protect integrity of the arbitral process.

#### *Manageability of the arbitral proceedings*

144. At the fifty-third session of the Working Group, the general question of case management had been said to be an important one to be further considered (A/CN.9/712, para. 72). Rules on transparency should not create delays, increase costs or unduly burden the arbitral proceedings and a right balance should be found between the public interest and the manageability of the arbitral proceedings.

145. At the current session of the Working Group, it was said that the manageability of the arbitral proceedings was an important aspect to take into account when designing rules on transparency, because rules on transparency should also aim at preserving the right of effective access to court. It was further said that a too expensive procedure that might result from organizing transparent proceedings could jeopardize a party's human right to effective access to justice.

146. However, concerns were expressed that a general rule on manageability of the arbitral proceedings would contribute to a significant erosion of transparency.

147. After discussion, the Working Group considered that the right balance might well need to be found in relation to each provision in the rules on transparency, rather than as part of the limitations to transparency.

### **7. Repository of published information ("Registry")**

148. The Working Group recalled that, at the fifty-third session of the Working Group, suggestions had been made that information could be made publicly available by the parties, either the host State or the investor, or by a neutral registry (A/CN.9/712, paras. 37, 73-75). General support was expressed for the idea that, should such a neutral registry be established, the United Nations Secretariat would be ideally placed to host it. It was also recalled that, should the United Nations not be in a position to take up that function, the Permanent Court of Arbitration at The Hague and ICSID had expressed their readiness to provide such registry services. A concern was expressed as to whether establishing a neutral registry fell within the mandate of the Working Group or of UNCITRAL itself. In response, the Working Group generally agreed that consideration of a neutral registry should be considered as an integral part of the mandate received from the Commission to prepare a workable legal standard on transparency in treaty-based investor-State arbitration.

149. The Working Group discussed the issue whether establishing a neutral registry should be seen as a necessary step in the promotion of transparency in treaty-based investor-State arbitration. Examples were given of regional arrangements, under which comparable information was provided directly by the various States involved. It was generally agreed that further information should be provided about such experience. It was also pointed out that in the case of arbitration cases handled by existing arbitration institutions, the institution administering the case would be best placed to publish information in compliance with a legal standard on transparency.

150. The prevailing view, however, was that the existence of a central registry would be crucial to provide the necessary level of neutrality in the administration of a legal standard on transparency. It was generally felt that it might be premature to attempt designing the detailed features of such a registry until decisions had been made by the Working Group as to the precise functions it would fulfil. For example, the amount and the cost of legal work required to summarize cases or redact documents would need to be taken into account, in addition to simple clerical work required by the publication of unedited documents. It was agreed that further investigation was required of the parameters to be taken into account in setting up such a registry. Particular points to be further discussed were administrative issues such as the funding, governance and liability of such a registry, as well as the languages in which it would function. In that context, a suggestion was made that in addition to any publication by the central registry, States could play a complementary role, for example by making public information available in the local language.

151. After discussion, the Working Group agreed to pursue discussion of the issues raised by the establishment of a central registry at a future session. The Secretariat was requested to conduct a preliminary investigation of the above-mentioned issues and to collect information from organizations experienced with comparable functions.

## **V. Other business**

152. In accordance with the decision of the Commission at its forty-third session (see above, para. 3), the Working Group proceeded on a discussion to identify other topics which arose more generally in treaty-based investor-State arbitration that would deserve additional work and thus might be brought to the attention of the Commission at a future session.

153. After considering whether the question of participation in the proceedings of a third party having a vested interest in the case (see above, para. 128) and the suggestion that specific rules regarding the appointment of arbitrators should be designed (see above, para. 57), the Working Group agreed that those matters should not be reported to the Commission. The Working Group reiterated its decision made at its fifty-third session (see A/CN.9/712, para. 103) to seek guidance from the Commission on whether the topic of the possible intervention of a non-disputing State party could be dealt with by the Working Group in the context of its current work.

**E. Note by the Secretariat on settlement of commercial disputes:  
preparation of a legal standard on transparency in treaty-based investor-State  
arbitration, submitted to the Working Group on Arbitration and Conciliation  
at its fifty-fourth session  
(A/CN.9/WG.II/WP.162 and Add.1)**

**[Original: English]**

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## I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission entrusted the Working Group with the task of preparing a legal standard on the topic of transparency in treaty-based investor-State arbitration.<sup>1</sup> Support was expressed for the view that the Working Group could also consider undertaking work in respect of those issues that arose more generally in treaty-based investor-State arbitration and that would deserve additional work. The prevailing view, in line with the decision previously made by the Commission, was that it was too early to make a decision on the precise form and scope of a future instrument on treaty-based arbitration and that the mandate of the Working Group should be limited to the preparation of rules of uniform law on transparency in treaty-based investor-State arbitration. However, it was agreed that, while operating within that mandate, the Working Group might identify any other topic with respect to treaty-based investor-State arbitration that might also require future work by the Commission. It was agreed that any such topic might be brought to the attention of the Commission at its next session, in 2011.<sup>2</sup>

2. At its fifty-third session (Vienna, 4-8 October 2010), the Working Group commenced its work on the preparation of a legal standard on transparency in treaty-based investor-State arbitration. The discussion of the Working Group at that session, reflected in document A/CN.9/712, took place on a preliminary and general basis, without attempting to reach consensus at that stage. That approach was chosen in order to delineate the issues for discussion at the next session of the Working Group (A/CN.9/712, para. 15). The Working Group proceeded with a general discussion on the possible nature and the various forms a legal standard on transparency might take (A/CN.9/712, paras. 22 to 30 and 76 to 100) as well as its possible content (A/CN.9/712, paras. 31 to 75).

3. In accordance with the decision of the Commission at its forty-third session (see above, para. 1), the Working Group also proceeded on a discussion to identify other topics that arose more generally in treaty-based investor-State arbitration that would deserve additional work and thus might be brought to the attention of the Commission at a future session. In that regard, the Working Group agreed to seek guidance from the Commission on whether the possible intervention in an

<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 190.

<sup>2</sup> *Ibid.*, para. 191.

arbitration of a State party to the investment treaty at issue that was not a party to the dispute could be dealt with by the Working Group in the context of its current work (A/CN.9/712, paras. 102 and 103).

4. In accordance with the request of the Working Group at its fifty-third session, this note seeks to set out an analysis of the matters identified by the Working Group with respect to the possible form (section II), applicability (section III) and substance (section IV) of a legal standard on transparency, for consideration by the Working Group at its fifty-fourth session (A/CN.9/712, para. 101). Unless otherwise indicated, all references to deliberations by the Working Group in this note are to deliberations made at the fifty-third session of the Working Group.

## **II. Scope and possible forms of a legal standard on transparency**

### **A. Scope of a legal standard on transparency**

5. The mandate given by the Commission to the Working Group at its forty-first<sup>3</sup> and forty-third<sup>4</sup> sessions was to provide a legal standard on transparency in treaty-based investor-State arbitration. At its forty-first session, the Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group. The various possibilities envisaged by the Commission indicated that work in that respect was meant to address a general issue that arose in all investor-State arbitrations. The Commission did not limit the scope of a legal standard on transparency to arbitration under the UNCITRAL Arbitration Rules. It included the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties.<sup>5</sup>

6. The Working Group may wish to consider whether a legal standard on transparency should be of general application, i.e., apply to treaty-based investor-State arbitration, irrespective of whether a specific set of arbitration rules applies to the settlement of the dispute (see below, paras. 16, 20 and 21). The Working Group may wish also to consider whether broad applicability of the legal standard on transparency, not tied to any specific set of rules, would be best suited to achieve the mandate given by the Commission to the Working Group to provide an instrument that would promote transparency in treaty-based investor-State arbitration.<sup>6</sup>

### **B. Possible forms of a legal standard on transparency**

7. At its fifty-third session, the Working Group generally discussed the possible nature of a legal standard on transparency in treaty-based investor-State arbitration and the various forms it might take (A/CN.9/712, paras. 22-30 and paras. 76-100),

<sup>3</sup> Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 314.

<sup>4</sup> Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 190 and 191.

<sup>5</sup> Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 314.

<sup>6</sup> Ibid., *Sixty-fifth session, Supplement No. 17* (A/65/17), paras. 190 and 191.

and decided that all suggestions in that regard would require further legal analysis (A/CN.9/712, para. 94).

8. It should be noted that the discussion on applicability of a legal standard on transparency in section III as well as the proposed draft text of provisions on transparency in section IV below are not intended to indicate a preference for any possible option. The questions of the nature of a legal standard on transparency, and its possible forms remain matters for decision by the Working Group.

9. The Working Group may also wish to note that the various possible forms of a legal standard on transparency listed below are not necessarily mutually exclusive.

### **1. Model statement of principle**

10. The Working Group may wish to consider whether, with a view to encouraging and facilitating transparency, it would be useful to prepare a model statement of principle that would be offered to States for adoption.

11. A model statement of principle could possibly state substantive rules on transparency and provide the text of a provision whereby a State could indicate that those rules would either apply or be offered for application in case of arbitration with an investor under a specific investment treaty. The statement of principle could be adopted by States through joint or unilateral declarations (see below, paras. 32-37), and could therefore constitute an option to deal with the application of rules on transparency to existing treaties.

12. Depending on the manner in which it is drafted, the statement, once given effect by States parties to the investment treaty concerned could be considered as constituting either an obligation for transparent arbitration or an additional offer to an investor for arbitration in compliance with the transparency provisions that the statement would contain (see below, paras. 50-53).

### **2. Model clauses for inclusion in investment treaties**

13. Model clauses for inclusion in dispute settlement provisions of investment treaties have also been cited as a possible form for a legal standard on transparency. It may be noted that dispute settlement provisions in investment treaties are often premised on the commercial arbitration model and, in most cases, do not address such issues as the disclosure of the existence of the proceedings, the disclosure of any procedural document, and open hearings or submissions by non-arbitrating parties.

14. By adopting such clauses in investment treaties, States would demonstrate their willingness to promote transparency in arbitration. Model clauses could be drafted in such a manner that they would provide a binding obligation for the investor to arbitrate under transparency provisions or an offer to that effect (see below, paras. 50-53).

### **3. Guidelines**

15. Another possible option to deal with transparency in treaty-based investor-State arbitration would consist in drafting guidelines for States to consider when negotiating investment treaties, for arbitral tribunals when deciding on such issues, for parties to arbitration and other parties with a legitimate interest in the outcome

of the arbitration. They could apply in instances of arbitration under existing or future treaties, as long as parties to the arbitration agree to their application.

#### 4. Stand-alone rules

16. Support was expressed at the fifty-third session of the Working Group for a legal standard either in the form of a supplement to the UNCITRAL Arbitration Rules or of stand-alone rules on transparency (A/CN.9/712, para. 76). The Working Group may wish to consider the scope of application of such rules (see above, paras. 5 and 6). Rules on transparency could be intended for application only in relation to arbitral proceedings conducted under the UNCITRAL Arbitration Rules, or more broadly for application to arbitral proceedings irrespective of whether those proceedings were governed by another set of rules.

(i) *Rules complementing the UNCITRAL Arbitration Rules in their generic form, and applying to treaty-based investor-State arbitration only*

17. The Working Group may wish to consider the option of drafting specific rules addressing transparency in treaty-based investor-State arbitration, thereby complementing the UNCITRAL Arbitration Rules in their generic form.

18. The Working Group may wish to consider the extent to which that option would preserve the general applicability of the UNCITRAL Arbitration Rules. Furthermore, the existence of a specific set of distinct rules applying only to investment arbitration may raise difficult issues regarding the definition of investment arbitration (covered by those rules) as opposed to other types of arbitration (to which those specific rules would not apply). Another matter for consideration would be whether limiting the drafting of new rules for investment arbitration to issues of transparency would be appropriate, taking account of additional matters that might be expected to be addressed in arbitration rules on investment.

19. Application to investment treaties of rules on transparency complementing the UNCITRAL Arbitration Rules would suppose that States parties to those treaties have expressed their consent to such application (see below, paras. 27-31, 44 and 47).

(ii) *Rules applicable to any treaty-based investor-State arbitration*

20. The Working Group may wish to consider whether stand-alone rules on transparency should be made applicable to treaty-based investor-State arbitration, irrespective of the applicable arbitration rules (see above, paras. 5, 6 and 16).

21. That option would imply that rules on transparency be drafted in a generic manner, and would apply if States parties to an investment treaty have expressed their consent to such application (see below, paras. 27-31, 44 and 46).

### III. Applicability of a legal standard on transparency

#### A. Relation between States parties to investment treaties

##### 1. Possible UNCITRAL instruments on the application of a legal standard on transparency to both existing and future investment treaties

###### (i) *Recommendation on the application of a legal standard on transparency*

22. Depending on the form of the legal standard on transparency, UNCITRAL could undertake to further the application of a legal standard on transparency to investment treaties through a recommendation urging States to apply the standard to existing and future treaties. The purpose of the recommendation would be to highlight the importance of transparency in the context of treaty-based investor-State arbitration. The recommendation would leave it to States to decide on the means of implementing the transparency standard in the context of both existing and future treaties (see below, paras. 26-40 and 45-48).

###### (ii) *Convention on transparency in treaty-based investor-State arbitration*

23. With a view to promoting application of a legal standard on transparency to investment treaties, another proposal made at the fifty-third session of the Working Group was that an international convention on transparency in treaty-based investor-State arbitration should be prepared whereby States could express consent or agree to apply a legal standard on transparency (A/CN.9/712, para. 93).

24. Regarding existing treaties, the purpose of such an approach would be to avoid the need for a State to enter into procedures to amend each of its already concluded investment treaties (see below, a description of those procedures under paras. 32-40).<sup>7</sup> However, a new convention would make the legal standard on transparency only applicable to investment treaties between such States parties that are also parties to the new convention.

25. The text of a new convention on transparency would also make it clear that transparency standards apply to future investment treaties, under conditions to be determined by the convention.

##### 2. Possible actions by States regarding existing investment treaties

26. At its fifty-third session, the Working Group considered the possible actions that could be undertaken by States to ensure applicability of a legal standard on transparency to existing multilateral or bilateral investment treaties. Many delegations had expressed support for the desirability of applying a legal standard on transparency also to existing investment treaties. However, it was questioned

<sup>7</sup> A comparable approach was taken in the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) regarding the use of electronic communications in connection with the formation or performance of a contract under certain Conventions. A provision along the lines of article 20 (1) of that Convention could be envisaged for such an instrument. It reads as follows: "1. *The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply...*".

whether such application to existing treaties was legally and practically feasible (A/CN.9/712, paras. 85-86).

(i) *Consent by States parties to investment treaties*

27. An investment treaty is an international agreement concluded between States in written form and governed by international law pursuant to article 2 (1) of the Vienna Convention on the Law of Treaties (1969)<sup>8</sup> (“the Vienna Convention”), which has been recognized as customary international law.

28. Investment treaties usually include a dispute settlement provision between the host State and an investor, which provides for a choice of arbitration rules for dispute resolution. Application of a legal standard on transparency to such provision of an existing treaty cannot be done automatically, because such legal standard would constitute an amendment to the treaty provision on dispute settlement, which could not be done without the agreement of the treaty parties (see articles 39-41 of the Vienna Convention), who are the “masters” of their treaty.

29. For that agreement to materialize, it would not be sufficient that UNCITRAL as intergovernmental body would have developed a legal standard on transparency under any of the forms listed above under paragraphs 10 to 21. UNCITRAL does not have the authority to impose on States application of UNCITRAL texts.<sup>9</sup>

30. It was suggested to the Working Group at its fifty-third session that automatic application of a legal standard on transparency to already existing treaties could be achieved by interpreting consent in the investment treaty to investor-State arbitration under the UNCITRAL Arbitration Rules as having anticipated that the UNCITRAL system of arbitration would develop over time. Under that view, a legal standard on transparency would automatically apply, as it would be part of that evolving system of UNCITRAL arbitration (A/CN.9/712, para. 89). The Working Group may wish to note that application of a legal standard to already existing treaties without the States parties agreeing to such application, for example by way of a joint interpretative declaration (see below, paras. 32-35) might be regarded as a violation of the treaty and of applicable international law, as it would result in incorporating into an existing treaty a legal standard that came into effect only after that treaty had been concluded. It may be recalled that article 31 (1) of the Vienna Convention provides as a general rule of treaty interpretation that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

31. The Working Group may wish to recall that it had been well aware of the difficulty of retroactive application in the context of investment treaties and thus drafted article 1 (2) of the UNCITRAL Arbitration Rules as revised in 2010 to cater for the effect of an unintended retroactive application (A/CN.9/646, para. 76).

(ii) *Joint interpretative declaration by States*

32. Application of a legal standard on transparency to existing investment treaties could be achieved through a joint interpretative declaration by States parties.

<sup>8</sup> Done at Vienna on 23 May 1969, entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

<sup>9</sup> See General Assembly resolution 2205 (XXI), sect. II, para. 8.

Article 31 (3) (a) of the Vienna Convention provides that “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” shall be taken into account, together with the context.

33. There are many examples of joint interpretative declarations by States in public international law. As an illustration, in 1993, the States parties to the Treaty on Conventional Forces in Europe (CFE) 1990 concluded a “Document of the States parties” which included an understanding on the interpretation and application of certain provisions of the CFE Treaty, that in effect amounted to amendment of the treaty. Another example of authoritative treaty interpretation involves the joint decision of member States of the, at that time, European Community to replace the term “ECU” with the term “Euro” to refer to the European currency unit in the treaty of the European Community. The member States reached agreement on that term, thereby avoiding an amendment to the treaty, which might have involved a time consuming ratification procedure and parliamentary scrutiny. The wording of the agreement reached at the meeting of member States in Madrid in 1995 was the following: “The specific name ‘Euro’ will be used instead of the generic term ‘ECU’ used in the treaty to refer to the European currency unit. The Governments of the 15 member States have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant Treaty provisions.”

34. A joint interpretative declaration by States parties to an investment treaty could express the agreement between the States parties that the provision of the treaty providing for investor-State arbitration should be interpreted as including application of the legal standard on transparency. Such interpretation under article 31 (3) (a) of the Vienna Convention does not require any special form,<sup>10</sup> i.e. treaty form, but would have to clearly demonstrate the intention of the parties that their declaration constitutes an agreed basis for interpretation.

35. Such interpretative declaration may be viewed as coming close to a modification or amendment of the original treaty. International courts and tribunals have accepted as authentic interpretation subsequent declaration that deviated from the original intention of the parties under the treaty and/or the plain words of the treaty.<sup>11</sup> However, the distinction between treaty interpretation and amendment is far from being clear under public international law. The Working Group may wish to consider that, despite the recognition of a modifying or amending effect of an

<sup>10</sup> See, for example, Judgment of the International Court of Justice in the Kasikili/Sedudu Island (Botswana/Namibia), Judgement of 13 December 1999, I.C.J. Reports 1999, p. 1045, para. 49, available at [www.icj-cij.org/docket/files/98/7577.pdf](http://www.icj-cij.org/docket/files/98/7577.pdf), clarifying that article 31 (3) (a) of the Vienna Convention did not envisage that a subsequent agreement needed to be included with the same formal requirements as a treaty for such an agreement to play a role in treaty interpretation.

<sup>11</sup> See, for example, *Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of the International Court of Justice of 13 July 2009, para. 64, available at [www.icj-cij.org/docket/files/133/15321.pdf](http://www.icj-cij.org/docket/files/133/15321.pdf); *Interpretation of the Air Transport Services Agreement of 27 March 1946 (France v. United States of America)*, Award of 22 December 1963, pp. 60 ff., available at [http://untreaty.un.org/cod/riaa/cases/vol\\_XVI/5-74.pdf](http://untreaty.un.org/cod/riaa/cases/vol_XVI/5-74.pdf); *Location of Boundary Markers in Taba (Egypt v. Israel)*, Award of 28 September 1988, para. 210, available at [http://untreaty.un.org/cod/riaa/cases/vol\\_XX/1-118.pdf](http://untreaty.un.org/cod/riaa/cases/vol_XX/1-118.pdf); *Interpretation of the Air Transport Services Agreement of 6 February 1948 (Italy v. United States of America)*, Award of 17 July 1965, pp. 99 ff., available at [http://untreaty.un.org/cod/riaa/cases/vol\\_XVI/75-108.pdf](http://untreaty.un.org/cod/riaa/cases/vol_XVI/75-108.pdf).

interpretative declaration by States parties under customary international law, certain States might be reluctant to choose that option in view of the risk that possible controversies regarding the effect of such interpretation might arise.

(iii) *Unilateral declarations by States*

36. It was also suggested at the fifty-third session of the Working Group that the applicability of a legal standard on transparency could be achieved through unilateral declarations by States (A/CN.9/712, para. 93).

37. A declaration by only one State would not be sufficient to make a legal standard on transparency applicable to already existing treaties, because a treaty is based on the agreement of the States parties and action by the other State(s) party/ies that it/they share the same understanding would be needed. Therefore, States parties to an investment treaty would need to issue unilateral declarations to the same end so that a legal standard on transparency would apply to an existing treaty. Such unilateral declarations would then form a subsequent agreement between the States parties regarding the interpretation of the treaty or the application of its provisions under article 31 (3) (a) of the Vienna Convention (see above, paras. 32-35). Such subsequent declarations do not necessarily need to take the form of a “joint” statement. However, there needs to be evidence of the agreement of the parties on the interpretation of the treaty, which could be expressed by an exchange of notes. As the International Law Commission has stated in its draft guidelines on declarations relating to bilateral agreements,<sup>12</sup> an authentic interpretation of a treaty can result from an interpretive declaration made by only one State party to the treaty, if it has been accepted by the other party.<sup>13</sup>

(iv) *Amendment or modification of an investment treaty*

38. Article 39 of the Vienna Convention provides that “A treaty may be amended by agreement by the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.” Articles 40 and 41 of the Vienna Convention provide further details on the amendment or modification of treaties. The possibility for amendment of a treaty only by a new and separate agreement flows from the principle of *pacta sunt servanda*. The agreement will be binding only between the agreeing States parties.

39. The provisions of articles 39 to 41 of the Vienna Convention apply only if the treaty does not provide otherwise for the amendment or modification of the treaty. The Working Group may wish to note that many investment treaties contain provisions for amendment of the treaty. Even where the treaty provides for a certain amendment procedure, the subsequent unanimous agreement of the States parties can overrule such procedures. The Working Group may wish to note that an informal agreement to amend or modify a treaty may raise domestic constitutional

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<sup>12</sup> The draft guidelines on declarations relating to bilateral agreements are included in the draft guidelines on reservations and authentic interpretation of a treaty pursuant to article 31 (3) (a) of the Vienna Convention issued by the International Law Commission, Report of the International Law Commission on the work of its sixty-second session, *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 10* (A/65/10), p. 40, available at <http://untreaty.un.org/ilc/reports/2010/2010report.htm>.

<sup>13</sup> Ibid., Draft Guidelines 1.5.3.



difficulties, even if articles 39 to 41 of the Vienna Convention do not require that, as a matter of public international law, a treaty should be amended or modified in the same manner as it was concluded.

40. Some investment treaties expressly provide for the approval by the States parties for such amendments in accordance with their respective legal procedures. As an illustration of an investment treaty expressly providing for an agreement of the parties to amend the treaty, the Free Trade Agreement between the United States, Central America and Dominican Republic (CAFTA-DR) of 2004 provides in article 22.2 that: “(1) The Parties may agree on any amendment of this Agreement. [...] (2.) When so agreed, and approved in accordance with the applicable legal procedures of each Party, an amendment shall constitute an integral part of this Agreement to take effect on the date on which all Parties have notified the Depositary in writing that they have approved the amendment or on such other date as the Parties may agree.”<sup>14</sup> Another example is the Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (“Japan-Mexico FTA”) of 2004, which provides in article 174 that: “(1.) Unless otherwise provided for in this Agreement, this Agreement may be amended by agreement between the Parties. Such amendment shall be approved by the Parties in accordance with their respective legal procedures. Such amendment shall enter into force on the thirtieth day after the date of exchange of diplomatic notes indicating such approval. (2.) Any amendment to this Agreement shall constitute an integral part of this Agreement.”<sup>15</sup> There are also investment agreements that do not expressly mention the requirement of approval by the States parties in accordance with the respective legal procedures. For example, the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) of 2009 provides in article 6 of Chapter 18 that: “This Agreement may be amended by agreement in writing by the Parties and such amendments shall come into force on such date or dates as may be agreed among them.”<sup>16</sup>

(v) *Could States be legally prevented from making a legal standard on transparency applicable to already existing treaties?*

41. The Working Group may wish to consider whether any right of an investor or any legitimate expectation of non-transparent arbitration under an investment treaty could prevent States from making a legal standard on transparency applicable to an already existing treaty. Such preclusion or estoppel would presuppose that the investor has a right or legitimate expectation of non-transparent arbitration for the investor under the investment treaty. The Working Group might wish to note that it is doubtful whether the investment treaty could be considered as creating such a right or legitimate expectation. If an investment treaty provides for arbitration under certain existing arbitration rules, it does not necessarily exclude by offering those arbitration rules that the actual arbitration proceedings would take place in a transparent manner. Further, many investment treaties refer to the possibility for an

<sup>14</sup> Available at [www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text](http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text).

<sup>15</sup> Available at [www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf](http://www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf).

<sup>16</sup> Available at [www.dfat.gov.au/trade/fta/asean/aanzfta/contents.html](http://www.dfat.gov.au/trade/fta/asean/aanzfta/contents.html).

investor to submit a claim to arbitration under “any other body of rules”, sometimes requiring agreement by both parties for these other rules to apply.<sup>17</sup>

42. The Working Group may wish to note that a right or legitimate expectation of an investor could be considered to come into existence only once the investor had accepted the offer for arbitration under the investment treaty, which, in many instances, takes place at the time of the submission of its claim.

### 3. Possible actions by States regarding future treaties

#### (i) *Consent by States parties to investment treaties*

43. Regarding the application of a legal standard on transparency to future treaties, it was said at the fifty-third session of the Working Group that a presumption of application of a legal standard on transparency could be provided for in a way that ensured the needed level of certainty to parties as to whether or not they were operating under transparency rules in a given arbitration (A/CN.9/712, paras. 82-84).

44. In that respect, the Working Group may wish to note that application of a legal standard on transparency to future investment treaties cannot be done automatically. At the fifty-third session of the Working Group, it was viewed as important that the provisions to be drafted regarding application of the rules on transparency to future treaties should be clear, and provide the necessary level of certainty as to the existence of consent of the States parties to adopt such standard as part of their arbitration process (A/CN.9/712, para. 84).

#### (ii) *Possible options for application of a legal standard on transparency to future treaties*

45. Consent of States to apply the legal standard on transparency could be materialized, either by the adoption by States of a convention on transparency in treaty-based investor-State arbitration (see above, paras. 23-25), or failing such a convention, by inclusion in investment treaties of provisions on transparency based on model clauses (see above, paras. 13 and 14), or by reference to a set of stand-alone rules on transparency (see above, paras. 16-21).

46. In case a legal standard on transparency would take the form of stand-alone rules, one possible approach would be for the legal standard on transparency to apply only if States parties to the investment treaty had expressly opted into transparent arbitration. Stand-alone rules on transparency could include wording along the lines of “the rules on transparency will apply to any arbitration initiated pursuant to an investment treaty hereafter ratified provided that the Parties have expressly agreed to their application.”

<sup>17</sup> See, for example, the United States of America Model Treaty concerning the Encouragement and Reciprocal Protection of Investment (“US Model BIT”) of 2004, which provides in article 24 (3) (b) that a claimant may submit a claim “if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules”; the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) of 2009, which provides in article 21 (1) that “if the disputing parties agree, to any other arbitration institution or under any other arbitration rules” and the Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (“Japan-Mexico FTA”) of 2004, which provides in article 79 (1) (d) “if agreed by the disputing parties, any arbitration in accordance with other arbitration rules”.

47. A different approach could be for the rules on transparency to establish a presumption regarding their application in the limited context of arbitration under the UNCITRAL Arbitration Rules. The formulation of the presumption would depend on the manner in which the UNCITRAL Arbitration Rules would be supplemented by rules on transparency. It was suggested at the fifty-third session of the Working Group that stand-alone rules on transparency could include wording along the lines of “these rules will be incorporated in the UNCITRAL Arbitration Rules for any arbitration initiated under those rules pursuant to an investment treaty hereafter ratified unless the treaty expressly provides that these rules will not apply” (A/CN.9/712, para. 83).

48. At the fifty-third session of the Working Group, it was suggested that any solution that might be chosen in respect of future treaties should be evaluated as to its impact on the already concluded investment treaties (A/CN.9/712, para. 84).

## **B. Relation between the host State and the investor parties to the arbitration**

49. Once the States parties to an investment treaty agree on the applicability of the legal standard, the legal standard would be applicable to disputes between the host State and an investor. Questions for consideration are whether an investor could refuse an offer for transparent arbitration, or accept it partially only, and whether both parties could decide not to apply the rules on transparency.

### **1. Could the investor deviate from a legal standard on transparency?**

50. At its fifty-third session, the Working Group had considered the question whether an investor should be given an opportunity to refuse an offer to arbitrate under the legal standard on transparency contained in the treaty or to deviate from the provisions of the legal standard (A/CN.9/712, paras. 30 and 95-96). In that regard, it was pointed out that, in contrast to commercial arbitration, treaty-based investor-State arbitration was conducted on the basis of an underlying treaty between States parties, which limited the ability of the parties to the arbitration to depart from the prescribed route of the underlying treaty.

51. It had been further said that providing the investor with the last word on the application of the legal standard on transparency would unduly privilege the investor, lead to a decrease in transparency and would be contrary to the Commission’s mandate to enhance transparency in treaty-based investor-State arbitration. However, it was also said that, for the purpose of ensuring the equality of parties in treaty-based investor-State arbitration, it might be advisable to provide the right for an investor to react to the host State’s offer of transparent arbitration (A/CN.9/712, para. 96).

52. In that regard it was suggested to make some of the provisions of the legal standard on transparency non-derogable and to specify for each provision, which ones would be derogable and which ones not (A/CN.9/712, para. 98). The Working Group may wish to consider the policy decision to be made whether the legal standard itself or the underlying investment treaty should provide for non-derogability of the legal standard or of some of its provisions.

**2. Could the disputing parties deviate from a legal standard on transparency?**

53. The Working Group further discussed whether the disputing parties should be allowed to depart from the legal standard on transparency. As mentioned above, the underlying treaty, depending on how it provides for the application of a legal standard on transparency would or not prevent such deviation. If the treaty does not allow for such deviation, the host State party to the arbitration could not unilaterally deviate from the provisions of the treaty.

## (A/CN.9/WG.II/WP.162/Add.1) (Original: English)

**Note by the Secretariat on settlement of commercial disputes:  
preparation of a legal standard on transparency in treaty-based  
investor-State arbitration, submitted to the Working Group on  
Arbitration and Conciliation at its fifty-fourth session****ADDENDUM****CONTENTS**

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#### IV. Possible content of a legal standard on transparency

1. At its fifty-third session, the Working Group generally agreed that the substantive issues to be considered in respect of the possible content of a legal standard on transparency would be as follows: publicity regarding the initiation of arbitral proceedings; documents to be published (such as pleadings, procedural orders, supporting evidence); submissions by third parties (“*amicus curiae*”) in proceedings; public hearings; publication of arbitral awards; possible exceptions to the transparency rules; and repository of published information (“registry”) (A/CN.9/712, para. 31). The Working Group may wish to note that document A/CN.9/WG.II/WP.163 contains information on the practical aspects of transparency that usefully complement matters dealt with in the sections below.

##### A. Issues for consideration

###### 1. Publicity regarding the initiation of arbitral proceedings

###### (i) *Timing of the publication and documents to be published*

2. At the fifty-third session of the Working Group, different views were expressed on whether the existence of arbitral proceedings should be made public once the arbitral proceedings commenced, or when the arbitral tribunal was constituted (A/CN.9/712, para. 34). Different views were expressed regarding the information to be made public at that early stage of the proceedings, in particular, whether it should be limited to the existence of a dispute, or also include publication of the notice of arbitration (A/CN.9/712, para. 33). It was suggested that providing only preliminary information regarding the parties involved, their nationality, and the economic sector concerned might be sufficient (A/CN.9/712, para. 33).

3. Rules of arbitral institutions often referred to in investment treaties regarding the settlement of disputes between the host State and an investor do not provide for the publication of the notice of arbitration. For instance, Regulation 22 of the ICSID Administrative and Financial Regulations provides that “[t]he Secretary-General

shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding”. Rules of other arbitration institutions either do not deal with that matter, or provide for the confidentiality of the procedure (see A/CN.9/WG.II/WP.160, paras. 38 to 47 on the content of rules of arbitration institutions in that respect). Investment treaties sometimes provide for the publication of the notice of arbitration (and even of the intent to arbitrate), but the timing for such publication is not necessarily defined. It may be done at a stage where the seriousness of the claim has already been assessed. Examples of such provisions can be found in document A/CN.9/WG.II/WP.160, paras. 18 and 20.

4. In case the Working Group would favour the option of publication of the notice of arbitration once received by a party, it may wish to consider how to deal with the issue of protecting confidential and sensitive information that may be contained in the notice of arbitration at that early stage of the proceedings where no arbitral tribunal would yet be constituted (see below, paras. 41 and 42). Similarly, the question of frivolous claims, and the way to limit publication thereof would deserve consideration.

(ii) *Person(s) responsible for publication and consequences in case of failure to publish*

5. As to the person(s) responsible for taking the initiative of publication regarding the initiation of the arbitral proceedings, it is conceivable that the host State, the investor or a repository should be responsible for the publication. The publication of information could be undertaken jointly by the parties, based on their consent to do so (A/CN.9/712, para. 35).

6. The determination of the person responsible for making information public would depend on whether a repository for publishing information is established under the legal standard on transparency. If this were to be the case, the repository would be the channel through which information would be published, and the manner in which information should be conveyed to the repository should also be defined. In case no repository is established, publication could be envisaged to be made by the parties, either jointly or separately (see below, paras. 41 and 42).

7. Questions identified by the Working Group at its fifty-third session as to whether publication of information at that stage should be made mandatory, and if so, whether there should be any sanction in case of non-compliance also deserves further consideration (A/CN.9/712, para. 36).

## **2. Documents to be published**

(i) *List of documents*

8. At the fifty-third session of the Working Group, different views were expressed on whether, and if so, which documents should be published (A/CN.9/712, para. 40). The view was expressed that all documents submitted to, and issued by, the arbitral tribunal should be made available to the public (A/CN.9/712, para. 41). A contrary view was that not all documents would need to be published, in particular in view of the necessity to find the right balance between the requirements of public interest and the legitimate need to ensure manageability and efficiency of the arbitral procedure (A/CN.9/712, para. 42).

9. Provisions on public access to procedural documents in investment treaties dealing with that matter most often include either a general statement on publicity of all documents or a list of documents that should be made publicly available. In that latter case, the following documents have been listed: request for arbitration, notice of arbitration, submissions to the tribunal by a disputing party and any written submissions by the non-disputing party(ies) and *amicus curiae*, minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal.

(ii) *Person(s) responsible for the publication*

10. At the fifty-third session of the Working Group, different views were expressed on whether the parties or the arbitral tribunal should be the ones to decide on publication of documents. A further question was whether the consent of the parties would be required for publication (A/CN.9/712, para. 43). Some views were expressed that the arbitral tribunal should decide the issue of publication of documents on a case-by-case basis (A/CN.9/712, para. 44).

11. Under investment treaties, the responsibility for making that information available to the public lies in certain instances with the arbitral tribunal, in others with the parties.<sup>1</sup> Where parties are authorized to make information public, certain investment treaties provide that either party may make all information public, whereas others limit the right of a party to publicize only its own statements or submissions. In general, treaties do not provide details on the manner in which the information is to be conveyed to the public.

12. Concerning the timing for publication, certain investment treaties provide that the information shall be made available “immediately” or “in a timely manner”, whereas others are silent on that question.

(iii) *Practical aspects of publication*

13. Questions regarding the practical aspects of the publication of documents, such as the language of publication (A/CN.9/712, para. 45) and allocation between the parties of the costs of publication were raised at the fifty-third session of the Working Group and would deserve further consideration.

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<sup>1</sup> Article 38, paras. (3) to (8), of Canada’s Model Foreign Investment Promotion and Protection Agreement 2004 (FIPA). See also, for instance, the Agreement between the United Mexican States and the Government of the Republic of Iceland on the Promotion and Reciprocal Protection of Investments, signed 24 June 2005, which states the following: “Article 17 — Awards and Enforcement (...) (4). The final award will only be published with the written consent of both parties to the dispute.”; available on 30 November 2010 at [www.unctad.org/sections/dite/ia/docs/bits/Mexico\\_Iceland.PDF](http://www.unctad.org/sections/dite/ia/docs/bits/Mexico_Iceland.PDF).



(iv) *Examples*

14. At the fifty-third session of the Working Group, an order in the case *Chemtura Corporation v. Government of Canada*<sup>2</sup> was given as an example of a document containing provisions on publication (A/CN.9/712, para. 41). It reads as follows:

*“Part II — Conduct of Proceedings and Public Disclosure of Documents [...] 11. Subject to the provisions of paragraph 13, either disputing party may disclose to the public the following materials, provided that the disputing party provides the other disputing party with 20 days’ notice of its intent to disclose such material publicly: all pleadings and submissions, together with their appendices and attached exhibits, correspondence to and from the Tribunal, transcripts and any awards, including procedural orders, rulings, preliminary and final awards. 12. A disputing party has twenty days from the date of notice by the other disputing party of its intent to publicly disclose material referred to in paragraph 11, to object to disclosure on the basis that it contains confidential information. Such material may not be publicly disclosed unless both disputing parties have confirmed that they do not object to such release or have agreed on the redaction of the material containing confidential information. 13. Except as permitted by this Order, neither disputing party shall publicly disclose material designated as confidential by the other disputing party [...].”*

15. Examples of provisions on publication of documents can be found in document A/CN.9/WG.II/WP.160, paras. 13 to 22.

**3. Publication of arbitral awards**

16. At the fifty-third session of the Working Group, many delegations expressed support for the establishment of a general provision under which awards rendered by arbitral tribunals in treaty-based investor-State arbitration should be published (A/CN.9/712, para. 62). That matter can be considered in light of examples given above in paragraphs 14 and 15 (“publication of documents”).

17. In case the Working Group would consider that awards should be treated differently from the other documents, and be made public, unless all parties to the arbitration agreed otherwise, it would still be possible to provide for the publication of excerpts of the award containing the relevant legal reasoning (A/CN.9/712, para. 63).<sup>3</sup> A provision reflecting that suggestion could read as follows: *“Awards shall be published unless all parties agree otherwise. In case the parties do not agree to the publication of an award, the arbitral tribunal shall promptly make publicly available excerpts of the legal reasoning of the tribunal.”*

**4. Submissions by third parties (amicus curiae) in arbitral proceedings**

18. Many delegations expressed strong support for allowing submissions by third parties, also known as amicus curiae submissions. It was said that amicus curiae submissions could be useful for the arbitral tribunal in resolving the dispute and promoted legitimacy of the arbitral process (A/CN.9/712, para. 46).

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<sup>2</sup> *Chemtura Corporation v. Government of Canada, Confidentiality Order*, January 21, 2008.

<sup>3</sup> See Rule 48 (4) of the ICSID Arbitration Rules.

(i) *Restricting criteria for amicus curiae submissions*

19. It was widely felt that there should be certain restricting criteria in place for amicus curiae submissions, including the subject matter of the submission, expertise of the amicus curiae, relevance for the proceedings, appropriate page limits, and the time when such submissions would be allowed (A/CN.9/712, para. 47).

(ii) *Intervention by non-disputing State(s)*

20. The Working Group may consider whether it wishes to further consider the question of participation of non-disputing States that are parties to the investment treaty, but not to the arbitration, pending decision by the Commission on whether that matter should be part of the scope of the current work (see A/CN.9/WG.II/WP.162, para. 3). At the fifty-third session of the Working Group, it was observed that another State party to the investment treaty at issue that was not a party to the dispute could also wish, or be invited, to make submissions. It was noted that such State often had important information to provide, such as information on *travaux préparatoires*, thus preventing one-sided treaty interpretation (A/CN.9/712, para. 49).

21. The Working Group may wish to consider whether specific provisions should be crafted to determine the possible scope of intervention of a non-disputing State in the procedure. For instance, the scope of intervention of a non-disputing State could be limited to questions of interpretation of the investment treaty, or to submissions on points of law. Other questions that the Working Group may wish to consider include whether the arbitral tribunal may *ex officio* invite the non-disputing State to make submissions, and how to ensure that submission by a non-disputing State would not disrupt the proceeding or unfairly prejudice either party.

(iii) *Decisions on amicus submissions*

22. The Working Group left open the question whether the arbitral tribunal would have full discretion to decide on amicus curiae submissions or whether it would have to consult the parties, in accordance with the consensual nature of arbitral proceedings (A/CN.9/712, para. 48).

(iv) *Levels of access to documents*

23. In the general framework of allowing amicus curiae submissions, the importance of access to documents was emphasized, as the quality of any amicus curiae submissions would depend on the permitted level of access to documents (A/CN.9/712, para. 51). With respect to the role of amicus curiae, a question that would deserve further consideration is whether there should be different levels of access to documents provided for the general public on the one hand and amicus curiae on the other hand.

(v) *Costs and case management concerns*

24. In its consideration of that matter, the Working Group may wish to keep in mind the cost that may be incurred by the parties as a result of amicus curiae submissions and the necessity to find a right balance between transparency concerns and manageability of the case.

(vi) *Examples*

25. With the exception of the ICSID Arbitration Rules, rules of arbitral institutions usually do not contain express provisions on the participation of a non-disputing party, the possibility of which would remain a matter between the parties to the arbitration and in the discretion of the arbitral tribunal (see A/CN.9/WG.II/WP.160, paras. 29 to 47). Rule 37 (2) of the ICSID Arbitration Rules regulates non-disputing party submissions as follows:

*“After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the ‘non-disputing party’) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”*

26. The Working Group may wish to note that Chapter Eleven of the North American Free Trade Agreement (NAFTA) and the interpretative documents produced by the Free Trade Commission contain details on the issue of third-party participation. The “Statement of the Free Trade Commission on non-disputing party participation” of 7 October 2004 reads as follows:

*“[...]B. Procedures*

*1. Any non-disputing party that is a person of a Party, or that has a significant presence in the territory of a Party, that wishes to file a written submission with the Tribunal (the ‘applicant’) will apply for leave from the Tribunal to file such a submission. The applicant will attach the submission to the application.*

*2. The application for leave to file a non-disputing party submission will: (a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant; (b) be no longer than 5 typed pages; (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant); (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party; (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission; (f) specify the nature of the interest that the applicant has in the arbitration; (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission; (h) explain, by reference to the factors*

*specified in paragraph 6, why the Tribunal should accept the submission; and (i) be made in a language of the arbitration.*

3. *The submission filed by a non-disputing party will: (a) be dated and signed by the person filing the submission; (b) be concise, and in no case longer than 20 typed pages, including any appendices; (c) set out a precise statement supporting the applicant's position on the issues; and (d) only address matters within the scope of the dispute.*

4. *The application for leave to file a non-disputing party submission and the submission will be served on all disputing parties and the Tribunal.*

5. *The Tribunal will set an appropriate date by which the disputing parties may comment on the application for leave to file a non-disputing party submission.*

6. *In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address matters within the scope of the dispute; (c) the non-disputing party has a significant interest in the arbitration; and (d) there is a public interest in the subject-matter of the arbitration.*

7. *The Tribunal will ensure that: (a) any non-disputing party submission avoids disrupting the proceedings; and (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.*

8. *The Tribunal will render a decision on whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal will set an appropriate date by which the disputing parties may respond in writing to the non-disputing party submission. By that date, non-disputing NAFTA Parties may, pursuant to Article 1128, address any issues of interpretation of the Agreement presented in the non-disputing party submission.*

9. *The granting of leave to file a non-disputing party submission does not require the Tribunal to address that submission at any point in the arbitration. The granting of leave to file a non-disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration. [...]"*

27. The Norwegian draft model agreement for investment contains specific provisions with respect to third-parties' intervention. Article 18, paragraph 3 provides as follows: "The Tribunal shall have the authority to accept and consider written amicus curiae submissions from a person or entity that is not a disputing Party, provided that the Tribunal has determined that they are directly relevant to the factual and legal issues under consideration. The Tribunal shall ensure an opportunity for the parties to the dispute, and the other Party, to submit comments on the written amicus curiae observations." In addition, article 18, paragraph 4 states that "[...] the Tribunal shall reflect submissions from the other Party and from amicus curiae in its report."

## 5. Hearings

### (i) Public hearings

28. At its fifty-third session, the Working Group considered whether hearings should be open to the public (A/CN.9/712, para. 52). Both support and reservations were expressed regarding public hearings. It was suggested that a provision on open hearings in any legal standard to be prepared on transparency should provide that hearings should be held in public, unless the parties agreed otherwise (A/CN.9/712, paras. 53-55). In contrast, reservations of a general nature were expressed regarding public hearings, a concept that was viewed to be contrary to the very nature of arbitration, which was said to be confidential and not to allow for third parties' access to hearings. It was said that treaty-based investor-State arbitration would often raise issues of a political nature and open hearings were likely to put additional pressure on the participating State, thus creating the risk that the involvement of the general public would not facilitate but adversely affect the settlement of the dispute (A/CN.9/712, para. 57).

29. Dispute resolution provisions in investment treaties favouring transparency provide that hearings shall be open to the public, subject to the protection of confidential information. Public hearings may be organized through webcast, or other means that would not necessarily require the physical presence of the public in the hearing room. Logistical arrangements are usually left to the arbitral tribunal to be determined in consultation with the disputing parties. Examples of such provisions can be found in document A/CN.9/WG.II/WP.160, paras. 23 to 28.

30. Rule 32 (2) of the ICSID Arbitration Rules deals with attendance by third party of hearings as follows: "*Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.*"

### (ii) Transcripts of hearings

31. At the fifty-third session of the Working Group, there was general agreement that the decision to be made regarding transcripts of hearings should depend upon the solution adopted in respect of public access to hearings (A/CN.9/712, para. 58). The Working Group was informed that, for arbitrations under the rules of ICSID, the decision to hold open hearings was left to the arbitral tribunal, unless either party objected. In contrast, to make transcripts publicly available, the consent of the parties was needed. It was further said that the publication of transcripts was a question usually left to the respondent State at least for cases under NAFTA and that ICSID so far had not published any transcripts on its website (A/CN.9/712, para. 59).

## 6. Possible limitations to transparency rules

### (i) *Principles*

32. At its fifty-third session, the Working Group considered the possible limitations to transparency. Various categories of possible exceptions or limitations were mentioned: protection of confidential and sensitive information, protection of the integrity of the arbitral process, and ensuring manageability of the arbitral proceedings (A/CN.9/712, paras. 67 to 72).

#### *- protection of confidential and sensitive information*

33. At the fifty-third session of the Working Group, the need to protect confidential and sensitive information was largely admitted, as was the need to protect proceedings from any outside pressures on the parties or on the arbitral tribunals (see below, paras. 36-40). Taking into account that both transparency and confidentiality can be considered as legitimate interests, the Working Group may wish to consider whether a right balance should be found to protect both interests. General comments were made to the effect that exceptions to transparency to protect confidential and sensitive information should not be so wide as to weaken the main rules on transparency; they should provide clarity and guidance, in order to avoid disputes between the parties on that matter (A/CN.9/712, para. 70).

#### *- protection of the integrity of the arbitral process*

34. At the fifty-third session of the Working Group, it was generally recognized that the question of protection of the integrity of the arbitral process was important to take into account as part of the discussions on transparency. In addition, protection of the integrity of the arbitral proceedings may be seen as a means to contribute to the de-politicization of investment disputes.

#### *- manageability of the arbitral proceedings*

35. At the fifty-third session of the Working Group, the general question of case management was said to be an important one to be further considered (A/CN.9/712, para. 72). Rules on transparency should not create delays, increase costs or unduly burden the arbitral proceedings and a right balance should be found between the public interest and the manageability of the arbitral proceedings.

### (ii) *Definition of confidential and sensitive information*

36. Dispute resolution clauses in investment treaties that deal with public access to procedural documents and awards usually provide that documents submitted to, or issued by, the arbitral tribunal shall be publicly available, unless the disputing parties agree otherwise, subject to the deletion of confidential and sensitive information. Confidential and sensitive information is usually described as information that is not generally known or accessible to the public and, if disclosed, would cause or threaten to cause prejudice to an essential interest of any individual or entity, or to the interest of a party or would be contrary to personal privacy (see A/CN.9/WG.II/WP. 160, paras. 13 to 22). At the fifty-third session of the Working Group, the view was expressed that any provision on that matter should be drafted in a generic manner, thus circumventing the need to envisage all possible

circumstances, but rather leaving a large degree of discretion to the arbitral tribunal (A/CN.9/712, para.69).

37. A model which was said to provide useful guidance in investor-State arbitration was the IBA Rules on the Taking of Evidence in International Arbitration (2010) which contained provisions on confidentiality in paragraphs (3) and (4) of article 9 on admissibility and assessment of evidence (A/CN.9/712, para. 68). Those provisions read as follows: “3. *In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account: (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice; (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations; (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.* 4. *The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.*”

(iii) *Person(s) determining confidential and sensitive information*

38. The determination of confidential and sensitive information could be handled by the arbitral tribunal or the parties (A/CN.9/712, para. 69). Provisions in investment treaties seem to indicate that usually the parties are responsible for identifying confidential and sensitive information, and in case a decision needs to be made in that respect, the arbitral tribunal has the authority to do so.

(iv) *Sanction*

39. The question of the conditions of enforcement of limitations or exceptions to transparency rules and whether a sanction should be provided in case a party would breach confidentiality obligations would deserve further consideration. One possible sanction mentioned at the fifty-third session of the Working Group was related to costs (A/CN.9/712, para. 71). Article 9 (7) of the IBA Rules on the Taking of Evidence in International Arbitration (2010) was given as an example of a provision containing such sanction. It provided that: “*If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence*”.

(v) *Example of procedure*

40. US Model BIT, article 29(4) provides as follows:

*“Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:*

*(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);*

*(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;*

*(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and*

*(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal’s determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.”*

## **7. Repository of published information (“registry”)**

41. At the fifty-third session of the Working Group, suggestions were made that information could be made publicly available by the parties, either the host State or the investor, or by a neutral registry (A/CN.9/712, paras. 37, 73-75). The purpose of the current work on transparency is to ensure that information on treaty-based investor-State arbitration cases are made known to the interested public. One flexible approach to do so could be to leave publication of information to the host State. In case an arbitral institution would be involved in the administration of the case, it could also be in charge of the publication.

42. In case the Working Group would decide that a neutral registry should be established, it may then wish to determine its role, and whether it would be involved in any determination regarding for instance limitations to transparency. Under that option, there would be a number of issues to clarify, such as what constitutes a treaty-based investor-State arbitration for the purpose of the applicability of the provisions on publication of documents by a neutral registry, the exact role of a neutral registry and whether it should be established within the United Nations Office of Legal Affairs, or in an existing arbitral institution; the Permanent Court of Arbitration at The Hague and ICSID have mentioned their readiness to provide that service.



## B. Proposals

43. The Working Group may wish to note that if the legal standard on transparency to be adopted takes the form of guidelines (see A/CN.9/WG.II/WP.162, para. 15), the content may include more detailed explanations; there could also be variants proposed to the parties and arbitral tribunals. If the legal standard takes the form of model clauses or stand-alone rules on transparency (see A/CN.9/WG.II/WP.162, paras. 13-14 and 16-21), binding on the parties once they apply, the rules should be clear as to the rights and obligations they provide.

### 1. Scope of application

44. A first part on the scope of application of the legal standard on transparency might be needed. The Working Group may wish to consider how to determine the criteria for application of the legal standard on transparency, whether it should be limited arbitration under investment treaties, or also apply to disputes under contract between States and investors, whether the term “investment treaty” would require clarification. The Working Group may wish to note the potential difficulties and lack of flexibility that any such definition of scope would entail. The Working Group may also wish to consider whether that section should also include a provision on the interplay between the legal standard on transparency and the applicable arbitration rules (see A/CN.9/WG.II/WP.162, paras. 46 and 47).

### 2. Initiation of the arbitral proceedings<sup>4</sup>

45. Proposal: *“Information regarding the name of the parties, their nationalities and the economic sector involved shall be made publicly available once [the notice of arbitration has been received by the respondent] [the arbitral tribunal has been constituted].”*

### 3. Publication of documents<sup>5</sup>

46. Option 1, Variant 1: *“All documents submitted to, or issued by, the arbitral tribunal shall be made publicly available [unless all parties agree otherwise,] subject to section 6 below.”* Variant 2: *“The following documents shall be made publicly available: the notice of arbitration; pleadings, submissions to the tribunal by a disputing party and any written submissions by the non-disputing party and amicus curiae; minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal [unless the disputing parties otherwise agree,] subject to section 6 below.”*

47. Option 2: *“The arbitral tribunal shall decide, in consultation with the parties, which documents to make publicly available.”*

<sup>4</sup> The proposal reflects the option where preliminary information only (and not the notice of arbitration) is disclosed at an early stage of the proceedings, either before or after the constitution of the arbitral tribunal. The option of publication of the notice of arbitration is dealt with under the section on publication of documents (see paras. 46-48).

<sup>5</sup> The following proposals seek to reflect the various suggestions made by the Working Group in relation to the publication of documents (see paras. 8-16). They include the question of publication of the notice of arbitration and arbitral award.

48. Proposal regarding the practical issue of language for the publication of documents: *“Documents shall be published in the language or languages in which they have been made available to the arbitral tribunal.”*

**4. Submissions by third parties (amicus curiae) in arbitral proceedings**

49. The Working Group may wish to consider the level of details it wishes to include on that matter in a legal standard on transparency, based on the examples given under paragraphs 25 to 27 above.

**5. Hearings and transcripts thereof**

50. Proposal: *“In the event of oral hearings, the Tribunal shall conduct hearings open to the public [unless either party objects] and shall determine, in consultation with the parties, the appropriate logistical arrangements. Transcripts of the hearings shall be made publicly available subject to section 6 below.”*

**6. Possible limitations to transparency rules**

51. A specific section dealing with limitations to both publication of documents and public hearings could be provided for in a legal standard on transparency. Those limitations could be dealt with in a generic or detailed manner and the Working Group may wish to determine which model would be more appropriate (see above, paras. 14, and 32-40).

**7. Repository of published information**

52. Proposal: *[The information] [The documents] referred to in sections 2 and 3 shall be made available by [to be determined] through [to be determined].*

**F. Note by the Secretariat on settlement of commercial disputes:  
transparency in treaty-based investor-State arbitration —  
comments of the Governments of Canada and of the United States  
of America on transparency in treaty-based investor-State  
arbitration under Chapter Eleven of the North American Free  
Trade Agreement (NAFTA), submitted to the Working Group on  
Arbitration and Conciliation at its fifty-fourth session  
[Original: English]  
(A/CN.9/WG.II/WP.163)**

In preparation for the fifty-fourth session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to work on the preparation of a legal standard on transparency in treaty-based investor-State arbitration, the secretariat has sent questions to States parties to the North American Free Trade Agreement (NAFTA) with a view to collect information on the practical aspects of transparency in treaty-based arbitration. In response, the Governments of Canada and of the United States of America, on 30th November 2010, submitted comments on the practical aspects of transparency in treaty-based investor-State arbitration under Chapter Eleven of NAFTA. The texts of the comments are reproduced as an annex to this note in the form in which they were received by the secretariat.

## **Annex**

### **1. Comments of the Government of Canada**

The Government of Canada herein provides a response to the Secretariat's request of information on our experience implementing transparency in the NAFTA context.<sup>1</sup>

### **I. Canada's Experience with respect to the Publication of the Initiation of NAFTA Arbitrations**

The Government of Canada gives public notice of the initiation of arbitral proceedings against it by posting the initiating documents submitted by potential claimants on the website of the Department of Foreign Affairs and International Trade as soon as possible, and in all cases, prior to the appointment of the arbitral tribunal. Indeed, Canada first provides public notice of potential arbitrations even before a claim is formally submitted. In particular, it has been Canada's practice to publish, promptly upon receipt from an alleged investor, the Notice of Intent to

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<sup>1</sup> Canada notes, for the sake of clarity, that while pursuant to NAFTA Article 1137 and Annex 1137.4 Canada may publish arbitral awards without the consent of the investor, the other practices which have resulted in enhanced transparency in NAFTA arbitrations are not provided for in the text of NAFTA itself, but rather are a result of efforts subsequent to the NAFTA's adoption. These include the Notes of Interpretation of Certain Chapter 11 Provisions (2001) regarding access to documents; the NAFTA Parties' statements on open hearings in NAFTA Chapter Eleven arbitrations (2003); and the Statement of the Free Trade Commission on non-disputing party participation (2003).

Submit a Claim to Arbitration (“Notice of Intent”).<sup>2</sup> Prior to publishing the Notice of Intent, and later the Notice of Arbitration, Canada sends a letter to the alleged investor, describing Canada’s obligations under its Access to Information Act, as well as the position of Canada pursuant to the *Notes of Interpretation* of the NAFTA Free Trade Commission on access to documents. The letter indicates Canada’s intent to make the Notice of Intent or Notice of Arbitration, as the case may be, public, and therefore, requests that the alleged investor provide Canada with a version of the document with any confidential information redacted. In light of the fact that Canada publishes these documents itself, we have no experience where there has been a failure to make the initiation of an arbitration public.

In our experience, concerns that the publication of these initiating documents could have deleterious consequences in the case a claim is not pursued, or is frivolous, are unjustified. We have made public all 28 Notices of Intent submitted against Canada. To date, arbitral proceedings against Canada have been initiated with respect to only 15 of these potential claims. Further, of those 15 proceedings, only 10 have, to date, proceeded to the actual appointment of an arbitral tribunal. We have experienced no negative effects from making the early initiating documents publicly available in either the 13 cases which have not even proceeded to arbitration, nor in the 5 cases which, while submitted, have never reached the appointment of a Tribunal.

## II. Canada’s Experience with respect to Public Access to Documents in NAFTA Arbitrations

Under the 1976 and 2010 versions of the UNCITRAL Arbitration Rules, there is no rule governing what documents can or cannot be made publicly available. In early NAFTA arbitrations against Canada, access to documents tended to be limited to the primary pleadings (Notice of Intent, Notice of Arbitration, Statement of Claim and Statement of Defense) and the decisions of the Tribunal. However, in 2001, in order to ensure that Tribunals were acting in the fullest interests of transparency, the NAFTA Free Trade Commission issued Notes of Interpretation, binding under the NAFTA, pursuant to which the NAFTA parties agreed to “make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal.”<sup>3</sup>

Subsequent to these Notes of Interpretation, Tribunals in NAFTA arbitrations against Canada have allowed access to all documents submitted to or issued by the Tribunal.<sup>4</sup> In Canada’s experience, the phrase “all documents submitted to, or issued

<sup>2</sup> In the NAFTA context, the filing of a Notice of Intent does not formally initiate arbitral proceedings. Rather, such a filing merely satisfies a prerequisite of the Parties’ consent to arbitration. An investor may submit a claim to arbitration (e.g. by filing a Notice of Arbitration under the UNCITRAL Arbitration Rules) only after 90 days has passed after the filing of the Notice of Intent.

<sup>3</sup> *Notes of Interpretation of Certain Chapter 11 Provisions*, July 31, 2001, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en>.

<sup>4</sup> For two different approaches giving effect to the Notes of Interpretation, compare *Chemtura Corp. v. Canada*, Confidentiality Order, dated January 21, 2008, 11, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Confidentialityorder.pdf> with *V.G. Gallo v. Canada*, Confidentiality

by” by the Tribunal creates a rule that is simple to follow: if it goes to or comes from the Tribunal, it is public, and if it is just between the parties, it is not. Accordingly, formal and informal written submissions, exhibits, witness statements/affidavits, expert reports, correspondence to and from the Tribunal and all decisions, orders, and awards by the Tribunal are made publicly available by Canada in redacted form. The only documents not publicly available pursuant to this approach are correspondence solely between the parties, as well as documents exchanged between the parties during document disclosure which are never offered into the evidentiary record by either party.

As a matter of policy, the Government of Canada takes upon itself the obligation to make these documents available to the public and, to date, it has borne the costs of doing so. In practice, Canada has a dual approach to the method of publication for these documents. Canada posts to the website of the Department of Foreign Affairs and International Trade the primary documents submitted to or issued by the Tribunal, such as pleadings (e.g. Notice of Intent, Notice of Arbitration, Statement of Claim and Statement of Defense), formal submissions (e.g. memorial, counter-memorial, reply and rejoinder), and decisions, orders and awards of the Tribunal. However, Canada does not post to the web, but instead makes publicly available upon request, other submissions, such as motions, expert reports, witness statements and exhibits. Such a request could be made either through Canada’s Access to Information Act, or simply by requesting that Canada provide these documents pursuant to the Confidentiality Order in the arbitration.

All of the above-described documents are made publicly available in the language in which they were submitted or issued. As a bilingual country, Canada is particularly aware of the importance of providing meaningful access to documents for different linguistic groups. However, to date, we have not received a request that any documents be translated and thus, have no relevant experience to share with the Secretariat in this regard.

### III. Canada’s Experience with Submissions by Third Parties in NAFTA Arbitrations

Canada’s experience in NAFTA arbitrations with respect to *amicus curiae* participation is that, as long as reasonable limits are established, *amicus* submissions can be a benefit for the Tribunal.

In this regard, the NAFTA Free Trade Commission issued a *Statement of the Free Trade Commission on non-disputing party participation* in 2003.<sup>5</sup> Pursuant to that Statement, whether to allow an interested *amicus* to participate is left to the discretion of the Tribunal. The disputing parties are permitted to comment on whether the Tribunal should grant leave for the *amicus* to file, but the Tribunal may, in principle, accept the submission over the objection of both disputing parties. The

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Order, dated June 4, 2008, at 5, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ConfidentialityOrder2008-06-04.pdf>.

<sup>5</sup> *Statement of the Free Trade Commission on non-disputing party participation*, October 7, 2003, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf>.

Statement recommends that in exercising its discretion, the Tribunal should consider a number of factors designed to help it determine whether or not the *amicus* submission will be helpful to the Tribunal—these include whether the *amicus* has knowledge or insight different from the parties and whether there is both an interest of the *amicus* and of the public in the dispute.

Recognizing that “written submissions by non-disputing parties in arbitrations under Section B of Chapter 11 of NAFTA may affect the operation” of Chapter 11 arbitration, the Free Trade Commission Statement also contains detailed guidelines for *amicus* submissions: an interested *amicus* must request leave to file a submission, *amicus* submissions must be in written form and must be attached to the application for leave, and the submission cannot be more than 20 pages in length. In preparing submissions, *amicus* have access only to the publicly available documents.

*Amicus* submissions have been made in two of the seven NAFTA arbitrations against Canada that have, to date, reached the stage of a hearing.<sup>6</sup> Further, procedural orders in other arbitrations have expressly addressed the issue of potential participation by *amicus*.<sup>7</sup> In the two cases where *amicus* submission were made, the disputing parties have been granted the opportunity to respond. In those cases, Canada and the Claimant each chose to respond to some but not all of the *amicus* submissions made. In our experience, Tribunals have not needed guidance on *amicus* submissions in addition to that contained in the Free Trade Commission Statement.

Finally, we note that in our NAFTA practice, the United States and Mexico have the right to make submissions on questions regarding the interpretation of the NAFTA pursuant to Article 1128 of NAFTA Chapter 11. In our view, such submissions are of a different type than an *amicus* submission.

#### IV. Canada’s Experience with Open Hearings in NAFTA Arbitrations

Three of the seven hearings in NAFTA Chapter 11 arbitrations against Canada have, so far, been open to the public.<sup>8</sup> Further, in another arbitration, where the hearing has yet to be held, the parties have agreed to an open hearing.<sup>9</sup> In two other cases, Canada has sought open hearings, but pursuant to the Claimants’ objection under the UNCITRAL Arbitration Rules, the hearings were closed.<sup>10</sup> The opening of the

<sup>6</sup> Specifically, *amicus curiae* made submissions in *UPS v. Canada* and in *Merrill & Ring Forestry L.P. v. Canada*.

<sup>7</sup> *Bilcon v. Canada*, Procedural Order No. 1, dated April 9, 2009, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ProceduralOrderNo1April9.pdf>.

<sup>8</sup> Specifically, *UPS v. Canada*, *Merrill & Ring v. Canada*, and *Mobil Investments Inc. and Murphy Oil Corporation v. Canada*.

<sup>9</sup> *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Canada*, Confidentiality Order, dated May 4, 2009, 26, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ProceduralOrderNo2-May42009.pdf>.

<sup>10</sup> *Chemtura v. Canada*, Confidentiality Order, 10, dated January 21, 2008, available at <http://www.international.gc.ca/trade-agreements-accords->

hearings did not pose significant logistical or operational hurdles, and nor, in Canada's opinion, did it negatively affect the hearing process in any way.

All three public hearings have been in arbitrations administered by ICSID and accordingly, the hearings have all been held at the World Bank in Washington, D.C. Public access was provided through the use of the ICSID closed-circuit television system. Members of the public were permitted to view the proceedings in a separate room. When confidential information was to be discussed, the video and audio feeds into this public viewing room were simply interrupted. In at least one case, the members of the public who were planning to attend the hearing were required to provide their names and affiliations in advance. Such measures can be used so as to ensure that people who have been excluded from the hearings (i.e. witnesses yet to testify) are not able to view the proceedings in contravention of that order. Media have attended these public hearings, but in all cases so far, any form of recording of the proceedings has been prohibited.

With respect to these three public hearings, Canada has posted two of the transcripts on the webpage maintained by the Department of Foreign Affairs and International Trade,<sup>11</sup> and intends to post the transcript of the most recent hearing as soon as it is available in redacted form.

## **V. Canada's Experience with the Publication of the Award in NAFTA Arbitrations**

Pursuant to Article 1137 and Annex 1137.4 of Chapter 11 of the NAFTA, Canada is entitled to publish any arbitral awards in NAFTA arbitrations. Canada does so by making such awards available, in redacted form, on the webpage maintained by the Department of Foreign Affairs and International Trade. In our experience, this process has been relatively efficient, and has presented no significant concerns with respect to the conduct of the arbitration or indeed the writing of the award by the Tribunal. To date, Canada has published all of the awards—jurisdictional, merits, damages and costs—in all 7 arbitrations that have issued awards. The typical procedure followed for publishing the award is the same followed for publishing all documents, described below.

## **VI. Canada's Experience Protecting Confidential Information in NAFTA Arbitration**

In every one of our NAFTA arbitrations to date, confidential information has been protected from public disclosure. Neither the text of NAFTA nor the subsequent Note of Interpretation on access to documents defines or identifies the information

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commerciaux/assets/pdfs/Confidentialityorder.pdf; *V.G. Gallo v. Canada*, Procedural Order No. 1, 31, dated June 4, 2008, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ProceduralOrder12008-06-04.pdf>.

<sup>11</sup> *UPS v. Canada*, Hearing Transcripts available at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/parcel\\_archive.aspx?lang=en](http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/parcel_archive.aspx?lang=en); *Merrill & Ring v. Canada* transcripts available at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/merrill\\_archive.aspx?lang=en](http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/merrill_archive.aspx?lang=en).

that is confidential and should be protected. As a result, arbitral tribunals in NAFTA cases have entered Confidentiality Orders which both define what is to be considered confidential information in a particular case, and the process for the protection of that information. For the most part, in our arbitrations, Tribunals have adopted similar definitions designed to protect business confidential information of either the parties or third parties. We have no experience with a Tribunal ordering information to be withheld from the public on grounds other than confidential business information, such as protecting the integrity of the arbitral process.

In terms of the process for protecting confidential information, in our practice, Tribunals have required that a party intending to make a document public give notice to the other disputing party of its intent to do so. The other disputing party then has a set period of time to review the document and redact any confidential information.<sup>12</sup> Because the redaction of information as confidential is done pursuant to an Order of the Tribunal, any disputes are also resolved by Tribunal.

There have been several cases where Canada has felt that the Claimant inappropriately over-used the “confidential information” designation. In such cases, we have filed a motion with the Tribunal, and the Tribunal has issued a decision on what information can and cannot be redacted prior to public disclosure.<sup>13</sup>

We have no experience with respect to a disputing party violating the Confidentiality Order of the Tribunal, and making public a document that was intended to be kept confidential. In this regard, we note that the Tribunal likely has the same powers it does to enforce any of its Orders, including imposing any relevant costs as a sanction. Further, we also note that in our practice, individuals, other than the representatives of the disputing parties, who are given access to confidential documents in order to assist in the preparation of the case, are typically required to sign a “Confidentiality Undertaking.” In our practice, such an Undertaking is expressly made enforceable pursuant to domestic law, and the individual executing the Undertaking agrees to a domestic court in which disputes relating to a breach can be heard.

## VII. Canada’s Experience with Administering a Repository for the Public Information in its NAFTA Arbitrations

As referenced above several times, Canada uses primarily a web-based repository to store the public documents in its NAFTA arbitrations. However, also as explained above, in order to minimize the web resources required, we limit the types of documents that we post to this repository, making subsidiary or supporting documents instead available upon request.

<sup>12</sup> See, e.g., *Chemtura v. Canada*, Confidentiality Order, 11-12, dated January 21, 2008, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Confidentialityorder.pdf>.

<sup>13</sup> See, e.g., *Bilcon v. Canada*, Procedural Order No. 4, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Bilcon-ProceduralOrderNo4.pdf>; *Chemtura v. Canada*, Procedural Order No. 3, dated August 8, 2008, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ProceduralOrder3Aug82008.pdf>.



In our experience, a web-based repository of information provides an efficient and cost-effective way to disseminate information to the widest possible public audience in Canada. Further, several of our arbitrations are being administered by either ICSID or the PCA, and in such cases, public documents are also made available on their web-based repositories. In our experience, allowing multiple portals of access ensures availability to as wide an audience as possible.

## 2. Comments of the Government of the United States of America

The United States takes this opportunity to respond to the Secretariat's questions regarding the experience of the United States with ensuring appropriate transparency of arbitral proceedings under Chapter Eleven of the North American Free Trade Agreement ("NAFTA"). In response to these questions, and as a supplement to the U.S. comments submitted previously to UNCITRAL on this subject,<sup>14</sup> the United States provides the following additional information regarding its current transparency practices.

### **(1) Publicity regarding the initiation of arbitral proceedings (for instance, what is your experience regarding the publication of the notice of arbitration at an early stage of the proceedings? What would be the consequences of a failure to publish information on the initiation of arbitral proceedings?)**

As part of its commitment to ensuring the transparency of its investor-State arbitrations, the United States makes available promptly to the public, subject to the redaction of protected information,<sup>15</sup> documents regarding the initiation of arbitral proceedings. Pursuant to the NAFTA Free Trade Commission's July 31, 2001 Notes of Interpretation of Certain Chapter 11 Provisions ("NAFTA FTC Interpretation"), the Department of State makes available, "in a timely manner,"<sup>16</sup> Notices of Arbitration ("NOAs") that it receives by posting them on its website.<sup>17</sup> Under recent free trade agreements ("FTAs"), such as the U.S. – Central America – Dominican Republic Free Trade Agreement ("CAFTA-DR"), and bilateral investment treaties ("BITs") based on the 2004 U.S. Model BIT,<sup>18</sup> the United States is required to

<sup>14</sup> See Comments received from the United States of America on transparency in treaty-based investor-State arbitration, A/CN.9/WG.II/WP.159/Add.3 at 7-11 (Aug. 4, 2010) ("U.S. Comments on Transparency").

<sup>15</sup> The categories of protected information are described in the United States' comments on transparency in treaty-based investor-State arbitration. *Id.* at 9-10.

<sup>16</sup> See Notes of Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions A(2)(b) (July 31, 2001), available at <http://www.state.gov/documents/organization/38790.pdf>.

<sup>17</sup> See NAFTA Investor-State Arbitrations, U.S. Department of State, <http://www.state.gov/s/l/c3439.htm>.

<sup>18</sup> As noted in the prior U.S. comments on transparency in treaty-based investor-State arbitration, see U.S. Comments on Transparency at 10, the following recent investment agreements negotiated by the United States "reflect the provisions" of the 2004 Model BIT with respect to transparency: U.S. – Uruguay BIT, art. 29; U.S. – Rwanda BIT, art. 29 (both available at <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties/bit-documents>), and the investment chapters of the following recent FTAs "include similar transparency provisions": U.S. – Chile FTA, art. 10.20; U.S. – Colombia Trade Promotion Agreement, art. 10.21; U.S. – Peru Trade Promotion Agreement, art. 10.21; U.S. – Korea FTA, art. 11.21; U.S. – Morocco FTA, art. 10.20; U.S. – Oman FTA, art. 10.20; U.S. – Panama Trade Promotion Agreement, art. 10.21; and U.S. – Singapore FTA, art. 15.20 (all available at <http://www.ustr.gov/trade-agreements/free-trade-agreements>).

“promptly” make available to the public both Notices of Intent (“NOIs”) and NOAs that it receives.<sup>19</sup>

As practiced in the NAFTA context, the Department of State responds to the receipt of a NOI with a letter that both confirms receipt and discusses “several aspects of NAFTA Chapter Eleven and U.S. law that are relevant to the disclosure of documents in NAFTA investor-State arbitrations.”<sup>20</sup> That letter notifies the claimant that:

(1) under NAFTA Articles 1127 and 1129, copies of documents generated in connection with the arbitration will be provided to the Governments of Canada and Mexico;

(2) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, these documents may be disclosed to members of the public, who have a right of access, enforceable in court, to federal agency records or portions thereof, except to the extent they are protected by applicable exemptions or exclusions; one of which, under 5 U.S.C. § 552(b)(4), protects from disclosure “trade secrets and commercial or financial information ... [that is] privileged or confidential”;

(3) under the NAFTA FTC Interpretation, the NAFTA Parties agreed to provide access to the public to information in NAFTA Chapter Eleven arbitrations;

(4) under NAFTA Article 1126(10), a copy of any request for arbitration or NOA will be recorded in a public register at the NAFTA Secretariat; and,

(5) the United States’ general practice is to make documents available to the public, to the fullest extent feasible, by posting them to the Department of State’s website.<sup>21</sup>

Accordingly, the letter also recommends that, particularly with respect to U.S. FOIA obligations, should the claimant believe that any part of any document that it provides in this matter reflects confidential business information or is otherwise protected from disclosure under FOIA, it should clearly mark the specific information for which protection is claimed and provide a second version of the document in which such information is omitted or obscured.<sup>22</sup>

Without such a designation, the Department of State presumes that any information in the documents provided by the claimant is not exempt from disclosure to the public under the FOIA.<sup>23</sup>

After the letter is sent to claimant’s counsel, and if a NOA is subsequently received, the Department of State posts the NOA to its website in a timely manner, subject to any relevant redactions for protected information. For example, in *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, the Department of State timely posted that NOA on a page which contained the following description of the case:

Grand River Enterprises Six Nations, Ltd., a Canadian corporation, Jerry Montour, Kenneth Hill and Arthur Montour have delivered a notice of arbitration under the UNCITRAL Arbitration Rules on their own behalf and on

<sup>19</sup> See CAFTA-DR art. 10.21(1)(a)-(b), 2004 Model BIT art. 29(1)(a)-(b), and *supra* note 18.

<sup>20</sup> See *infra* Form Letter, app. A.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

behalf of Native Wholesale Supply (collectively “Grand River”). Grand River is involved in the manufacture and sale of tobacco products. According to its Statement of Claim, Grand River seeks not less than \$310 million to \$664 million for damages allegedly resulting from a 1998 settlement agreement between various state Attorneys General and the major tobacco companies, and certain state legislation that partially implements the settlement.

Grand River alleges violations of NAFTA Articles 1102 (national treatment), 1103 (most-favoured-nation treatment), 1104 (better of national or most-favoured-nation treatment), 1105 (minimum standard of treatment under international law) and 1110 (expropriation).

The United States intends to defend this claim vigorously.<sup>24</sup>

As illustrated by the last sentence of the case description above, the United States indicates its position with respect to the defence of the claim when the NOA is posted.

The NAFTA FTC Interpretation reflects the political commitment of the NAFTA Parties to each other and to their respective national stakeholders to provide public access to each NOA, as well as other documents submitted to, or issued by, a Chapter Eleven tribunal.<sup>25</sup> The failure to provide public access would be inconsistent with this commitment.

**(2) Documents to be published (for instance, have there been any uncertainties as to whether certain types of documents should be published; or issues raised with respect to translation or costs related issues?)**

The United States described the documents to be published under the NAFTA FTC Interpretation and the 2004 Model BIT in its previous comments on transparency in treaty-based investor-State arbitration.<sup>26</sup>

To date, the United States has not faced uncertainty as to whether certain types of documents submitted to, or issued by a NAFTA tribunal should be published. The Department of State has generally posted to its website written submissions, transcripts, orders, and decisions for the cases in which it is a disputing Party, and provides links to websites maintained by Canada and Mexico which provide access to documents in cases submitted to arbitration against those NAFTA Parties.<sup>27</sup> Documents that are not posted to the website may be requested by members of the public, subject to the redaction of protected information, by contacting the U.S.

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<sup>24</sup> *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, U.S. Department of State, <http://www.state.gov/s/l/c11935.htm>.

<sup>25</sup> See NAFTA FTC Interpretation A(2)(b).

<sup>26</sup> See U.S. Comments on Transparency at 9.

<sup>27</sup> The only documents that the Department of State posts on its web pages for claims against the Governments of Canada or Mexico are non-disputing Party submissions under Article 1128 of the NAFTA. See, e.g., *Pope & Talbot, Inc. v. Government of Canada*, U.S. Department of State, available at: <http://www.state.gov/s/l/c3747.htm> (providing a brief description of the matter, copies of the United States’ Article 1128 submissions, and a hyperlink “[f]or further information and documents concerning this claim” to the Government of Canada’s webpage).

Department of State's Office of International Claims and Investment Disputes (L/CID).<sup>28</sup>

No issues have been raised with respect to the translation of these documents or costs related to making them available. The Department of State makes the documents available in the language or languages in which they were submitted to or issued by the tribunal.

**(3) Submissions by third parties (for instance, have you ever experienced an arbitral tribunal in the need of more guidance with respect to the decision-making on the acceptance of submissions by third parties?)**

The United States described the provisions relevant to consideration of amicus involvement in its previous comments on transparency in treaty-based investor-State arbitration.<sup>29</sup> Those comments also described the NAFTA FTC's Statement on Non-Disputing Party Participation ("FTC Amicus Statement"),<sup>30</sup> which recommended specific guidelines to be adopted by Chapter Eleven tribunals when considering proposed amicus submissions.<sup>31</sup> In practice, the United States has not been asked to provide guidance in addition to that recommended by the FTC Amicus Statement.

In *Glamis Gold, Ltd. v. United States*, the Tribunal applied the FTC Amicus Statement's guidelines. The Tribunal amended its first procedural order, which had established a deadline for amicus submissions, "respecting the filing of applications and submissions by non-parties in accordance with [FTC Amicus Statement]"<sup>32</sup> and noted subsequently that amicus submissions "must satisfy the principles" of the FTC Amicus Statement.<sup>33</sup> As detailed in the Award, the Tribunal had expressed its view that it "should apply strictly the requirements specified in the FTC Statement, for example restrictions as to length or limitations as to the matters to be addressed..."<sup>34</sup> For its part, the United States had fully supported amicus participation, "insomuch as it met the requirements of the FTC Statement in terms of both length and content [and] as long as that participation was effectuated in a manner that avoided placing undue burden on the Parties."<sup>35</sup> Ultimately, the Tribunal decided to accept amicus submissions from the National Mining Association, the Quechan Indian Nation,

<sup>28</sup> NAFTA Investor-State Arbitrations, International Claims and Investment Disputes (L/CID), U.S. Department of State, <http://www.state.gov/s/l/c3439.htm>.

<sup>29</sup> U.S. Comments on Transparency at 10-11.

<sup>30</sup> *Id.* (discussing Statement of the FTC on Non-Disputing Party Participation (Oct. 7, 2003), available at: <http://www.state.gov/documents/organization/38791.pdf>).

<sup>31</sup> *Id.*

<sup>32</sup> *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 4 9 (Aug. 26, 2005), available at: <http://www.state.gov/documents/organization/54151.pdf>.

<sup>33</sup> *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Letter from President Young regarding the Request for Extension to File Application for Leave to File a Non-Disputing Party Submission and Associated Submission at 2 (Oct. 10, 2006), available at: <http://www.state.gov/documents/organization/73890.pdf>; see also *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Decision on Application and Submission by Quechan Indian Nation 10 (Sept. 16, 2005), available at: <http://www.state.gov/documents/organization/53592.pdf> (noting that the Quechan Indian Nation's submission "satisfies the principles" of the FTC Amicus Statement).

<sup>34</sup> *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Award 286 (June 8, 2009) ("*Glamis Award*"), available at: <http://www.state.gov/documents/organization/125798.pdf>.

<sup>35</sup> *Id.* 285.

Sierra Club and Earthworks, and Friends of the Earth,<sup>36</sup> and to “consider [them], as appropriate, in accordance with the principles stated in the FTC Statement and the particular criterion mentioned by [the United States] that each submission bring ‘a perspective, particular knowledge or insight that is different from that of the disputing parties.’”<sup>37</sup>

In *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, the parties agreed at the first session of the Tribunal that “the Tribunal should later adopt a process for receiving and considering *amicus* submissions, as necessary (but not at this stage), by having recourse to the recommendations of the [FTC Amicus Statement].”<sup>38</sup> When the Office of the National Chief of the Assembly of First Nations presented an *amicus* submission<sup>39</sup> without an accompanying application for leave to file, the Tribunal notified the parties that it “had received an unsolicited letter from a non-party supporting a Party in the pending arbitration.”<sup>40</sup> The Tribunal stated further that, “[i]n considering whether to accept and consider this letter, or any other submissions by non-Parties, the Tribunal intends to be guided by the [FTC Amicus Statement] and will decide in due course whether to consider the submission, in light of any views the Parties may wish to indicate in the Reply and Rejoinder.”<sup>41</sup> The United States stated in its Rejoinder that The Assembly of First Nation’s submission was not accompanied by an application for leave to file a non-party submission. The procedures recommended by the [FTC Amicus Statement] – which the Tribunal has indicated will guide their consideration of *amicus* submissions in this case – require that any proposed *amicus* submission be accompanied by an application for leave to file. Because the Assembly of First Nations did not seek leave to file, their submission should not be considered in this arbitration.<sup>42</sup>

The Tribunal has not yet decided whether to accept the submission.

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<sup>36</sup> The applications for leave to file and the submissions are available at <http://www.state.gov/s/l/c10986.htm>.

<sup>37</sup> *Glamis* Award 286 (quoting FTC Amicus Statement § B(6)(a)). Notably, the Quechan Indian Nation filed two *amicus* submissions, the second of which was accepted at the same time as the others above. *Id.* The Tribunal accepted the first submission in its Decision on Application and Submission by Quechan Indian Nation, dated September 16, 2005. *See supra* note 33.

<sup>38</sup> *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, NAFTA/UNCITRAL, Minutes of the First Session of the Tribunal § II(1) (Mar. 31, 2005), *available at*: <http://www.state.gov/documents/organization/45017.pdf>.

<sup>39</sup> *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, NAFTA/UNCITRAL, Letter from Phil Fontaine, National Chief of the Assembly of First Nations, to the Tribunal (Jan. 19, 2009), *available at*: <http://www.state.gov/documents/organization/117812.pdf>.

<sup>40</sup> *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, NAFTA/UNCITRAL, Letter from the Tribunal to the Parties Concerning the Amicus Curiae Submission at 1 (Jan. 27, 2009), *available at*: <http://www.state.gov/documents/organization/117813.pdf>.

<sup>41</sup> *Id.* at 1-2.

<sup>42</sup> *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, NAFTA/UNCITRAL, Rejoinder at 77, n.277 (May 13, 2009), *available at*: <http://www.state.gov/documents/organization/125482.pdf>.

**(4) Public hearings (for instance, how are public hearings organized? What is your experience with respect to the publication of transcripts?)**

The United States has a clear policy in support of open hearings. In the NAFTA context, the United States has declared that it “will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information.”<sup>43</sup> Moreover, in the CAFTA-DR and under the 2004 Model BIT, the commitment to public hearings is even stronger because the relevant articles require that [t]he tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.<sup>44</sup>

In practice, NAFTA hearings have been open to the public via closed-circuit television feed. That feed may be cut, however, for portions of a hearing involving protected information. As explained in detail by the *Glamis* Tribunal in its Procedural Order No. 11: with respect to public access to the hearing, ICSID explained that a separate room had been reserved [at the World Bank in Washington, D.C.] into which a television broadcast would be made through the Bank’s video channel. Neither Party objected to public access in this form. Both Parties did, however, recognize that public viewing would not be possible during the discussion of specific confidential information, including the presentation of company financial information and details as to the exact locations of culture sites and artefacts.<sup>45</sup>

At the most recent merits hearing in *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, the hearing was open to the public in the same manner. In that arbitration, the parties had agreed that [s]ubstantive hearings on merits would be open to the public via a live closed-circuit television transmission, provided that ICSID [was] able to make the appropriate logistical arrangements. It was also noted that no member of the public would be admitted into the hearing room.<sup>46</sup>

Pursuant to that agreement, the hearing was broadcast to a public viewing room at the World Bank in Washington, D.C., subject to cuts of the feed for the protection of confidential business information.

The Department of State also publishes complete hearing transcripts on its website, subject to the redaction of protected information.<sup>47</sup>

<sup>43</sup> Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations (Oct. 7, 2003), *available at*: [http://ustraderep.gov/assets/Trade\\_Agreements/Regional/NAFTA/asset\\_upload\\_file143\\_3602.pdf](http://ustraderep.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf).

<sup>44</sup> See CAFTA-DR art. 10.21.2, 2004 Model BIT art. 29(2), and *supra* note 18.

<sup>45</sup> *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 11 15 (July 9, 2007), *available at*: <http://www.state.gov/documents/organization/88173.pdf>.

<sup>46</sup> *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, NAFTA/UNCITRAL, Minutes of the First Session of the Tribunal § I(10) (Mar. 31, 2005), *available at*: <http://www.state.gov/documents/organization/45017.pdf>.

<sup>47</sup> See Cases Filed Against the United States of America, U.S. Department of State, *available at*: <http://www.state.gov/s/l/c3741.htm>. For an example of a dispute concerning the redaction of a hearing transcript, see *infra* response to question six.

**(5) Publication of awards (for instance, have there been any cases in which certain decisions or awards were excluded from publication? In the affirmative, what were the reasons?)**

To date, there have not been any cases where the United States was the disputing Party in which decisions or awards were excluded from publication. In Annex 1137.4 of the NAFTA, the United States specified that where it “is the disputing Party, either the United States or a disputing investor that is a party to the arbitration may make an award public.” Moreover, the United States has committed to making awards public under the NAFTA FTC Interpretation.<sup>48</sup> Additionally, the United States is required to make awards public under the CAFTA-DR and the 2004 Model BIT.<sup>49</sup>

**(6) Possible exceptions to the transparency rules (how to deal in practice with those exceptions, in particular in case of disagreement between the parties and how to ensure compliance?)**

As detailed in the U.S. comments on transparency in treaty-based investor-State arbitration, the NAFTA FTC Interpretation and the 2004 Model BIT provide for the non-disclosure of protected information.<sup>50</sup> In prior cases, the United States has concluded confidentiality agreements with claimants to ensure the non-disclosure of protected information and to particularize a procedure for determining whether certain information should be protected.

In practice, the United States seeks to resolve matters of confidentiality with the opposing party. In the event that the parties cannot reach agreement on whether certain information should be protected, the dispute is submitted to the tribunal for resolution, in accordance with any applicable confidentiality agreement. For example, in *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, the United States disagreed with the claimants’ designation of specific information in the hearing transcripts as confidential business information. In the interest of making the transcripts public “in a timely manner,” as required by the NAFTA FTC Interpretation, the Department of State posted the hearing transcripts with this information redacted by the claimants to its website. However, the United States brought its challenge of certain of these redactions to the Tribunal, arguing that the claimants’ designation of the information as business confidential was not justified under the terms of the applicable confidentiality agreement. The Tribunal has not yet resolved this issue.

The United States has not encountered, in its investor-State practice as a disputing Party, any compliance issues regarding the non-disclosure of protected information.

**(7) Repository of published information (for instance, what difficulties have been encountered in the procedure of publication?)**

The Department of State has not encountered any particular difficulties with the publication of documents on its website. Nor has the Department encountered any particular difficulties with, in accordance with NAFTA Article 1126(10), providing a

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<sup>48</sup> See NAFTA FTC Interpretation A(2)(b).

<sup>49</sup> See CAFTA-DR art. 10.21.1(e), 2004 Model BIT art. 29(1)(e), and *supra* note 18.

<sup>50</sup> See *supra* note 15.

copy of any request for arbitration or NOA to the NAFTA Secretariat for inclusion in a public register.

## **Appendix A: Form Letter**

*By E-mail & Courier*

Re: [Caption of Matter]

Dear [Addressee]:

This letter will confirm the receipt on [date] by the United States Government of [the claimant's] Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter Eleven of the North American Free Trade Agreement ("NAFTA") concerning [brief description of the matter].

We take this opportunity to note several aspects of NAFTA Chapter Eleven and United States law that are relevant to the disclosure of documents in NAFTA investor-State arbitrations. First, the United States is obliged under NAFTA Articles 1127 and 1129 to provide to the other NAFTA Parties copies of many categories of documents generated in connection with arbitrations under Chapter Eleven. [The claimant] should understand that, by invoking the dispute-resolution provisions of Chapter Eleven, it has submitted itself to a process by which its documents can and will be provided to the Governments of Canada and Mexico.

Second, we note the United States' obligations under the Freedom of Information Act ("FOIA"), codified at 5 U.S.C. § 552. Under the FOIA, any member of the public has a right of access, enforceable in court, to federal agency records or portions thereof, except to the extent protected from disclosure by applicable exemptions or exclusions. One of the FOIA exemptions most often invoked for documents provided by litigants to agencies is 5 U.S.C. § 552(b)(4), which protects from disclosure "trade secrets and commercial or financial information ... [that is] privileged or confidential."

Should [the claimant] believe that any part of any document it provides in this matter reflects confidential business information or is otherwise protected from disclosure under FOIA, it should clearly mark the specific information for which protection is claimed and provide a second version of the document in which such information is omitted or obscured. Absent such a designation, we will presume that [the claimant] does not claim that any information in documents provided by it is exempt from disclosure to the public pursuant to the FOIA.

Third, we note the July 31, 2001 statement of interpretation of the Free Trade Commission established under NAFTA Article 2001, which is available at [www.state.gov/documents/organization/38790.pdf](http://www.state.gov/documents/organization/38790.pdf). That statement, among other things, recorded the intentions of the three NAFTA Parties to grant, subject to limited exceptions, access to the public to information in investor-State arbitrations pursuant to Chapter Eleven of the NAFTA.

Fourth, we note that NAFTA Article 1126(10) requires a disputing Party to provide a copy of any request for arbitration or notice of arbitration to the NAFTA Secretariat for inclusion in a public register. Any document submitting a claim to



arbitration in this matter will be made available to the public at the United States Section of the NAFTA Secretariat.

Fifth, the United States' general practice is to post to the website of the Department of State – to the fullest extent feasible – all submissions, orders and decisions in Chapter Eleven cases against the United States that are of interest to the public.

**G. Note by the Secretariat on settlement of commercial disputes:  
transparency in treaty-based investor-State arbitration — proposals by  
Governments and International Organizations, submitted to the  
Working Group on Arbitration and Conciliation at its  
fifty-fourth session**

**[Original: English]**

**(A/CN.9/WGII/WP.164)**

In preparation for the fifty-fourth session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to work on the preparation of a legal standard on transparency in treaty-based investor-State arbitration, delegations were encouraged at the fifty-third session of the Working Group to provide information, including written proposals, to the secretariat (A/CN.9/712, para. 101). The texts of the proposals are reproduced as an annex to this note in the form in which they were received by the secretariat.

**Proposal by the Government of Germany**

[Original: English]

[Date: 14 December 2010]

In the opinion of the German delegation to the UNCITRAL Working Group II (Arbitration and Conciliation), the session held by the Working Group from 4 to 8 October 2010 in Vienna was successful in laying down important foundations, first towards better understanding of the transparency requirement in investor-State arbitration and second, towards arbitration practices that comply with the transparency requirement. An analysis of the legal options available to create transparency in investor-State arbitration, which was advocated by many delegations, and by the chairperson in particular, helped to clarify a number of questions on the subject. In this light, the German delegation wishes to submit the following proposals to the chairperson and the other delegations before the next session of the Working Group. The proposals concern the next steps to be taken in preparing new rules on increased transparency in investor-State arbitration.

**The German delegation considers that the rules should be drafted as non-binding guidelines.**

Compared to the alternatives, non-binding guidelines most closely comply with the principle of a party-dominated process that underpins arbitration. Non-binding guidelines are also the best means of achieving the desired objective of all delegations: that is, to establish the widest possible acceptance of transparency rules. Such guidelines could have a significant bearing on both existing investment protection treaties and investment protection treaties that will be negotiated or revised in the future. They should apply to international treaties at intergovernmental level and to private contracts between States and investors which provide for the settlement of disputes through arbitration. In contrast to mandatory transparency rules, non-binding guidelines would allow sufficient flexibility to meet with broad agreement and thus achieve a large measure of practical relevance, in the German view.

Parties to future arbitration proceedings executed on the basis of existing investment protection treaties under the UNCITRAL Arbitration Rules could reach an agreement in the event of a dispute through ad hoc application of the new transparency guidelines. They could also agree, at a later stage, to a general application of the guidelines by means of a treaty amendment or addition.

It would be possible to incorporate the guidelines directly in new investment protection treaties. In this regard, the German delegation proposes the drafting of an additional model clause, which would allow the treaty parties to agree on the applicability of the UNCITRAL transparency guidelines.

In the German delegation's opinion, the alternative to transparency guidelines — agreement on mandatory transparency rules for investor-State disputes — would be a far inferior solution, and barely acceptable for Germany:

- It is unlikely that binding rules would take account, to the same extent as guidelines, of the generally desired goal to achieve the widest possible acceptance of the transparency rules. In contrast to a mandatory legal standard, drafting of non-binding guidelines would be more likely to favour rapid and successful reform within UNCITRAL.
- Incorporating the mandatory regulations in existing treaties would be considerably more difficult. Only investment protection treaties containing a dynamic reference to the latest applicable version of the UNCITRAL Arbitration Rules could be assumed, *ipso jure*, to include the new transparency rules.
- In arbitrations, the question of incorporating the rules would be contentious, possibly leading to additional expense and delays. This would impede the legitimate desire to create uniform transparency rules for investor-State arbitration.
- The UNCITRAL transparency rules should not be structured or formulated in such a way that could restrict national rights concerning access to information. There is a much higher risk of imposing such a restriction through mandatory regulations than through non-binding guidelines.



## **II. PROCUREMENT**

### **A. Report of the Working Group on Procurement on the work of its nineteenth session (Vienna, 1-5 November 2010) (A/CN.9/713)**

**[Original: English]**

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## Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the “Commission”) entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”, A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. At its seventh to thirteenth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006, New York, 21-25 May 2007, Vienna, 3-7 September 2007, and New York, 7-11 April 2008, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640 and A/CN.9/648), the Working Group considered the topics related to the use of electronic communications and technologies in the procurement process: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 and referring to the publication of forthcoming procurement opportunities; and (c) electronic reverse auctions (ERAs), including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered, and their procedural aspects.

3. At its seventh, eighth and tenth to twelfth sessions, the Working Group in addition considered the issues of abnormally low tenders (ALTs), including their early identification in the procurement process and the prevention of negative consequences of such tenders.

4. At its thirteenth and fourteenth (New York, 7-11 April 2008, and Vienna, 8-12 September 2008) sessions, the Working Group held an in-depth consideration of the issue of framework agreements on the basis of drafting materials contained in notes by the Secretariat. At its thirteenth session, the Working Group also discussed the issue of suppliers’ lists and decided that the topic would not be addressed in the revised Model Law, for reasons that would be set out in the Guide to Enactment. At its fourteenth session, the Working Group also held an in-depth consideration of the issue of remedies and enforcement and addressed the topic of conflicts of interest.

5. At its fifteenth session (New York, 2-6 February 2009), the Working Group completed the first reading of the draft revised model law and although a number of issues were outstanding, including the entire chapter IV, the conceptual framework was agreed upon. It also noted that further research was required for some

provisions in particular in order to ensure that they were compliant with the relevant international instruments.

6. At its sixteenth session (New York, 26-29 May 2009), the Working Group considered proposals for article 40 of the revised model law, dealing with a proposed new procurement method — competitive dialogue. The Working Group agreed on the principles on which the provisions should be based and on much of the draft text, and requested the Secretariat to review the provisions in order to align the text with the rest of the draft revised model law. The Secretariat was also entrusted with revising the draft provisions for chapter I.

7. At its seventeenth and eighteenth sessions (Vienna, 7-11 December 2009, and New York, 12-16 April 2010), the Working Group completed a second reading of all chapters of the draft revised model law and had begun a third reading of the text. The Working Group settled many of the substantive issues and requested the Secretariat to redraft certain provisions to reflect its deliberations at the sessions. The Working Group, at its eighteenth session, agreed to address the remaining outstanding issues throughout the draft revised model law with a view to finalizing the text at its nineteenth session and presenting the draft revised model law for adoption by the Commission at its forty-fourth session, in 2011. It also agreed to undertake work on a draft revised guide to enactment.

8. At its thirty-eighth to forty-first sessions, in 2005 to 2008, respectively, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the revised Model Law (A/60/17, para. 172, A/61/17, para. 192, A/62/17 (Part one), para. 170, and A/63/17, para. 299). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the revised Model Law (A/61/17, para. 192). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17 (Part one), para. 170). Pursuant to that recommendation, the Working Group adopted the timeline for its deliberations at its twelfth and thirteenth sessions (A/CN.9/648, annex), and agreed to bring an updated timeline to the attention of the Commission on a regular basis. At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time (A/63/17, para. 307).

9. At its forty-second session, in 2009, the Commission considered chapter I of the draft revised model law and noted that most provisions of that chapter had been agreed upon, although some issues remained outstanding. The Commission noted that the draft revised model law was not ready for adoption at that session of the Commission. It entrusted the Secretariat to prepare drafting suggestions for consideration by the Working Group to address those outstanding issues. At that session, the importance of completing the revised model law as soon as reasonably possible was highlighted (A/64/17, paras. 283-285).

10. At its forty-third session, in 2010, the Commission requested the Working Group to complete its work on the revision of the Model Law during the next two sessions of the Working Group and present a draft revised model law for finalization and adoption by the Commission at its forty-fourth session, in 2011. The Commission instructed the Working Group to exercise restraint in revisiting issues on which decisions had already been taken (A/65/17, para. 239).

## II. Organization of the session

11. The Working Group, which was composed of all States members of the Commission, held its nineteenth session in Vienna, from 1 to 5 November 2010. The session was attended by representatives of the following States members of the Working Group: Argentina, Belarus, Bolivia (Plurinational State of), Botswana, Canada, China, Colombia, Czech Republic, Fiji, France, Germany, India, Iran (Islamic Republic of), Italy, Mexico, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

12. The session was attended by observers from the following States: Belgium, Dominican Republic, Guatemala, Indonesia, Kuwait, Panama, Romania, Slovakia, Sweden, Tunisia and Yemen.

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

(a) *United Nations system*: United Nations Office on Drugs and Crime (UNODC) and the World Bank;

(b) *Intergovernmental organizations*: European Bank for Reconstruction and Development (EBRD), European Union (EU), International Development Law Organization (IDLO), and Organization for Economic Cooperation and Development (OECD);

(c) *International non-governmental organizations invited by the Working Group*: Forum for International Conciliation and Arbitration (FICACIC) and International Federation of Consulting Engineers (FIDIC).

14. The Working Group elected the following officers:

*Chairman*: Mr. Tore WIWEN-NILSSON (Sweden)<sup>1</sup>

*Rapporteur*: Mr. Seung Woo SON (Republic of Korea)

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

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.74);

(b) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law (A/CN.9/WG.I/WP.75 and Add.1-8).

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<sup>1</sup> Elected in his personal capacity.



16. The Working Group adopted the following agenda:
  1. Opening of the session.
  2. Election of officers.
  3. Adoption of the agenda.
  4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
  5. Other business.
  6. Adoption of the report of the Working Group.

### **III. Deliberations and decisions**

17. At its nineteenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law.

## **IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (A/CN.9/WG.I/WP.75/Add.1-8)**

### **A. Chapter VIII. Review (A/CN.9/WG.I/WP.75/Add.8)**

18. The Working Group was informed about the results of inter-session consultations on draft chapter VIII. It noted that the following proposals for amendment during those consultations would affect the drafting of the entire chapter: (a) excluding procuring entities and approving authorities from the group of review bodies, the latter term being used only with respect to courts and administrative review bodies outside the procuring entity; (b) limiting the possibility of procuring entity to consider complaints only until the award of the procurement contract; (c) giving the discretion to the procuring entity to decide on suspension of the procurement proceedings; (d) leaving the power to overturn the concluded contracts to courts; and (e) referring in the Guide to systems, alternative to the one in the revised Model Law. The Working Group was also invited to reconsider the need for references to “approving authority” throughout the chapter, taking into account their very infrequent use in the draft revised Model Law as compared to the 1994 text.

19. It was agreed that specific changes proposed to be made to draft chapter VIII during inter-session consultations should be introduced to the Working Group by the Secretariat article by article.

*Article 61. Right to review*

20. The Working Group had before it the following suggestion for article 61:

**“Article 61. Right to seek reconsideration or review**

(1) A supplier or contractor that claims to have suffered or claims that it may suffer, loss or injury due to alleged non-compliance with the provisions of this Law may seek a reconsideration or review of the alleged non-compliance, in accordance with articles [62 to 66] of this Law or with other provisions of applicable law of this State.

(2) A supplier or contractor may appeal any decision taken by a procuring entity or by a review body in proceedings initiated pursuant to paragraph (1) of this article, or may institute proceedings if no decision is issued within the prescribed time-limits, or if the procurement proceedings are not suspended as required by article [65 (1)] of this Law.”

21. The point was made that the provisions of paragraph (1) should be conformed to article 64 (2) as regards suppliers that would have the right to file a complaint or appeal (see para. 57 below).

*Article 62. Review by the procuring entity or the approving authority*

22. The Working Group had before it the following suggestion for article 62:

**“Article 62. Application for reconsideration by  
the procuring entity or the approving authority**

(1) A supplier or contractor may apply to procuring entity[, or where applicable, to the approving authority], to have a decision or step in the procurement proceedings reconsidered.

(2) Applications for reconsideration shall be submitted in writing and shall be submitted within the following time periods:

(a) Applications for reconsideration as regards the terms of solicitation, pre-qualification or pre-selection or arising from the pre-qualification or pre-selection proceedings shall be submitted no later than the deadline for presenting submissions;

(b) All other applications for reconsideration arising from the procurement proceedings shall be submitted prior to the entry into force of the procurement contract.

(3) Promptly after the timely submission of an application under paragraph (2) of this article, the procuring entity [or approving authority] may suspend the procurement proceedings. The procuring entity[, or approving authority] may take no decision or step to award the procurement contract until [its decision on the application has been communicated to the supplier or contractor submitting the application].

(4) The procuring entity [or approving authority] may overturn, correct, vary or uphold any decision or step in the procurement proceedings that is the subject of the application.

(5) The procuring entity [or the approving authority] shall issue a written decision on the application within ... working days (the enacting State specifies the period) after the submission of the application. The decision shall state the reasons for the decision, and the action taken.

(6) If the procuring entity [or the approving authority] does not communicate its decision to the supplier or contractor submitting the application and to any other participant in the application by the time specified in paragraph (2) of this article, the supplier or contractor submitting the application is entitled immediately thereafter to institute proceedings under article [63 or 66]. Upon the institution of such proceedings, the competence of the procuring entity [or the approving authority] to entertain the complaint ceases.”

23. The Working Group recalled its earlier decision not to refer in the article to “the head of the procuring entity” (as in the 1994 text), and to provide for an optional recourse by aggrieved suppliers to the procuring entity. The formal nature of the procedures covered by the article was highlighted.

#### *Paragraph (2)*

24. With reference to paragraph (2), the following risks of not allowing the procuring entity to consider applications for reconsideration after the procurement contract entered into force were highlighted: (a) in the absence of an independent review body in some jurisdictions, suppliers’ recourse would be limited to the courts, which might be burdensome and inefficient; and (b) the system would provide incentives to the procuring entity to rush to conclude procurement contracts to avoid review. The point was made that in some jurisdictions, the law provided that the procuring entity could consider complaints submitted to it after the award of the procurement contract, and the procuring entities had the authority to overturn contracts that had entered into force. Possible reasons for overturning the procurement contract mentioned were termination of an awarded contract where an impropriety had occurred during the award process, for public policy considerations and for preserving the integrity of the process. Support was therefore expressed for article 62 (2) as contained in document A/CN.9/WG.I/WP.75/Add.8.

25. The view prevailed that the article should not deal with justifications for termination of a concluded contract and should not allow the unilateral modification of concluded contracts by the procuring entity. Concern was expressed that the proposed expansion of the period for filing complaints might inadvertently give excessive powers to the procuring entity. The limited scope of the Model Law, which did not cover the contract administration stage, was noted in this respect. Support was expressed therefore for paragraph (2) as contained in paragraph 22 of this report. Safeguards provided for by a standstill period and in chapter VIII of the Model Law, including the possibility of post-award review in a court and where applicable in the independent review body, were considered sufficient.

26. Reservation was expressed about this approach on the understanding that under certain conditions the procuring entity, rather than the court or the independent review body, would be in the best position to deal with post-award

complaints. In such situations, it should be allowed to deal with them without requiring recourse to the independent review body or court. The Working Group agreed that the matter might need to be reconsidered in conjunction with other provisions of the chapter, so that the correct balance between the effective protection of the rights of suppliers, and the need to ensure the integrity of the process, and efficiency was achieved.

*Paragraph (3)*

27. With regard to paragraph (3), it was questioned whether it would be desirable to provide the procuring entity with complete discretion as regards a decision to suspend the procurement proceedings. Particular concern was expressed about an optional suspension in the case of complaints as regards terms of solicitation. In challenges to pre-qualification or pre-selection decisions, potentially negative impacts on aggrieved suppliers, where there was no suspension, was also noted. The suggestion was therefore made that the first sentence should be deleted and in the second sentence the word “shall” should be used in lieu of the word “may”.

28. The alternative view was that the provisions of the first sentence, conferring discretion on the procuring entity to suspend the procurement proceedings, should be retained. It was noted that the provisions for mandatory suspension might be abused by suppliers which might use them for exerting pressure on the procuring entity. The Working Group also noted that article 63 provided safeguards by allowing an appeal against a decision by the procuring entity not to suspend to the independent review body. Some other provisions of the Model Law, such as on extension of deadlines for presenting submissions or on cancellation of the procurement, were also noted as relevant.

29. The view prevailed that the law should confer discretion on the procuring entity to suspend the procurement proceedings. The understanding was that the Guide should refer to cases that would justify a suspension, such as in the case of complaints as regards the terms of solicitation, in which case a suspension would be justified to avoid costs that would arise if the entire procurement proceedings were nullified late in the process. It was decided that the Model Law could not stipulate all situations when suspension would or would not be justifiable and therefore relying on the reasonable judgment of the procuring entity was unavoidable and appropriate.

30. It was agreed that the last sentence of paragraph (3) should be redrafted along the following lines: “The procuring entity[, or approving authority] shall not award the procurement contract until [its decision on the application has been communicated to the supplier or contractor submitting the application].” The Secretariat was requested to amend the provisions in order avoid any unintentional implication that the procurement contract could be awarded immediately after the procuring entity’s decision on the application for reconsideration was communicated to the supplier or contractor submitting the application. (For further discussion relevant to the provisions of article 62 on suspension, see paras. 70-73 below.)

*Paragraph (4)*

31. In response to a query as regards the words “or step”, it was clarified that the reference was intended to cover actions other than a decision, such as the means or timeframe of communicating a decision to interested parties. Preference was expressed for reconsidering or deleting the reference to “or step”.

*Paragraph (5)*

32. Questions were raised as regards the requirement to provide a decision in writing. The practice in jurisdictions that allowed for silence on the part of the procuring entity to be taken as an objection or a rejection was noted. The Working Group agreed that the issue would be discussed in the Guide with an indication that best practice was to provide a written, reasoned decision. Reference in this context was also made to paragraph (6) that addressed the consequences of a failure to issue a decision.

33. The Secretariat was requested to replace the provisions throughout the chapter referring to “issuance of the decisions” with provisions reading “giving notice of the decision” and indicating the intended addressees.

*Paragraph (6)*

34. It was agreed that the paragraph should be redrafted to make it consistent with paragraph (5) as regards the need to give notice of the decision and specify reasons for the decision and the intended addressees. It was also noted that a reference to “participants in the application” should be reconsidered to make it more consistent with the relevant wording found in article 64 (1) in document A/CN.9/WG.I/WP.75/Add.8.

35. The suggestion was made that the provisions of article 62 should envisage an additional period of time after the notice of the decision of the procuring entity to allow an effective appeal. A cross-reference in this regard was made to the relevant provisions in article 65 (5) in document A/CN.9/WG.I/WP.75/Add.8.

*Article 63. Review before an independent administrative body*

36. The Working Group had before it the following suggestion for article 63:

**“Article 63. Review before an independent review body”<sup>\*</sup>**

(1) A supplier or contractor seeking review may submit a complaint or an appeal to ... (the enacting State inserts the name of the independent review body). Complaints or appeals shall be submitted in writing, and shall be submitted within the following time periods:

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<sup>\*</sup> States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit this article and provide only for judicial review (article [66]), on the condition that in the enacting State exists an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption. [States may provide for the system of appeal judicially, or administratively, to reflect the legal system in the jurisdiction concerned.]

- (a) Complaints as regards the terms of solicitation, pre-qualification or pre-selection or arising from the pre-qualification or pre-selection proceedings shall be submitted no later than the deadline for presenting submissions;
  - (b) All other complaints regarding decisions or steps taken in the procurement proceedings shall be submitted prior to the entry into force of the procurement contract;
  - (c) Complaints submitted on the ground that a decision was not issued in accordance with article 62 (4), or that the procurement proceedings were not suspended in accordance with article [65 (1)], shall be submitted within ... working days (the enacting State specifies the period) after the expiry of the prescribed time-limit for issuance of such a decision or within ... working days (the enacting State specifies the period) after the submission of the application for reconsideration;
  - (d) Appeals against a decision of the procuring entity [or approving authority] made under article [62 (3)] of this Law shall be submitted within ... working days (the enacting State specifies the period) after the decision was communicated to the supplier or contractor concerned.
- (2) Upon receipt of a complaint or an appeal, the ... (the enacting State inserts the name of the independent review body) shall give notice thereof promptly to the procuring entity [and to the approving authority where applicable].
- (3) The [insert name of review body] may declare the legal rules or principles that govern the subject matter of the complaint or appeal and shall be [empowered/required] to take one or more of the following actions:
- (a) Prohibit the procuring entity[, or the approving authority as the case may be,] from acting or deciding unlawfully or from following an unlawful procedure;
  - (b) Require the procuring entity[, or the approving authority as the case may be,] 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;
  - (c) Overturn in whole or in part an unlawful act or decision of the procuring entity, or the approving authority as the case may be, [other than any act or decision as to the award of the procurement contract], [or uphold or overturn in whole or in part a decision of the procuring entity [or the approving authority] on an application made under article 62];
  - (d) Revise an unlawful decision by the procuring entity, or the approving authority as the case may be, or substitute its own decision for such a decision, other than any act or decision bringing the procurement contract into force, or confirm a lawful decision by the procuring entity or the approving authority;
  - (e) Order that the procurement proceedings be suspended or terminated;
  - (f) Dismiss the complaint or appeal;
  - (g) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint or appeal as a result of

an unlawful act or decision of, or procedure followed by, the procuring entity or the approving authority in the procurement proceedings, and for any loss or damages suffered[, which shall be limited to costs for the preparation of the submission, or the costs relating to the complaint and the appeal where applicable, or both]; or

(h) Take such alternative action as is appropriate in the circumstances.

(4) The [insert name of review body] shall within [...] days after receipt of the complaint or appeal issue a written decision concerning the complaint or appeal, stating the reasons for the decision and the action taken.

(5) The [insert name of review body] shall communicate its decision to all participants in the review proceedings in accordance with article 64 (5).

(6) The procuring may request the [insert name of review body], in writing, to permit a procurement contract to be awarded before an application under article 62 is determined, on the grounds referred to in paragraph (3) of article 65. The decision of the [insert name of review body] on such a request shall be made a part of the record of the procurement proceedings and shall promptly be communicated to all parties to the application concerned.”

37. It was agreed that the reference to an “independent review body” should be replaced with a reference to an “independent body”. The former was considered too narrow since the body in question in some jurisdictions, apart from being a review body, might have some advisory function.

38. In paragraph (1) (b), it was agreed to replace “prior to the entry into force of the procurement contract” with the relevant text in article 63 (1) (b) contained in document A/CN.9/WG.I/WP.75/Add.8. In support of this change, it was noted that it would be essential to permit complaints and appeals to be filed shortly after the contract entered into force, so as to eliminate any incentive for the procuring entity to conclude the procurement contract while the complaint of the aggrieved supplier remained unresolved. It was noted, however, that the Guide might draw the attention of enacting States to the fact that not all jurisdictions in fact allowed for complaints or appeals to be filed after the procurement contract had entered into force.

39. As a result of the change agreed to be made in paragraph (1) (b), it was agreed to delete paragraph (1) (c) and replace paragraph (1) (d) with the text of article 63 (1) (c) contained in document A/CN.9/WG.I/WP.75/Add.8.

40. A number of revisions were proposed to the list of actions that might be taken by the independent body, to reflect, in particular, that not all jurisdictions allowed review bodies: (a) to substitute decisions of the procuring entity with their own decisions; and (b) to overturn the procurement contract. It was agreed that the following list of actions might be included in paragraph (3):

“(a) Prohibit the procuring entity[, or the approving authority as the case may be,] from acting or deciding unlawfully or from following an unlawful procedure;

(b) Require the procuring entity[, or the approving authority as the case may be,] 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;

- (c) Overturn in whole or in part an unlawful act or decision of the procuring entity, or the approving authority as the case may be, [other than any act or decision as to the award of the procurement contract], [or uphold or overturn in whole or in part a decision of the procuring entity [or the approving authority] on an application made under article 62];
- (d) Revise an unlawful decision by the procuring entity, or the approving authority as the case may be, or substitute its own decision for such a decision, other than any act or decision bringing the procurement contract into force, or confirm a lawful decision by the procuring entity or the approving authority;
- (e) Overturn the award of a procurement contract or the framework agreement that has entered into force unlawfully and, if notice of the award of the procurement contract or the framework agreement has been published, order the publication of notice of the overturning of the award;
- (f) Order that the procurement proceedings be suspended or terminated;
- (g) Dismiss the complaint or appeal;
- (h) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint or appeal as a result of an unlawful act or decision of, or procedure followed by, the procuring entity or the approving authority in the procurement proceedings, and for any loss or damages suffered(, which shall be limited to costs for the preparation of the submission, or the costs relating to the complaint and the appeal where applicable, or both); or
- (i) Take such alternative action as is appropriate in the circumstances.”

41. With respect to the provisions in subparagraphs (c) to (e), it was agreed that the text should be placed in parenthesis, and that the Guide or a footnote to those provisions should explain that States that did not allow the listed actions to be taken by an independent body might not enact them. With respect to the provisions in parenthesis in subparagraph (h), it was agreed that the Guide would explain that, if the language in parenthesis was deleted, the resulting provisions, by allowing the State to permit compensation for lost profits, might provide appropriate incentives for filing complaints and appeals, which might be appropriate when the concept of an independent review was introduced. With respect to the provisions in subparagraph (i), it was agreed that if the text was included, the Guide would specify that it was intended to accommodate evolving practices as regards actions that might be taken by review bodies, and would discuss the scope of the subparagraph.

42. It was observed that the language of article 63 addressed the question of timing of complaints, but not the manner in which an independent body would determine whether a complaint was receivable. In this context, practical experience in some countries was shared: suppliers had appeared ignorant of procurement law, and complaints without merit had been commonly filed. The manner in which such complaints were treated could call into question the effectiveness of review proceedings, it was said. It was accordingly suggested, and agreed, that the words “without merit” should be added in subparagraph (g). It was noted that in one jurisdiction the independent body had 5 days to decide whether to take the action referred to in subparagraph (g). It was noted that the Guide would explain that



“without merit” in this context was a broad notion intended to cover frivolous or vexatious claims and complaints filed out of time or by persons that had no standing to file a complaint.

43. The need to make consequential changes in paragraph (4) and (5) as regards notices of decisions and intended addressees was noted (see para. 33 above).

44. A query was raised about the possibility of charging suppliers fees for filing complaints or appeals. This was seen as an effective tool to deter abusive practices. It was considered however that the issue of charging fees should be dealt with in other branches of law.

45. The point was also made that the Model Law or the Guide should clarify the meaning of an “independent” body as referred to in article 63. It was agreed that the Guide should explain the concept of independence of a review body and how it could be guaranteed.

46. In the course of its consideration of article 65 (see paras. 59-65 below), the Working Group considered the following proposal for an additional text to be inserted in article 63 as appropriate:

“(1) The [insert name of the independent body] shall have the power to order the suspension of the procurement proceedings at any time before the entry into force of the procurement contract if and for as long as it finds suspension necessary to protect the interest of a supplier or contractor having submitted an application, complaint or appeal in accordance with article 61, and taking into account the factors listed in paragraph (4) of this article. The [insert name of the independent body] shall also have the power to lift any suspension ordered by the procuring entity or by itself, taking into account the above considerations.

(2) Except in the circumstances set forth in paragraph (4) of this article, suspension of the procurement proceedings shall be automatic for a period of ten (10) working days at the following stages of the proceedings:

(a) Upon receipt of a complaint or appeal under this article prior to the deadline for presenting applications to pre-qualify or submissions, in order to allow the [insert name of the independent body] to decide whether or not to extend the deadline and to take other actions as regards the terms of solicitation, pre-qualification or pre-selection or other issues arising from pre-qualification or pre-selection proceedings; [The Guide would explain in which cases the order of extension of the deadline is sufficient and in which cases the review body should decide on the substance of the complaint or appeal in addition to ordering the extension of the deadline, e.g. whether an additional supplier should be permitted to participate in the restricted tendering or whether a previously disqualified supplier should be allowed to participate further in the procurement proceedings] and

(b) Upon the receipt of a complaint or appeal under this article after presentation of submissions in those cases where there is no standstill period applied by the procurement entity prior to the entry into force of a procurement contract or framework agreement.

(3) (The [insert name of the independent body] shall also have the power subsequent to the entry into force of a procurement contract or framework agreement, to order the suspension of the performance of the procurement contract or framework agreement during the pendency of its review proceedings if and for as long it finds suspension necessary to protect the interest of a supplier or contractor having submitted an application, complaint or appeal in accordance with article 61, and taking into account the factors listed in paragraph (4) of this article.)

(4) Automatic suspension of the procurement proceedings and suspension of performance of a procurement contract or a framework agreement do not apply if:

(a) The [insert name of the independent body] decides that the complaint or appeal is manifestly without merit or the supplier or contractor submitting it is without standing, including based on summary proceedings;

(b) The [insert name of the independent body] decides that the suspension will cause disproportionate harm to the procuring entity or to suppliers or contractors participating in the procurement proceedings; or

(c) The [insert name of the independent body] decides that urgent public interest considerations require the procurement proceedings, the framework agreement, or the procurement contract, as applicable, to proceed.

(5) The [insert name of the independent body] shall lift the suspension at such time as it gives the notice of its decision to the supplier or contractor having submitted an application, complaint or appeal in accordance with article 61 and to other participants in the procurement proceedings if it rejects or dismisses the application, complaint or appeal.”

47. The following queries and proposals were made with respect to those provisions:

(a) That the reference to “automatic suspension” should be reconsidered. In this regard, it was observed that the exceptions in paragraph (4) would have to be considered and assessed in order to determine whether a suspension was applicable by virtue of the law. The alternative interpretation was that the exceptions meant that there would be an automatic suspension, but that it would be lifted if any of the determinations listed under paragraph (4) were made by the independent body within the 10 day suspension period;

(b) That the provisions should be reviewed to avoid giving the impression in paragraph (1) and (3) that suspension under those paragraphs was automatic. In this context, it was suggested that the opening phrase in paragraph (2) should be reworded and the order of paragraphs (2) and (3) should be reversed;

(c) That paragraph (4) (b) should be deleted. The point was made that the independent body would not have the means to determine within a short suspension period whether harm existed and the question of proportionality with respect to the interests of various stakeholders. It was also observed that the issue of disproportionate harm might be subsumed within the notion of “urgent public interest” in paragraph (4) (c). In this respect, it was recalled that a similarly-worded reference to disproportionate harm in article 56 (1) of the 1994 Model Law was

made in a different context, in that it did not require a determination by a review body as to the existence and extent of harm;

(d) That how article 61 bis (see paras. 67-69 below) was related to paragraph (1) of the proposed text should be clarified;

(e) That whether the exceptions listed under paragraph (4) were exhaustive should also be clarified. In particular, it was questioned whether there should be an automatic suspension in the cases set out in article 20 (3); and

(f) That whether the provisions should relate to applications for reconsideration should be clarified.

48. The Working Group agreed to include the proposed additional text in article 63 with some revisions. The Working Group agreed to delete paragraph (4) (b) and to note in the Guide that the deleted provisions would in practice be subsumed under the exception “urgent public interest”. In response to a suggestion that the requirement for an “urgent” public interest might not encompass the full scope of the exception in paragraph 4 (b) it was considered that the term “urgent” was sufficiently broad to encompass not only urgency in terms of time but also the extent of the public interest. The need to ensure consistency with the wording in article 20 (3) (c) that referred to the same exception (in the context of the standstill period) was noted. The Working Group also agreed that a reference to “urgent public interest” in the proposed text would sufficiently cover the situations listed in article 20 (3).

49. The Working Group also agreed: (a) to add in the beginning of paragraph (1) the words “upon receipt of a complaint or appeal”; (b) to replace in the second sentence of paragraph (1) the words “to lift” with the words “to extend or lift”; (c) to move reference to “during the pendency of its review” in paragraph (3) to the beginning of that paragraph; (d) to delete references to automatic suspension throughout the provisions by replacing them as appropriate with the text stating that “the procurement shall be suspended”; and (e) to ensure consistency of the presentation of the provisions as regards timing of the actions concerned.

50. In response to certain other concerns raised about the provisions, the point was made that the goal of the provisions was to ensure quick decisions on whether suspensions should or should not be applied, even if the results were less than perfect. It was recognized that there might be various grounds for not applying a suspension other than those specifically mentioned in the provisions, which would have to be considered in practice. The key safeguard against abuse was considered to be the requirement to put on the record all decisions in relation to suspension and the reasons for them, so that ultimately they could be scrutinized by the court. The Working Group emphasized that the 1994 approach to the issue of suspension was no longer applicable in the revised Model Law, in particular since the exemptions from review contained in article 52 (2) of the 1994 text had been deleted. This deletion, it was noted, would lead to a considerably greater number of complaints and appeals, which might cause significant disruption to the procurement proceedings.

*Article 64. Certain rules applicable to review proceedings under articles [62 and 63]*

51. The Working Group had before it the following suggestion for article 64:

**“Article 64. Certain rules applicable to review  
proceedings under articles [62 and 63]**

(1) Promptly after the receipt of an application under article [62], a complaint under article [63], or an appeal under article [63] of this Law, the procuring entity or [insert name of review body] shall notify all suppliers or contractors participating in the procurement proceedings to which the application, complaint or appeal relates as well as any governmental authority whose interests are or could be affected about the submission of the application, complaint or appeal and its substance.

(2) Any such supplier or contractor or governmental authority has the right to participate in the application or review proceedings. A supplier or contractor or a governmental authority that fails to participate therein is barred from subsequently making the same or equivalent application, complaint or appeal.

(3) The participants to the application or review proceedings shall have access to all proceedings and shall have the right to be heard prior to a decision being made on the application, complaint or appeal, the right to be represented and accompanied, the right to request that the proceedings take place in public and the right to present evidence, including witnesses.

(4) In cases before [an approving authority or] the [insert name of the independent body], the procuring entity shall provide to body concerned all documents pertinent to the application, complaint or appeal, including the record of the procurement proceedings, in timely fashion.

(5) A copy of the decision of the procuring entity, approving authority or [insert name of the independent body] shall be communicated to the participants in the proceedings within ... working days (the enacting State specifies the period) after the issuance of the decision. Promptly thereafter, the application, complaint or appeal and the decision thereon shall be made available to the public.

(6) No information under paragraphs (3) to (5) of this article shall be disclosed and no public proceedings shall take place if so doing would be against the protection of essential security interests of the State or contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition.

(7) The decision by the procuring entity[, approving authority] or [insert name of review body] and the reasons and circumstances therefor shall be made part of the record of the procurement proceedings.”

*Title*

52. It was agreed that the title should read: “Certain rules applicable to applications for reconsideration under article 62 and review proceedings under article 63”.

*Paragraph (1)*

53. It was agreed that the paragraph should be amended to provide expressly that the body to which an application for reconsideration or review was submitted was the body required to fulfil the notice requirement contained in the paragraph.

54. The reference to “any governmental authority whose interests are or could be affected” was queried. In reply, it was noted that such governmental authorities were granted the right to participate in reconsideration application or review proceedings under paragraph (2), and therefore that they should be provided with notice of those proceedings, in order to ensure that they could avail themselves of the right. On the other hand, it was noted that the Model Law should not regulate internal government communications, and therefore that this issue would be better addressed in the Guide. After consideration, it was agreed to remove the reference from the paragraph and to include appropriate discussion in the Guide.

55. It was queried whether the procuring entity would be notified of the proceedings in the same way as suppliers or contractors. It was agreed that the procuring entity should be afforded the same rights to be notified and to participate as suppliers or contractors, and therefore that appropriate references should be made in this paragraph and in paragraph (2). A suggestion that the procuring entity should be able to make an application to the independent body other than as provided for in article 63 (6) contained in paragraph 36 above was not taken up by the Working Group.

*Paragraph (2)*

56. Following the deletion of the reference to “any governmental authority whose interests are or could be affected” from paragraph (1) (see para. 54 above), it was agreed that the phrase “any governmental authority” should be replaced by the phrase “any governmental authority whose interests are or could be affected” in the first sentence of the paragraph.

57. It was noted that a supplier or contractor that received notice of the reconsideration application or review proceedings was not automatically entitled to seek review under article 61 (1). It was therefore agreed to explain in the Guide the relationship between article 64 (2) and article 61 (1).

*Paragraph (5)*

58. The reference to provision of a copy of the decision of the procuring entity or independent body was queried, in that it implied a bureaucratic procedure of sending out individual notices. It was suggested, therefore, that reference should be made to notification of the decision to appropriate suppliers, contractors and other bodies; it was also observed that those bodies should be all those that participated in the procurement proceedings and not just in the reconsideration application or review proceedings, and that until the notification had been provided, the procuring entity was not permitted to enter into the procurement contract. These suggestions were agreed upon, noting also that drafting changes to ensure consistency with articles 62 and 63 regarding notification of decisions would be made (see para. 33 above).

*Article 65. Suspension of procurement proceedings, the framework agreement or the procurement contract*

59. The Working Group had before it the following suggestion for article 65:

**“Article 65. Suspension of the procurement proceedings,  
the framework agreement or the procurement contract**

(1) Promptly after the timely submission of a complaint or appeal under article [63] of this Law, the [insert name of review body] shall suspend the procurement proceedings, the framework agreement or the procurement contract, for a period to be determined by the [insert name of review body], except as provided for in paragraph (2) of this article.

(2) The [insert name of review body] need not suspend the procurement proceedings if it decides that the complaint or appeal is manifestly without merit.

(3) The [insert name of review body] may lift the suspension applied in accordance with paragraph (1) of this article if it decides that the suspension will cause or has caused disproportionate harm to the procuring entity or to other suppliers or contractors, or that urgent public interest considerations require the procurement proceedings, or the procurement contract or framework agreement, to proceed.

(4) The [insert name of review body] may extend the originally determined period of suspension in order to preserve the rights of the supplier or contractor submitting an application, complaint or appeal or commencing an action [before the courts] pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed the period required for the procuring entity[, approving authority] or [insert name of review body] to take a decision in accordance with article [62 or 63] as applicable, plus a period thereafter sufficient to allow a supplier or contractor to file any appeal against the decision of the procuring entity[, the approving authority] or [insert name of review body].

(5) The fact of the suspension and the duration of the suspension or a decision by the [insert name of review body] not to suspend the procurement proceedings or the procurement contract or the framework agreement, as the case may be, shall be included in the notification of the submission of the complaint or appeal issued in accordance with article [64 (1)] of this Law, which shall be promptly communicated by the [insert name of review body] to the supplier or contractor submitting the complaint or appeal.

(6) A decision on an extension of the suspension indicating the duration of the extension or a decision to lift the suspension and all other decisions taken by the [insert name of review body] pursuant to this article, and the reasons therefore, shall be promptly communicated to all participants in the proceedings.

(7) The fact of the suspension and the duration of the suspension and any decision by the [insert name of review body] under this article and the reasons

and circumstances therefor shall be made part of the record of the procurement proceedings.”

60. The Working Group considered a proposal to remove the requirement for automatic suspension in review proceedings before an independent body. In support of the proposal, it was observed that the rights of suppliers would be adequately protected if the procuring entity were constrained from entering into the procurement contract as had been agreed under article 62 (3) (see para. 30 above; for further consideration of this issue, see the discussion on article 61 bis in paras. 67-69 below). It was also considered that providing for automatic suspension would be a cumbersome and rigid approach, which would allow suppliers to submit abusive requests that would needlessly delay the procurement proceedings. An automatic suspension, it was further stressed, would risk causing serious damage to the procurement proceedings, and suppliers would be able to impose heavy pressure on the procuring entity with significant economic consequences. From this perspective, as was explained, only in exceptional circumstances would a suspension be required, under the safeguard that no procurement contract could come into force while the review proceedings continued. The safeguards contained in paragraphs (2) and (3) were considered inadequate. It was noted that the independent body should be empowered to make its own decision on a request for suspension presented to it, hearing both parties before taking its decision if necessary. In this regard, it was emphasized that the supplier or contractor would have the burden of demonstrating why a suspension should be granted.

61. Objection was raised to this approach, and a system of presumptive suspension was urged. Presumptive suspension in this context was explained to mean that an initial suspension would apply for a short, defined period, and a further suspension could be denied or the initial suspension lifted, such as for the reasons set out in paragraphs (2) and (3). The comment was made that this approach would be consistent with the 1994 text, and would lead to a more efficient and effective process, which ultimately could be less disruptive of the procurement process because it could avoid the need to undo steps in the procurement process if a decision was ultimately made against the procuring entity. In addition, it was underscored that an approach that was cost-effective and easy to follow (such as this alternative proposed) would provide the appropriate degree of incentive for suppliers to submit complaints. Another reason for this approach, it was said, was that when a review was first sought, the supplier or contractor would have only an outline understanding of what had gone awry in the procurement proceedings, and it would be when the record of the procurement had been made available that the supplier or contractor would be able to substantiate its complaint. In response, caution was urged to avoid suppliers engaging in a fishing expedition to find grounds for review through such a mechanism.

62. An alternative suggestion was that, taking into account the requirement for the independent body to act “promptly” after the submission of a complaint, the independent body need not suspend the procurement proceedings in either of the circumstances envisaged in paragraphs (2) and (3). Those circumstances, it was recorded, could also justify the lifting of any suspension granted during the review proceedings, which the independent body would be able to do at any stage.

63. The Working Group heard the following suggestions as regards the principles that could form the basis of a revised draft article 65:

(a) That the combined use of a standstill period and a prohibition against a contract entering into force until a complaint was resolved would cover many situations that could be expected to arise;

(b) That issues relating to the period prior to the commencement of the standstill period, to situations where there was no standstill period (as envisaged by article 20 (3)) and situations arising once the procurement contract had entered into force might require additional provisions;

(c) The additional provisions might involve some form of presumptive suspension;

(d) That in practical terms, once the procuring entity had decided on the award of the procurement contract, the standstill period and an automatic suspension would provide the same safeguard;

(e) That if the procurement involved considerations that would justify not imposing a standstill, an automatic suspension or any suspension would also not be appropriate;

(f) That if a complaint were filed during the standstill period, and assuming that it might most frequently be filed towards the end of that standstill period, an automatic suspension would effectively be required in order to give effect to the prohibition against entering into the procurement contract until the complaint was resolved. In this regard, it was emphasized that the provisions should ensure that they gave the means to exercise the rights provided in the chapter in practice, which would involve an automatic suspension to prevent the contract coming into force in some cases;

(g) That the risk that a procurement contract could be held in abeyance for an extended period while a complaint was taken through the various bodies should be taken into account. While the procuring entity could request the independent body to grant it permission to enter into the procurement contract on urgent public interest grounds under article 63 (6) as contained in paragraph 36 of this report (subsequently replaced by article 61 bis (2), see paras. 67-69 below), and could presumably make an equivalent request to the court, it was observed that procurements that did not involve urgent public interest considerations could be delayed for lengthy periods. It was added, in this regard, that the procuring entity would be able to cancel the procurement and recommence the procedure if it considered that this would be a more appropriate course of action, and so review bodies need not necessarily be constrained by these issues;

(h) That the flexibility conferred by article 63 (including as regards the powers granted to the independent body) should not be constrained by excessively rigid provisions in article 65 (1), and a particular issue to be considered was whether the article should be permissive as regards suspension;

(i) That paragraph (1) might provide for the right of the independent body to decide on a suspension taking into account the subject matter and other substantive terms and conditions of the procurement in question.



64. It was noted that once the provisions of article 65 were agreed, articles 62 to 65 should be considered and if necessary reorganized, in order to avoid repetition and to ensure that all provisions that applied to reconsideration applications under article 62 were located together, and all those that applied to review proceedings under article 63 also appeared together. In this regard, the need for a separate article on suspension in review proceedings was questioned.

65. Further consideration of the provisions of article 65 took place in the context of the new provisions proposed to be included in article 63 (see paras. 46-50 above). As a result of the changes agreed to be made in those new provisions for article 63 (see paras. 48-49 above), the Working Group agreed that article 65 (4) and (5) should be deleted, and the provisions from article 65 (6) and (7) should be placed in article 63, with changes consequent upon the deliberations at the current session to be reflected as necessary.

*Article 66. Judicial review*

66. The point was made that consistency in references to judicial review and judicial authorities throughout chapter VIII should be ensured.

*Article 61 bis. Effect of an application for reconsideration, request for review or appeal*

67. The Working Group had before it the following proposal for a new article 61 bis:

**“Article 61 bis. Effect of an application for reconsideration, request for review or appeal**

(1) The timely receipt by the procuring entity, the [insert the name of the independent body] or judicial authority of an application for reconsideration, request for review or appeal (collectively referred to in this chapter as a “challenge”) prohibits the procuring entity from entering into a procurement contract or framework agreement resulting from the procurement proceedings concerned while the challenge is outstanding before the procuring entity, the [insert the name of the independent body] or judicial authority. This prohibition remains in force until after sufficiently long period has expired after giving notice of the decision on the challenge to all participants in the procurement proceedings in accordance with article [64 (...)] to allow appeal of the decision.

(2) The procuring entity may request the [insert name of the independent body], in writing, to permit it to enter into a procurement contract or framework agreement notwithstanding the prohibition in paragraph (1) of this article on the grounds referred to in article [63 (4) (a) to (c)]. The [insert the name of the independent body], upon consideration of such request, may authorize the procuring entity to take the steps necessary to make the procurement contract enter into force in the circumstances set forth in article [63 (4) (a) to (c)]. The decision of the [insert name of independent body] on such a request shall be made a part of the record of the procurement proceedings. Notice of the decision shall promptly be given to all participants in the procurement proceedings.”

68. The following queries and suggestions were made as regards that article:

(a) Whether the words “or judicial authority” were appropriate or necessary in paragraph (1); if so whether the same words should also appear in paragraph (2);

(b) Whether the provisions presumed that the decision would always be against suppliers and therefore an appeal was inevitable;

(c) That the Guide text to paragraph (2) should explicitly refer to the fact that there could be a further appeal to the court against the independent body’s decision on an application under that paragraph;

(d) That the words “to allow appeal of the decision” in paragraph (1) should be reconsidered to make it clearer that the reference was to the time required for filing an appeal, and not to that required for the consideration of an appeal by the independent body or the court;

(e) That the article should indicate how the prohibition would lapse in practice, such as following the filing of an appeal;

(f) That the reference to “sufficiently long” should be reconsidered, since it might imply a lengthy period for filing an appeal, whereas the aim was to provide for a short period; instead, it was proposed to provide that enacting States should specify the applicable time period (with the Guide indicating that it should be within a time frame of 1 to 8 working days);

(g) That the provisions should be reviewed with a view to avoiding an excessively long and indefinite suspension under the default principle contained in the first sentence of paragraph (1). This suspension would cover the entire period during which the challenge was outstanding, whether it was outstanding before the procuring entity, the independent body or the court; and

(h) The words “at any time” should be added after the word “request” in the first sentence of paragraph (2).

69. The Working Group agreed to revise article 61 bis as follows:

**“Article 61 bis. Effect of an application for  
reconsideration, request for review or appeal**

(1) The timely receipt by the procuring entity, [insert name of independent body] or judicial authority, as the case may be, of an application for reconsideration, request for review or appeal (collectively referred to in this chapter as a “challenge”) prohibits the procuring entity from entering into a procurement contract [or framework agreement] resulting from the procurement proceedings concerned. The prohibition referred to in this article shall lapse after the expiry of [...] working days (the enacting State specifies the period) after notice of the decision was given to all participants in the procurement proceedings in accordance with article [62 (5)] and [63 (4)].

(2) The procuring entity may at any time request the [insert name of independent body] or judicial authority, as the case may be, to permit the procuring entity enter into the procurement contract [or framework agreement] on the grounds referred to in article [63 (4) (a) and (b)]. The [insert name of independent body], upon consideration of that request, may authorize the

procuring entity to enter into the procurement contract [or framework agreement] where it is satisfied that such circumstances exist. The decision of the [insert name of independent body] shall be made a part of the record of the procurement proceedings, and notice thereof [in accordance with article [...]] shall promptly be given to all participants in the procurement proceedings.”

*Concluding remarks as regards chapter VIII*

70. The proposed deviation from the approach taken in the 1994 text that provided for an automatic suspension in proceedings both before the procuring entity and in those before the independent body was noted. Concern was expressed that this revised approach to the regulation of suspension procedures in articles 62 and 63 was undesirable, as it would lead to a dual challenge system that would compromise the incentive to seek to resolve disputes first before the procuring entity. An additional concern raised was that since recourse to the procuring entity was optional, more complaints could be expected to be filed directly with the independent body under the envisaged framework, which in turn raised issues of capacity. In this regard, it was considered whether a short period of automatic suspension before the procuring entity would be an effective tool to redress the balance.

71. In response, it was observed that the incentive to seek to resolve a dispute first with the procuring entity was still present, in that so doing would be advantageous from the perspectives of efficiency and good long-term relations between the parties. It was also pointed out that the role of the procuring entity in the challenge process was distinct from that of the independent body: it was the party whose decisions were at issue, and because the procuring entity was aware of all circumstances of the case, it would be in a better position than an independent body to handle disputes. In addition, giving the procuring entity discretion in deciding whether to apply a suspension was entirely consistent with the toolbox approach under the Model Law. The provisions, it was added, did not exclude the possibility that the procuring entity could apply a suspension: they merely provided more flexibility than was granted to the independent body.

72. Objection was raised to any proposals including automatic suspension provisions in article 62, even if the period of suspension was short. The preferred approach was to set out optional language in the Guide for the use of enacting States that wished to provide for automatic suspension of the procurement proceedings in an application for reconsideration filed with the procuring entity. It was also noted that the Guide might reflect that, in some countries, decisions subject to review might be made by the approving authority, and that conferring unfettered discretion to suspend the procurement proceedings upon the procuring entity might therefore be inappropriate.

73. It was agreed that, although the approach taken in chapter VIII would be maintained, the Guide would highlight the concerns expressed and provide options for those enacting States that might consider enacting provisions different from those set out in the text, to meet the practice in particular of multilateral development banks. The importance of ensuring that the procuring entity conducted a serious and effective review of any application for reconsideration under all approaches was highlighted.

**B. Chapter II. Methods of procurement and their conditions for use.  
Solicitation and notices of the procurement  
(A/CN.9/WG.I/WP.75/Add.3)**

*Article 24. Methods of procurement, an accompanying footnote*

74. It was suggested that the existing footnote accompanying the article should be expanded to state that enacting States may wish to provide that recourse to some procurement methods should be subject to a high-level approval. As a consequence, the reference to a high-level approval should be deleted in some provisions of the Model Law. Support was expressed for this suggestion, and it was proposed that the relevant wording in the footnote might draw on the opening phrase in article 27 (2) and accompanying footnote 5.

75. Alternative suggestions were that reference to high-level approval might be excluded from the Model Law and the Guide. The negative consequences of a high-level approval requirement on the procurement proceedings, such as delays and additional reasons for challenges, were highlighted.

76. The Working Group's earlier consideration of this issue was recalled. Objection to including references to a high-level approval in the text of the Model Law other than in articles 20, 27 (2) and 27 (5) (e) was reiterated.

77. A specific suggestion was made that the following wording should be included in the end of the footnote: "States may consider whether, for certain methods of procurement, to include a requirement of a high-level approval by a designated organ. On this question see the Guide to Enactment (A/CN.9/...)." No objection was raised to this suggestion. It was also agreed that the Guide would explain that with the decentralization of procurement that had been effected in many systems, the use of high-level approval had been reduced and might no longer be necessary. An additional point made was that a requirement for a high-level approval might be particularly inappropriate in certain circumstances, such as in the use of two-stage tendering, in the context of the precise conditions for use of that procurement method, and in some instances of single-source procurement (for example in urgent situations). It was observed that the Guide should draw this point to the attention of enacting States.

78. Concern was expressed about the part of the footnote that referred to "open tendering". It was agreed that this part should be amended to read as follows: "though an appropriate range of options, including open tendering, should be always provided for".

*Article 25. General rules applicable to the selection of a procurement method*

79. The point was made that the conditions for use of procurement methods were elastic and that the Guide should emphasize the principle of maximizing competition contained in article 25. It was stressed that this principle would be used as a ground to challenge the selection of a procurement method.

80. It was proposed that the Guide should explain that the meaning of the principle "maximizing competition" in the context of different procurement methods would be different (for example, in the context of auctions, it could be appropriate to state that maximizing a number of bidders could be an appropriate means to achieve the

goal of maximizing competition but the same means would not be appropriate in the context of the request for proposals with dialogue proceedings).

*Article 26. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)*

81. It was suggested to reflect the content of footnote 2 in the Guide. No objection was raised to that suggestion.

*Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)*

82. With reference to footnote 8, support was expressed for reflecting the provisions of paragraph (2) (d) also under paragraph (1) as a condition justifying recourse to two-stage tendering. The relevant provisions of the 1994 text (article 19 (1) (d)) were recalled in this context. Concern was expressed that including such provisions only in paragraph (2) would imply that request for proposals with dialogue would be a default option in the case of the failure of open tendering. This concern was widely shared in the Working Group and it was agreed that the proposed changes would avoid giving this unintentional interpretation.

83. Another suggestion to address this concern was that the provisions of paragraph (2) (d) might be formulated as a general principle and placed in article 25. This was on the understanding that following a failure of an open tendering procedure, the procuring entity would be able to use any procurement method provided that the conditions for its use were met. The need for such provisions (which were considered redundant by some delegations) was questioned.

84. Another suggestion was to include the relevant provisions within article 27, so that the procuring entity would have a choice among all procurement methods listed in article 27. Concern was expressed that this approach would confer discretion on the procuring entity to have automatic recourse to single-source procurement where open tendering failed. A query was also raised as to whether recourse to competitive negotiations and consecutive negotiations in these circumstances would be appropriate.

85. A further suggestion was to delete the provisions of paragraph (2) (d) and to explain the consequences of the failure of open tendering only in the Guide.

86. Opposition was expressed to deleting these provisions. They were considered essential as justifying recourse to more flexible procurement methods where open tendering had failed. In this respect, it was explained, they set out an additional condition for the use of request for proposals with dialogue and two-stage tendering, which would apply only in the case of a failed open tendering procedure, and without which there could be no recourse to these flexible methods in such circumstances.

87. The prevailing view was that the provisions of paragraph (2) (d) should appear also in paragraph (1) with the understanding that both two-stage and request for proposals with dialogue were options following a failed open tendering procedure, but they were not the only further option. The understanding was that the procuring

entity would be required to assess reasons for the failure of the open tendering procedure and decide whether the situation could be rectified so that a new open tendering procedure could be held, or where that was not feasible, to assess whether the procurement should be abandoned altogether or whether using other procurement methods would be appropriate. It was agreed that the Guide should explain the reasoning for including provisions of paragraph (2) (d) also in paragraph (1) of article 27.

88. The Working Group agreed to replace the word “and” at the end of paragraph (4) (b) with the word “or”.

89. With reference to paragraph (5), the point was made that the Guide should encourage the procuring entity not to draft its description of the subject matter of the procurement in a way that artificially limited the market concerned to a single source, and the experience in one jurisdiction in using functional descriptions to support this approach was shared.

*Article 28. Conditions for use of an auction*

90. The Working Group agreed to defer the consideration of some issues raised in conjunction with the definition of “auction” until it took up article 2 on definitions.

*Article 29. Conditions for use of a framework agreement procedure*

91. The preference was expressed for using the word “indefinite” rather than the word “repeated” in paragraph (1) (a). No objection was raised to this suggestion.

92. Views were expressed both in favour of and against the suggestion contained in footnote 21 to include an open-ended condition for the use of framework agreements in addition to the conditions set out in paragraph (1) (a) and (b).

93. The Working Group decided to retain the provisions without change. The Working Group noted the utility of the use of framework agreements for centralized purchasing, which had proved in many jurisdictions to be an effective means in ensuring economy and efficiency in procurement, and noted that the Guide would explain that the existing wording indeed accommodated centralized purchasing.

### **C. Chapter III. Open tendering (A/CN.9/WG.I/WP.75/Add.3)**

94. The Working Group noted the need for consequential changes in this and subsequent chapters as a result of amendments agreed to be made in chapter VIII. It also noted that consistency throughout the Model Law, to the extent permitted by different procurement methods, should be ensured in provisions that required the procuring entity to provide information “to the extent known” in the solicitation documents or their equivalent.

*Article 37. Examination and evaluation of tenders*

95. With reference to footnote 61, support was expressed for deleting paragraph (8) in the light of the separate article that addressed the issues of confidentiality (article 22 of the current draft). No objection was raised to that proposal.

**D. Chapter IV. Procedures for restricted tendering, request for quotations and request for proposals without negotiation (A/CN.9/WG.I/WP.75/Add.4)**

*Article 41. Request for proposals without negotiation*

96. The suggestion was made that the heading of the article should be changed to “Two-envelope tendering”. The Working Group recalled that that title was suggested for use in the earlier drafts but was considered to be inaccurate and not sufficiently technologically neutral.

**E. Chapter V. Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement (A/CN.9/WG.I/WP.75/Add.5)**

*Article 43. Request for proposals with dialogue*

97. It was proposed that the word “maximum” should appear before the words “effective competition” in paragraph (3) (b). It was decided that the provisions should remain unchanged.

*Article 44. Request for proposals with consecutive negotiations*

98. It was agreed to use the term “ranking” in the article. The Working Group also confirmed the understanding that no pre-selection should be used in this procurement method for the reasons set out in footnote 22.

99. With respect to the provisions of footnote 21, proposed to be included in the Guide, the suggestion was made that the Guide should first set out benefits of using the procurement method under appropriate conditions and subsequently should discuss means to mitigate possible risks with its use. It was noted that the same approach should be followed in describing other procurement methods in the Model Law. It was also proposed that the Guide should highlight the widespread use of request for proposals with consecutive negotiations in the situations envisaged by the Model Law.

*Article 45. Competitive negotiations*

100. The Working Group agreed to include in paragraph (3) provisions prohibiting negotiations after the best and final offers (BAFO) were submitted, drawing on similar provisions in article 43 (12). In response to the point made that some jurisdictions allowed post-BAFO negotiations, the understanding in the Working Group was that it was not good practice to do so. It was noted that the Guide should elaborate on this point.

## **F. Chapter VI. Auctions (A/CN.9/WG.I/WP.75/Add.6)**

### *Article 47. Procedures for soliciting participation in procurement by means of an auction*

101. With reference to paragraph (1) (l), several delegations reported that there was no practice in their jurisdictions to limit the number of bidders. The point was made that technological constraints that were present when the relevant provisions were first considered in the Working Group a few years ago were generally no longer present. It was nevertheless decided to retain the provisions in paragraph (1) (l) and related provisions of paragraph (2), possibly in parenthesis, with an indication to enacting States that they might consider omitting these provisions if they viewed them irrelevant in the light of prevailing circumstances.

102. It was suggested that, if the provisions were retained, their drafting could be simplified to provide for limiting the number of bidders using only the “first come first served” principle.

103. The provisions were retained without change on the understanding that other procedures and criteria for limiting the number might be applicable.

104. With reference to paragraph (1) (q), the point was made that it would not be always possible to establish the criteria for closing the auction at the outset of the procurement proceedings, rather after when the number of bidders registered for the auction and other information having impact on the structure of the auction (whether it would be held in one round or several subsequent rounds) were known. It was suggested that it would be appropriate for the law to require the general criteria to be set out at the outset of the procurement proceedings, leaving specific criteria to be defined later in the process.

105. The Working Group confirmed its understanding that the Model Law would provide for two types of auctions: simple auctions, and more sophisticated ones that might involve pre-auction examination or evaluation of initial bids. Although a suggestion was made to refer to “pre-auction bids” instead of “initial bids”, that suggestion was subsequently withdrawn in the light of the need to ensure consistency with the use of the terms throughout the Model Law (such as with article 42 (2) where reference was made to initial tenders).

106. The Working Group heard various reasons for the need to hold pre-auction examination or evaluation of initial bids, including that in some more complex auctions, no bidding could start before ranking was established and the relevant information was communicated to bidders as required under paragraph (4) (c). It was also noted that more complex auctions might receive initial bids that significantly exceeded the minimum requirements, particularly where suppliers would be permitted to offer items with different technical merits and correspondingly different price levels.



## **G. Chapter VII. Framework agreements procedures (A/CN.9/WG.I/WP.75/Add.7)**

### *Article 53. Requirements of closed framework agreements*

107. With respect to provisions in article 53 (1) (a), the preference was expressed for retaining the provisions in the second set of square brackets. While support was expressed for this suggestion, it was proposed that the wording should be changed to make it clearer that the reference to a maximum duration of a closed framework agreement should not necessarily preclude there being more than one maximum for all framework agreements. The point was made that the maximum duration might vary not only by subject matter of the procurement but also by region or sector of economy, reflecting the specific circumstances in an enacting State.

108. The alternative suggestion was that the wording in the first set of square brackets should be retained and a specific maximum duration should be set out as an indication to enacting States as to what should be considered the best practice. The Working Group recalled its earlier consideration of the issue and that it was agreed not to fix any definite maximum in the Model Law, on the understanding that it would be impossible to set the one for all types of procurement.

109. A further suggestion was that instead of setting a maximum in either law or procurement regulations, the Model Law should envisage a mechanism for adapting long-term closed framework agreements to evolving needs in the market. In response, it was observed that such a flexible mechanism could be considered present in the wording in the second set of square brackets or might be envisaged in the framework agreements themselves.

110. Yet other suggestions were to replace the text in the second set of square brackets with the wording along the following lines: “the maximum duration established by this State” or “the maximum duration established in accordance with provisions of law of this State”. In response, it was considered best practice to keep all procurement-related legal provisions in the law and regulations on public procurement.

111. The question was therefore whether the relevant provisions should be in procurement law or in procurement regulations. The prevailing view in the Working Group was that the matter should be addressed only in procurement regulations since they allowed more flexibility in addressing the issue reflecting the prevailing conditions in an enacting State at any particular time. The understanding was that this approach did not interfere in the hierarchy of legal acts of the enacting State and methods used to ensure coherence of the legal framework. It was suggested that the Guide might therefore elaborate on the implication of other branches of law, such as State budgeting, on provisions of procurement regulations that would regulate a maximum duration of closed framework agreements.

112. After discussion, it was agreed to retain the text in the second set of square brackets without brackets and to provide necessary explanations in the Guide as regards the need to take into account provisions of other branches of law, such as State budgeting, in establishing any maximum duration of closed framework agreements.

*Article 56. Second stage of a framework agreement procedure*

113. The Working Group agreed that the text in square brackets in paragraph (4) (b) (x) should be deleted for the reasons provided in footnote 28.

*Article 57. No material change during the operation of a framework agreement*

114. The point was made that the accompanying Guide text to the first sentence of the article should make reference to the possibility of product modifications and technology substitutions.

**H. Chapter I. General provisions (A/CN.9/WG.I/WP.75/Add.1 and 2)***Article 2. Definitions***(a) Auction**

115. In response to comments made that the scope of the definition covered only limited types of auctions, the Working Group confirmed that the Model Law should regulate only those electronic reverse auctions in which the procuring entity acted as a buyer and where the process involved presentation of successively lowered bids. It was agreed that, while the Model Law provisions would remain unchanged in this respect, the Guide might discuss other auctions existing in practice and explain why the decision was made in UNCITRAL not to regulate them in the Model Law.

116. Concern was also expressed about the use of the term “auction” in the current draft instead of the term “electronic reverse auction” used in earlier drafts. It was highlighted that this change would involve difficulties in enacting States that had already enacted legislation using the earlier terminology. In addition, it was pointed out that the use of the term “auction” might be confusing as it implied features of the traditional auctions, such as that they were usually price-only and presupposed the physical presence of bidders. Concern that the previously used term was not technologically neutral was considered irrelevant since the Model Law provided for only online auctions.

117. The Working Group agreed to reinsert the term “electronic reverse auction” in the text.

118. The proposal was made that the definition should refer to what was considered a distinct feature of this purchasing technique — the possibility of seeing bids submitted in the course of the auction. In this regard, it was said that the absence of such a feature in the course of an auction would be a ground for a challenge in that transparency and integrity might be absent in the process. In response, it was observed that the extent of disclosure of information relevant to bids would vary from auction to auction and was regulated in article 50. The Working Group recalled its earlier consideration of avoidance of collusion and the need to preserve confidentiality of commercially sensitive information.

119. It was agreed that, with the exception of the change agreed to be made in the term used (see para. 117 above), the definition would remain unchanged.

**(e) Framework agreement procedure**

120. It was agreed that the text in subparagraphs (i) to (v) should remain in the text of the Model Law as providing helpful guidance as regards the newly introduced procedure.

**(i) Procurement involving classified information**

121. Support was expressed for reflecting the content of footnote 14 in the Guide.

**(m) Socio-economic policies**

122. Support was expressed for the definition as it was presented in the text.

123. It was proposed, and agreed, that the text in the first set of parenthesis in footnote 21 should not be included in the Guide.

124. A question was raised about the second sentence of footnote 22, which referred to the costs that might arise from the pursuit of socio-economic policies. The issue was noted to be politically sensitive and thus more appropriate for consideration by the Commission.

**(p) Standstill period**

125. It was proposed that the definition should be amended to refer to the point in time from which the standstill period would run and to reflect that no contract or framework agreement could be awarded during the standstill period.

126. In response, the following wording was proposed: “‘Standstill period’ means the period starting when the notice is dispatched in accordance with article 20 (2) of this Law during which the procuring entity cannot enter into the procurement contract and during which suppliers or contractors whose submissions were examined can challenge the decision so notified under articles 62, 63 and 66.”

127. It was agreed that the text “whose submissions were examined” should be deleted from this proposed definition, and that the definition should refer to the acceptance of the successful submission rather than to the entry into force of the procurement contract. It was agreed that the pool of suppliers entitled to initiate a challenge during the standstill period should be regulated in article 20 (2) and in the relevant provisions of chapter VIII rather than in the definition, and consistency on this matter throughout the Model Law should be ensured.

128. The Working Group agreed to revise the definition along the following lines: “‘Standstill period’ means the period starting when the notice referred to in article 20 (2) is dispatched in accordance with that article, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge the decision so notified under chapter VIII of this Law.”

*Article 8. Participation by suppliers or contractors*

129. It was proposed to add in the end of footnote 43 for subsequent reflection in the Guide that multilateral development banks, in particular, did not allow participation in procurement to be limited on the basis of nationality, except for a very few cases mandated for example by public international law. Instead, it was

noted, the banks would not require international solicitation in some procurement proceedings, but international participation in such proceedings would not be excluded per se.

*Article 11. Rules concerning evaluation criteria and procedures*

130. The Working Group agreed to delete the text in parenthesis in paragraph (4) (a) and the text in square brackets in paragraph (4) (b).

131. The importance of explaining in the Guide the link between the provisions on margins of preference in subparagraph (b) and those on socio-economic policies, and in particular their possible cumulative effect, was emphasized.

*Article 20. Acceptance of the successful submission and entry into force of the procurement contract*

132. The Working Group agreed to:

(a) Retain references to “contract price” and “price” currently in square brackets throughout chapter I without square brackets and ensure consistency in those references;

(b) Conform the text in paragraph (2) (c) with the chapeau provisions of paragraph (2) with the aim of ensuring that all suppliers or contractors that presented submissions should receive the notice referred to in paragraph (2);

(c) Retain provisions on the threshold value in paragraph 3 (b);

(d) Delete the text in square brackets from paragraph 3 (c) in the light of the amendments agreed to be made in chapter VIII and the aim of preventing the procuring entity from failing to apply a standstill period for abusive reasons.

133. Some concerns about the provisions of article 20 (6) and (8) and the related provisions of article 17 (1) were noted, in particular that these provisions could imply that a separate written contract was the norm in all procurement methods. This indication, it was said, combined with the ability to cancel the procurement in the case of a failure by suppliers to sign the contract, could be open to abuse (such as the inappropriate use of procurement methods other than open tendering). In response it was noted that article 17 (3) already contained appropriate safeguards. It was agreed that the Guide should stress that the solicitation documents should require a written contract only when it was strictly necessary.

*Article 22. Confidentiality*

134. The Working Group agreed to retain the proposed wording in square brackets in paragraph (1) without square brackets.

135. It was noted that the same wording appeared in square brackets in certain other provisions of the Model Law, such as in article 23 (4) (a), and it was agreed that it also should be retained in those provisions without square brackets.

*Article 23. Documentary record of procurement proceedings*

136. The Working Group agreed with the deletion of paragraph (1) (f) for the reasons set out in footnote 47, in particular because the issue was already adequately covered in paragraph (1) (e).

## **V. Other business**

137. The Working Group recalled that UNCITRAL practice was to circulate the final text as recommended by its working groups to all Governments and relevant international organizations for comment. It was noted that the same practice would be followed with respect to the draft Model Law emanating from the current session, and it was anticipated that the comments received would be before the Commission at its forty-fourth session next year. It was emphasized that no amendments would be made to the draft Model Law after the text was circulated for comment and before the Commission considered it.

138. The understanding was that the Working Group, at its twentieth session, would focus on the revised draft Guide. The Working Group noted that efforts were under way to present a working draft of the Guide to the next session of the Working Group and the subsequently amended draft of the Guide for the Commission session next year, to assist the latter with the consideration of the draft revised Model Law. For this purpose, inter-session consultations were expected. It was emphasized that the Commission was not expected to adopt the Guide at its next session. It was assumed that the Commission would have five to eight days to consider the draft revised Model Law, but that the assumption could be revised if circumstances warranted.

139. The Working Group recalled that it had deferred a number of issues for discussion in the Guide and that decisions on them should be maintained, unless they were superseded by subsequent discussion in the Working Group. It was also recalled that additional sections addressing issues of procurement planning and contract administration, a glossary of terms and table of correlation with the 1994 Model Law were agreed to be included in the Guide. The understanding was that, for the lack of time, it would not be feasible to prepare any expanded Guide for implementers or end-users, and thus the Guide would be addressed to legislators.

140. It was agreed that repetitions between the general part of the revised Guide and article-by-article commentary should be minimized to the extent possible; where they were unavoidable, consistency ought to be ensured. It was agreed that the relative emphasis between these two sections should be carefully considered. The Secretariat was requested to follow the following guidelines in preparing the revised Guide: (a) to produce an initial draft of the general introductory part of the Guide, which would ultimately be used by legislators in deciding whether the revised Model Law should be enacted in their jurisdictions; (b) in preparing that general part, highlight changes that had been made to the 1994 Model Law and reasons therefor; (c) to issue a draft text for the Guide on a group of articles or a chapter at or about the same time, to facilitate the discussions on the form and structure of the revised Guide; (d) ensure that the text was user-friendly and easily understandable by parliamentarians who were not procurement experts; theoretical discussion should therefore be eliminated; and (e) sensitive policy issues, such as

best value for money, should be addressed with caution. The Secretariat was further requested, in order to expedite the work on the revised Guide, to circulate to experts and interested delegations for comment as soon as possible the text of the Guide already available, such as on e-procurement and framework agreements, which had already been before the Working Group.

141. As regards the publication of the Model Law with the Guide, various options were considered, including the use of electronic media. Features, such as hyper-linking the relevant provisions, were suggested to make the use of e-text of the Model Law and the Guide more user-friendly. The pressing need to allow the immediate use of particular provisions of the Model Law, such as on e-procurement, framework agreements and remedies, was noted. The need to finalize the accompanying Guide to these provisions first and the option of posting them at least on the UNCITRAL website were therefore highlighted.

142. The Working Group noted that some issues in the areas of public-private partnerships and sustainable procurement had been brought to the attention of the Secretariat as potential future work for UNCITRAL. It was also noted that the Commission might wish to consider which steps to take to ensure consistency between the revised Model Law and UNCITRAL instruments on privately financed infrastructure projects.

143. The Working Group heard the statement by a representative of the United Nations Office on Drugs and Crime (UNODC) regarding the relevance of the work by this Working Group to the work of UNODC and intergovernmental mechanisms established under the United Nations Convention against Corruption on the issues of prevention of corruption in public procurement. The Working Group noted that the first meeting of a Conference of States Parties' working group on the prevention of corruption was expected to be held in Vienna from 13 to 15 December 2010, which would address, among others, issues related to public procurement and conflicts of interest. The UNODC representative invited delegations and observers of the Working Group to participate at that session.

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**B. Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its nineteenth session**

**(A/CN.9/WG.I/WP.75 and Add.1-8)**

**[Original: English]**

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 8 to 91 of document A/CN.9/WG.I/WP.74, which is before the Working Group at its nineteenth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments in public procurement.
2. At its eighteenth session, the Working Group, for the lack of time, was not able to consider the entire draft revised Model Law contained in document A/CN.9/WG.I/WP.73/Add.1-8. The Working Group requested the Secretariat to revise chapters VI and VIII and some provisions in chapters V, VII, I and II that were considered at the session, in the light of its deliberations.
3. The present note sets out the table of contents of the draft revised Model Law contained in the addenda to this note (A/CN.9/WG.I/WP.75/Add.1-8). Chapters VI and VIII and some provisions in chapters V, VII, I and II were revised to reflect the deliberations at the Working Group’s eighteenth session. The provisions of section II of chapter II and of chapters III and IV that were not considered at the Working Group’s eighteenth session were further revised by the Secretariat in the light of the changes agreed to be made so far in the Model Law.
4. It is expected that at its nineteenth session, the Working Group will proceed with the consideration of the revised chapters VIII and II and will subsequently take up the chapters regulating procedures for different procurement methods. It is expected that chapter I will be taken up after other chapters have been considered.
5. In accordance with the agreement reached at the Working Group’s fifteenth session (A/CN.9/668, para. 280) and confirmed at the Working Group’s subsequent sessions, the documents for the session of the Working Group are posted on the UNCITRAL website upon their availability in various language versions.

## Table of contents

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
<b>Chapter I. GENERAL PROVISIONS</b>  <b>Articles 1-23 bis</b>	<b>Chapter I. GENERAL PROVISIONS</b>	
Article 1. Scope of application	Article 1. Scope of application	Revisions to article 1 of the 1994 Model Law agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 16-17); further amendments in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 17)
Article 2. Definitions	Article 2. Definitions	Revisions to article 2 of the 1994 Model Law agreed upon at the Working Group's fifteenth, seventeenth and eighteenth sessions (A/CN.9/668, paras. 272-274, A/CN.9/687, paras. 19-29, and A/CN.9/690, paras. 96-111); proposals made at the Commission's forty-second session (A/64/17, paras. 51-74); and amendments proposed by the Secretariat further to the expert consultations
Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]	Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]	Revisions to article 3 of the 1994 Model Law agreed upon at the Commission's forty-second session (A/64/17, paras. 75-78)
Article 4. Procurement regulations	Article 4. Procurement regulations	Revisions to article 4 of the 1994 Model Law in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 31-32)
Article 5. Publication of legal texts	Article 5. Public accessibility of legal texts	Draft article 5 as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 30-34), except for its paragraph (3), which was included in a separate article 6 (see below)  The draft article with this revision was approved at the Working Group's fifteenth session (A/CN.9/668, para. 32). Further revised at the eighteenth session (A/CN.9/690, para. 115)



Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 6. Information on possible forthcoming procurement <b>(new provisions)</b>		Based on draft article 5, paragraph (3), as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 30-34), and revised at the Working Group's fifteenth session (A/CN.9/668, paras. 37-38), and at the Commission's forty-second session (A/64/17, paras. 80-87)
Article 7. Communications in procurement	Replaced article 9. Form of communications	Article 5 bis as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 17-25) and as proposed to be revised at the Commission's forty-second session (A/64/17, paras. 121-143)
Article 8. Participation by suppliers or contractors	Article 8. Participation by suppliers or contractors	Amendments proposed by the Secretariat further to the expert consultations and in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 40-42)  Further revised at the eighteenth session (A/CN.9/690, paras. 118-120)
Article 9. Qualifications of suppliers and contractors	Article 6. Qualifications of suppliers and contractors  Article 10. Rules concerning documentary evidence provided by suppliers or contractors	Revisions agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 73-76 and 109, and A/CN.9/687, paras. 43-50); amendments proposed by the Secretariat further to the expert consultations. Further revised at the eighteenth session (A/CN.9/690, paras. 121-122)
Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement	Article 16. Rules concerning description of goods, construction or services	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 77-81) and proposals made at the Commission's forty-second session (A/64/17, paras. 144-148); amendments proposed by the Secretariat in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 51-52). Further revised at the eighteenth session (A/CN.9/690, para. 124)
Article 11. Rules concerning evaluation criteria and procedures <b>(new provisions based on the 1994 text)</b>	Articles 27 (e), 34 (4), 38 (m), 39 and 48 (3) (basis of new provisions)	Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 82-87); proposals made at the Commission's forty-second session (A/64/17, paras. 149-174); and amendments proposed by the Secretariat further to the expert consultations and in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 53-62)

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 12. Rules concerning estimation of the value of procurement <b>(new provisions)</b>		New provisions are proposed to be added in the light of the suggestions made by experts. They are based on the equivalent provisions of the WTO GPA (article II.2 and 3 of the 1994 version and article II.6 of the 2006 version); revised by the Secretariat in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 63-66)
Article 13. Rules concerning the language of documents	Article 17. Language Article 29. Language of tenders	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 88 and 169)
Article 13 bis. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or submissions <b>(new provisions based on the 1994 text)</b>	Articles 7 (3) (a) (iv) and 30 (2) to (4)	Proposed by the Secretariat
Article 14. Clarifications and modifications of solicitation documents	Article 28. Clarifications and modifications of solicitation documents	Proposed by the Secretariat to be moved from chapter III to chapter I. Further revised at the eighteenth session (A/CN.9/690, para. 130)
Article 15. Tender securities	Article 32. Tender securities	As approved at the Working Group's fifteenth session (A/CN.9/668, para. 91); minor amendments proposed by the Secretariat further to the expert consultations
Article 16. Pre-qualification proceedings	Article 7. Pre-qualification proceedings. Also articles 23, 24 and 25, provisions related to pre-qualification	Revisions agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 93-110; and A/CN.9/687, paras. 72-76) and at the Commission's forty-second session (A/64/17, paras. 177-178); minor amendments proposed by the Secretariat further to the expert consultations. Further revised at the eighteenth session (A/CN.9/690, para. 131)
Article 17. Cancellation of the procurement	Article 12. Rejection of all tenders, proposals, offers or quotations	Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 111-117) and at the Commission's forty-second session (A/64/17, paras. 179-208) and agreed upon at the Working Group's seventeenth session (A/CN.9/687, paras. 77-81); and amendments proposed by the Secretariat further to the expert consultations. Further revised at the eighteenth session (A/CN.9/690, paras. 132-134)

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 18. Rejection of abnormally low submissions ( <b>new provisions</b> )		Based on article 12 bis as preliminarily agreed upon by the Working Group at its twelfth session (A/CN.9/640, paras. 44-55) and proposals made at the Commission's forty-second session (A/64/17, paras. 209-212); minor amendments proposed by the Secretariat
Article 19. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest	Article 15. Inducements from suppliers or contractors	Conflicts of interest (A/CN.9/664, para. 116) A proposal by a delegation for a new paragraph 1 of the article; revisions agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 121-125; and A/CN.9/687, paras. 83-90); proposals made at the Commission's forty-second session (A/64/17, paras. 213-222); and amendments proposed by the Secretariat further to the expert consultations
Article 20. Acceptance of the successful submission and entry into force of the procurement contract	Article 13. Entry into force of the procurement contract  Article 36. Acceptance of tender and entry into force of procurement contract	Standstill period (A/CN.9/664, paras. 45-55 and 72)  Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 126-145; and A/CN.9/687, paras. 91-98) and at the Commission's forty-second session (A/64/17, paras. 223-247); amendments proposed by the Secretariat further to the expert consultations. Further revised at the eighteenth session (A/CN.9/690, para. 138)
Article 21. Public notice of awards of procurement contract and framework agreement	Article 14. Public notice of procurement contract awards	Revisions agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 146-148; and A/CN.9/687, paras. 99-100), and amendments proposed by the Secretariat further to the expert consultations. Further revised at the eighteenth session (A/CN.9/690, para. 139)
Article 22. Confidentiality	Articles 45, 48 (7) and 49 (3)	Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 149-152; A/CN.9/687, paras. 101-103) and at the Commission's forty-second session (A/64/17, paras. 248-266); and amendments proposed by the Secretariat. Further revised at the eighteenth session (A/CN.9/690, paras. 140-142)

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 23. Documentary record of procurement proceedings	Article 11. Record of procurement proceedings	Revisions considered at the Working Group's ninth (A/CN.9/595, para. 49), eleventh (A/CN.9/623, para. 100), twelfth (A/CN.9/640, paras. 90-91), fifteenth (A/CN.9/668, paras. 153-157) and seventeenth sessions (A/CN.9/687, paras. 104-106) and at the Commission's forty-second session (A/64/17, paras. 267-280); and amendments proposed by the Secretariat further to the expert consultations. Further revised at the eighteenth session (A/CN.9/690, para. 143)
Article 23 bis. Code of conduct (new provisions)		Proposed by the Secretariat; based on provisions of draft article 4 (2) that were before the Working Group at its seventeenth session. Further revised at the eighteenth session (A/CN.9/690, paras. 144-145) and further to consultations with experts
<b>Chapter II.</b> <b>METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE.</b> <b>SOLICITATION AND NOTICES OF THE PROCUREMENT</b>  <b>Articles 24-29 quinquies</b>	<b>Chapter II.</b> <b>METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE</b>	Draft article 7. Rules concerning methods of procurement and type of solicitation in WP.69/Add.1  Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 39-70; and A/CN.9/687, paras. 107-131) and at the Commission's forty-second session (A/64/17, paras. 88-120)  Amendments proposed by the Secretariat further to the expert consultations. Further revised at the eighteenth session (A/CN.9/690, paras. 146-155)
<b>Section I.</b> <b>METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE</b>  <b>Articles 24-29 bis</b>		Chapter II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE, articles 24-29, as contained in document WP.71/Add.2 and considered at the Working Group's seventeenth session (A/CN.9/687, paras. 107-131). In the light of introduction of new provisions on methods of solicitation and their conditions for use in the chapter, the Secretariat proposed splitting the chapter into two sections

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 24. Methods of procurement (new provisions)		Proposed by the Secretariat further to the expert consultations held in autumn 2009  Revisions considered at the Working Group's seventeenth session (A/CN.9/687, paras. 107-109). Further revised at the eighteenth session (A/CN.9/690, para. 146)
Article 25. General rules applicable to the selection of a procurement method	Article 18. Methods of procurement	Draft article 7 (1), (2) and (8) in WP.69/Add.1 as considered at the Working Group's fifteenth session (A/CN.9/668, paras. 40-45, 69)  Revisions considered at the Working Group's seventeenth session (A/CN.9/687, paras. 110-112)
Article 26. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)	Articles 20, 21 and 42	Revisions considered at the Working Group's seventeenth session (A/CN.9/687, paras. 113-119)
Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)	Article 19 (1)	As related to the new procurement method (request for proposals with dialogue), see para. 1 of a new article 40 proposed by delegations of Austria, France, UK and USA as considered at the Working Group's sixteenth session (A/CN.9/672, paras. 32-37) and revised in A/CN.9/XLII/CRP.2, para. 5 (a)  Revisions considered at the Working Group's seventeenth session (A/CN.9/687, paras. 120-129)  Amendments proposed by the Secretariat further to the expert consultations. Further revised at the eighteenth session (A/CN.9/690, paras. 149-155).
	Article 19 (2)	Amendments proposed by the Secretariat further to the expert consultations and in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 120-129). Further revised at the eighteenth session (A/CN.9/690, paras. 154-155)

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
	Article 22	<p>Draft article 7 (7) in WP.69/Add.1 as considered at the Working Group's fifteenth session (A/CN.9/668, paras. 51-64) and at the Commission's forty-second session (A/64/17, para. 119)</p> <p>A revision agreed to be made at the Working Group's seventeenth session (A/CN.9/687, para. 131)</p>
Article 28. Conditions for use of an auction ( <b>new provisions</b> )		<p>Draft article 41 (1) in WP.69/Add.4 as approved at the Working Group's fifteenth session (A/CN.9/668, para. 216)</p> <p>Amendments proposed by the Secretariat further to the expert consultations</p>
Article 29. Conditions for use of a framework agreement procedure ( <b>new provisions</b> )		Moved from the chapter on framework agreement procedures of the draft considered by the Working Group at its fifteenth session (article 49) (A/CN.9/668, paras. 226-229)
<b>Section II.</b> <b>SOLICITATION AND NOTICES OF THE PROCUREMENT</b>  <b>Articles 29 bis-29 quater (new provisions)</b>		New provisions proposed by the Secretariat in the light of the deliberations at the Working Group's seventeenth session
Article 29 bis. Solicitation in open tendering, two-stage tendering and in procurement by means of an auction		
Article 29 ter. Solicitation and notices of the procurement in restricted tendering, competitive negotiations and single-source procurement		
Article 29 quater. Solicitation in request for proposals proceedings		

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
<b>Chapter III.</b> <b>OPEN TENDERING</b> <b>Articles 30-38</b>	<b>Chapter III.</b> <b>TENDERING</b> <b>PROCEEDINGS</b>	As considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 159-166, and 170-182; and A/CN.9/687, paras. 132-158)  Amendments proposed by the Secretariat further to the most recent changes throughout the draft revised Model Law and further to the expert consultations
	Article 23 deleted in the light of the newly proposed definition of "domestic procurement"	
Articles 30-33	Articles 24-27, with consequential changes	Revisions agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 161-166; and A/CN.9/687, paras. 132-139)  Amendments proposed by the Secretariat further to the expert consultations and as a result of the most recent changes throughout the draft revised Model Law
	Articles 28. Clarifications and modifications of solicitation documents was moved to chapter I (see above)  Article 29. Language of tenders was deleted and its provisions merged with the proposed article 13. Rules concerning the language of documents, in chapter I. General provisions, in order to make them applicable to all procurement methods	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, para. 169)

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Articles 34-35	Articles 30-31, with consequential changes	<p>Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 170-172)</p> <p>Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 175-176; and A/CN.9/687, paras. 140-144)</p> <p>Amendments proposed by the Secretariat further to the expert consultations, the newly proposed article 13 bis and as a result of the most recent changes throughout the draft revised Model Law</p>
	Article 32. Tender securities became article 15. Submission securities and placed in chapter I. General provisions, in order to make it applicable to all procurement methods (see above)	
Articles 36-38	Articles 33-35, with consequential changes	<p>Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 177-182; and A/CN.9/687, paras. 145-158)</p> <p>Amendments proposed by the Secretariat further to the expert consultations and as a result of the most recent changes throughout the draft revised Model Law</p>
	Article 36. Acceptance of tender and entry into force of procurement contract became article 20 and placed in chapter I. General provisions, in order to make it applicable to all procurement methods	



Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
<b>CHAPTER IV.</b> <b>PROCEDURES FOR RESTRICTED TENDERING, REQUEST FOR QUOTATIONS AND REQUEST FOR PROPOSALS WITHOUT NEGOTIATION</b> <b>Articles 39-41</b>	Chapter IV, article 42 and other relevant provisions; and chapter V, articles 47 and 50	Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 183-201; and A/CN.9/687, paras. 159-181) Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 202-208) Amendments proposed by the Secretariat further to the most recent changes throughout the draft revised Model Law
Article 39. Restricted tendering	Article 47. Restricted tendering	Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 183-192; and A/CN.9/687, paras. 159-169) Amendments proposed by the Secretariat in the light of the newly proposed section II of chapter II (see above)
Article 40. Request for quotations	Article 50. Request for quotations	Revisions agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 202-208; and A/CN.9/687, paras. 170-172)
Article 41. Request for proposals without negotiation	Article 42. Selection procedure without negotiation, and other relevant provisions of chapter IV. Principal method for procurement of services	Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 193-201; and A/CN.9/687, paras. 173-181)
<b>CHAPTER V.</b> <b>PROCEDURES FOR TWO-STAGE TENDERING, REQUEST FOR PROPOSALS WITH DIALOGUE, REQUEST FOR PROPOSALS WITH CONSECUTIVE NEGOTIATIONS, COMPETITIVE NEGOTIATIONS AND SINGLE-SOURCE PROCUREMENT</b> <b>Articles 42-46</b>	Chapter IV, articles 43 and 44 and other relevant provisions; chapter V, articles 46, 48, 49 and 51	Revisions considered at the Working Group's fifteenth, seventeenth and eighteenth sessions (A/CN.9/668, paras. 209-212; A/CN.9/687, paras. 182-210; and A/CN.9/690, paras. 17-37) Revisions considered at the Working Group's sixteenth session (A/CN.9/672) Amendments proposed by the Secretariat in the light of the newly proposed section II of chapter II (see above) and further to the most recent changes throughout the draft revised Model Law

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 42. Two-stage tendering	Article 46. Two-stage tendering	<p>Revisions considered at the Working Group's seventeenth session (A/CN.9/687, paras. 182-191)</p> <p>Amendments proposed by the Secretariat in the light of the newly proposed section II of chapter II (see above)</p>
Article 43. Request for proposals with dialogue	Articles 43 and 48	<p>A new article proposed by delegations of Austria, France, UK and USA as considered at the Working Group's fifteenth and sixteenth sessions (A/CN.9/668, paras. 210-211, and A/CN.9/672, paras. 32-37). See also the revised proposal in A/CN.9/XLII/CRP.2</p> <p>Revisions to the article considered at the Working Group's seventeenth session (A/CN.9/687, paras. 192-208)</p> <p>Amendments proposed by the Secretariat in the light of the newly proposed section II of chapter II (see above) and further to the most recent changes throughout the draft revised Model Law. Further revised at the eighteenth session (A/CN.9/690, paras. 20-23)</p>
Article 44. Request for proposals with consecutive negotiations	Article 44. Selective procedure with consecutive negotiations	Amendments proposed by the Secretariat further to the expert consultations. Further revised at the eighteenth session (A/CN.9/690, paras. 24-32)
Article 45. Competitive negotiations	Article 49. Competitive negotiation	Amendments proposed by the Secretariat further to the expert consultations and in the light of the newly proposed section II of chapter II (see above). Further revised at the eighteenth session (A/CN.9/690, paras. 33-35)
Article 46. Single-source procurement	Article 51. Single-source procurement	Revised at the eighteenth session (A/CN.9/690, paras. 36-37)
<b>CHAPTER VI.</b> <b>AUCTIONS</b> <b>Articles 47-51</b> <b>(new provisions)</b>		<p>Draft articles 22 bis and 51 bis to septies (see A/CN.9/WG.I/WP.59, A/CN.9/WG.I/WP.61, para. 17, and A/CN.9/640, paras. 56-89), subsequently replaced by articles 43-48 in WP.69/Add.4 that were considered at the Working Group's fifteenth session (A/CN.9/668, paras. 213-222)</p> <p>Amendments proposed by the Secretariat further to the expert consultations and as a result of the most recent changes throughout the draft revised Model Law</p>

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
		Further revised at the eighteenth session (A/CN.9/690, paras. 38-51)
<b>CHAPTER VII. FRAMEWORK AGREEMENTS PROCEDURES</b>  <b>Articles 52-57 (new provisions)</b>		<p>Draft articles 22 ter and 51 octies to quindecies (see A/CN.9/WG.I/WP.62, and A/CN.9/664, paras. 75-110), subsequently replaced by draft articles 48-55 in WP.69/Add.4 considered at the Working Group's fifteenth session (A/CN.9/668, paras. 223-255; revisions agreed to be made as per paras. 230-233 and 239-255; other revisions considered are in paras. 226-229 and 235-237)</p> <p>Amendments proposed by the Secretariat further to the expert consultations and as a result of the most recent changes throughout the draft revised Model Law</p> <p>Further revised at the eighteenth session (A/CN.9/690, paras. 52-65)</p>
<i>Articles 58-60 are not used in the current draft</i>		
<b>CHAPTER VIII. REVIEW</b>  <b>Articles 61-66</b>	Chapter VI. Review	<p>Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 19-74)</p> <p>Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 259-262 and 267-268)</p> <p>Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 264 and 267 (b))</p> <p>Amendments proposed by the Secretariat further to revisions at the eighteenth session (A/CN.9/690, paras. 66-93), the expert consultations and as a result of the most recent changes throughout the draft revised Model Law</p>
Article 61. Right to review	Article 52. Right to review	<p>Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 19-27)</p> <p>The Working Group, at its fifteenth session, approved the draft article without change (A/CN.9/668, para. 257)</p> <p>Amendments proposed by the Secretariat further to revisions at the eighteenth session (A/CN.9/690, paras. 66-69) and the expert consultations</p>

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 62. Review by the procuring entity or the approving authority	Article 53. Review by procuring entity (or by approving authority)	<p>Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 28-33)</p> <p>Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 259-260)</p> <p>Amendments proposed by the Secretariat further to revisions at the eighteenth session (A/CN.9/690, paras. 69-70 and 85-88) and the expert consultations</p>
Article 63. Review before an independent administrative body	Article 54. Administrative review	<p>Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 34-58)</p> <p>Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, para. 262)</p> <p>Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 263-264)</p> <p>Amendments proposed by the Secretariat further to revisions at the eighteenth session (A/CN.9/690, paras. 71-73 and 85-88) and the expert consultations</p>
Article 64. Certain rules applicable to review proceedings under articles [62 and 63]	Article 55. Certain rules applicable to review proceedings under article 53 [and article 54]	<p>Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 59-60)</p> <p>Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 267-268)</p> <p>Revisions considered at the Working Group's fifteenth session (A/CN.9/668, para. 267 (b))</p> <p>Amendments proposed by the Secretariat further to revisions at the eighteenth session (A/CN.9/690, paras. 74-76 and 85-88) and the expert consultations</p>
Article 65. Suspension of the procurement proceedings, the framework agreement or the procurement contract	Article 56. Suspension of procurement proceedings	<p>Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 61-73)</p> <p>Amendments proposed by the Secretariat further to revisions at the eighteenth session (A/CN.9/690, paras. 77-88) and the expert consultations</p>
Article 66. Judicial review	Article 57. Judicial review	<p>Amendments proposed by the Secretariat further to revisions at the eighteenth session (A/CN.9/690, paras. 89-93)</p>

**(A/CN.9/WG.I/WP.75/Add.1) (Original: English)****Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its nineteenth session****ADDENDUM**

This note sets out a proposal for the Preamble and articles 1-13 of chapter I (General provisions) of the revised Model Law.

The Secretariat's comments are set out in the accompanying footnotes.

**UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT****Preamble**

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement 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<sup>1</sup> regardless of nationality, and thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;
- (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;
- (f) Achieving transparency in the procedures relating to procurement.

Be it therefore enacted as follows.

**CHAPTER I. GENERAL PROVISIONS****Article 1. Scope of application<sup>2</sup>**

This Law applies to all public procurement.

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<sup>1</sup> Amended pursuant to A/CN.9/690, para. 94.

<sup>2</sup> The accompanying Guide text will point out that States in situations of economic and financial crisis might exempt the application of the Model Law through legislative measures (which would themselves receive the scrutiny of the legislature) (A/CN.9/668, para. 63).

## Article 2. Definitions<sup>3</sup>

For the purposes of this Law:

(a) “Auction”<sup>4</sup> means an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves presentation by suppliers or contractors of successively lowered bids during a scheduled period of time and automatic evaluation of the bids;<sup>5</sup>

(b) “Currency” includes monetary unit of account;

(c) “Direct solicitation” means the<sup>6</sup> solicitation addressed directly to one or a restricted number of suppliers or contractors. This excludes solicitation addressed to a limited<sup>7</sup> number of suppliers or contractors following prequalification or pre-selection proceedings;

(d) “Domestic procurement” means procurement limited to domestic suppliers or contractors pursuant to article [8] of this Law;

(e) “Framework agreement procedure”<sup>8</sup> means a procurement conducted in two stages: a first stage to select supplier(s) or contractor(s) to be the party or parties to a framework agreement with a procuring entity, and a second stage to award a procurement contract under the framework agreement to a supplier or contractor party to the framework agreement:

(i) “Framework agreement” means an agreement or agreements between the procuring entity and the selected supplier(s) or contractor(s) concluded upon completion of the first stage of the framework agreement procedure;

(ii) “Closed framework agreement” means a framework agreement to which no supplier or contractor that is not initially a party to the framework agreement may subsequently become a party;

(iii) “Open framework agreement” means a framework agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties;

(iv) “Framework agreement procedure with second stage competition” means a procedure under an open framework agreement or a closed framework agreement with more than one supplier or contractor in which certain terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded are to be established or refined through the second stage competition;

<sup>3</sup> The article will be supplemented in the revised Guide to Enactment by a more comprehensive glossary of terms used in the Model Law.

<sup>4</sup> The more neutral term to “electronic reverse auction” is used in the current draft pursuant to A/CN.9/690, para. 39 (a), and the comments made during the intersessional consultations.

<sup>5</sup> The last portion was added to encompass in the definition all the main features of the reverse auction.

<sup>6</sup> The word “exceptional” was deleted pursuant to A/CN.9/690, para. 108.

<sup>7</sup> The word “limited” replaced the word “restricted” used in the previous draft.

<sup>8</sup> During the intersessional consultations, suggestions were made to reconsider referring to the “procedure” in this context.

(v) “Framework agreement procedure without second stage competition” means a procedure under a closed framework agreement in which all terms and conditions of the procurement are established when the framework agreement is concluded;

(...)<sup>9</sup>

(f) “Prequalification documents” means documents issued by the procuring entity that set out the terms and conditions of the prequalification proceedings in accordance with article [16] of this Law;<sup>10</sup>

(g) “Procurement” means the acquisition<sup>11</sup> of goods, construction or services (the “subject matter of the procurement”);<sup>12</sup>

(h) “Procurement contract” means a contract or contracts<sup>13</sup> resulting from the procurement proceedings and made between the procuring entity and supplier(s) or contractor(s);

(i) “Procurement involving classified<sup>14</sup> information” means procurement in which the procuring entity may be authorized by the procurement regulations or by other provisions of law of this State to take special measures and impose special

<sup>9</sup> The definition of “Material change” was deleted pursuant to A/CN.9/690, paras. 96-98. During the intersessional consultations, the prevailing view was that the definition should be deleted and the relevant provisions should address the extent of permissible change in the specific context, as has been done in draft articles 42 and 43.

<sup>10</sup> The definition is retained without square brackets pursuant to A/CN.9/690, para. 100.

<sup>11</sup> Amended pursuant to A/CN.9/690, para. 101. The accompanying Guide text will explain that the definition encompasses acquisition by purchase, but also by lease (drawing on equivalent terms in article I.2 of the WTO Agreement on Government Procurement (the 1994 version of GPA) and article II.2 (b) of the provisionally agreed text of the revised GPA (the 2006 version of GPA), the latter referring to “purchase, lease and rental or hire purchase, with or without an option to buy”).

<sup>12</sup> The accompanying Guide text will set out the substance of the definitions of the goods, construction and services from the 1994 text (article 2 (c) to (e)).

<sup>13</sup> The accompanying Guide text will note that reference to contracts in plural intends to encompass inter alia split contracts awarded as a result of the same procurement proceedings. In this regard, it will refer to the provisions of the Model Law stipulating that suppliers or contractors may be permitted to present submissions for only a portion of the subject matter of the procurement (e.g. article 33 (g) of this draft).

<sup>14</sup> The accompanying Guide text will explain that the term “classified information” intends to refer to information designated as classified by an enacting State in accordance with the relevant national law, and that the provision does not intend to confer any discretion on the procuring entity to expand the definition of “classified information”. The Guide will also explain that the term “classified information” being understood in many jurisdictions as information to which access is restricted by law or regulation to particular classes of persons, and that the term does not intend to refer only to the procurement in the sectors where “classified information” is most commonly encountered, such as national security and defence, but also to procurement in any other sector where protection of certain information from public disclosure may be permitted by law, such as in the health sector (for example procurement of vaccines in the case of pandemics in order to avoid panic) or where sensitive medical research and experiments may be involved. Because of the risk of abuse of exceptions to transparency requirements, the Working Group may wish to recommend in the Guide that the issues pertaining to the treatment of “classified information” should be regulated at the level of statutes in order to ensure appropriate scrutiny by the legislature.

requirements for the protection of classified information, including to determine which provisions of this Law calling for public disclosure shall not apply;<sup>15</sup>

(j) “Procurement regulations” means regulations to be enacted in accordance with article [4] of this Law;

(k) “Procuring entity” means:

(i) *Option I*

Any governmental department, agency, organ or other unit, or any subdivision or multiplicity thereof,<sup>16</sup> that engages in procurement, except ...; (and)

*Option II*

Any department, agency, organ or other unit, or any subdivision or multiplicity thereof,<sup>17</sup> 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”);

(l) “Public procurement” means procurement carried out by a procuring entity;<sup>18</sup>

(m) “<sup>19</sup>Socio-economic policies”<sup>20</sup> means environmental, social, economic and other policies of this State authorized or required by the procurement regulations or other provisions of law of this State<sup>21</sup> to be taken into account by the

<sup>15</sup> The accompanying Guide text will note that the definition, where it is used in the Model Law, is supplemented by the requirement in the article on the documentary record of procurement proceedings to include in the record the reasons and circumstances on which the procuring entity relied to justify the measures and requirements imposed during the procurement proceedings for protection of classified information, such as exemptions from public disclosure.

<sup>16</sup> Amended pursuant to A/CN.9/690, paras. 102 and 103. The accompanying Guide text will explain that procurement can be done by groups or consortia of procuring entities, and they can collectively be dealt with as a single “procuring entity”. It will further note that, in some jurisdictions, to ensure political accountability, even when procuring entities band together, one remains the lead procuring entity. The Guide will also refer to a consortium of procuring entities from various States where a procuring entity from one State in its capacity as the lead procuring entity acts as an agent of procuring entities from other States.

<sup>17</sup> Ibid.

<sup>18</sup> The accompanying Guide text will cross-refer to the definitions of “procurement” and “procuring entity”.

<sup>19</sup> There was suggestion during the intersessional consultations to add the word “Government” or use it instead of the word “socio-economic” in that definition. While there was some support for the use of the term “Government socio-economic policies”, the term “Government policies” was considered to be very broad for the purposes intended. Alternative phrases used in academic texts include “secondary policies”, “horizontal policies” and “horizontal considerations”.

<sup>20</sup> The Working Group has agreed to reconsider the need for this definition (A/CN.9/690, para. 120 (v)).

<sup>21</sup> Amended pursuant to A/CN.9/690, para. 106. The Guide will explain that the provisions are not intended to be open-ended, but to encompass only those policies set out in the legislation of the enacting State, and those that can be triggered by international regulation such as United



procuring entity in the procurement proceedings. (The enacting State may expand this subparagraph by providing an illustrative list of such policies;)<sup>22</sup>

(n) “Solicitation” means an invitation to tender or to present quotations, proposals or bids, according to the context;<sup>23</sup>

(o) “Solicitation documents” means documents issued by the procuring entity, including any amendments thereto,<sup>24</sup> that set out the terms and conditions of the given procurement;

(p) “Standstill period”<sup>25</sup> means the period before the entry into force of the procurement contract, during which the suppliers or contractors whose submissions have been examined may seek review of the decision of the procuring entity to accept the successful submission at the end of that period;

(q) “Submission(s)” means tender(s), proposal(s), offer(s), quotation(s) and bid(s) referred to collectively or generically;

(...)<sup>26</sup>

(r) “Supplier or contractor” means, according to the context, any potential party or any party to the procurement proceedings with the procuring entity;

(s) “Tender security”<sup>27</sup> means a security required from suppliers or contractors by the procuring entity and provided to the procuring entity to secure the

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Nations Security Council anti-terrorism measures or sanctions regimes. The aim of the provisions is to ensure that (a) socio-economic policies (which might include political policies as well as those enumerated in the paragraph) are not determined on an ad hoc basis by the procuring entity, and (b) applied across all government purchasing, so that their costs and benefits can be seen. If there is any other organ or organs with the authority to promulgate socio-economic policies in an enacting State, the Guide will note that it or they should operate under these constraints (and not allow, for example, misuse and abuse through ad hoc adoption of policies, favouritism, etc.).

<sup>22</sup> The accompanying Guide text will contain an illustrative list of such policies, such as that contained in the 1994 Model Law (article 34 (4) (c) (iii)). The Guide will also describe the costs to procurement that recourse to such policies can bring, and that they are commonly considered to be appropriate only for the purposes of assisting development, such as capacity-building.

<sup>23</sup> Amended to differentiate “solicitation” from “the invitation to participate in the procurement proceedings,” the latter being broader as it may encompass an invitation to pre-qualify or an invitation to the pre-selection in accordance with article 43. The accompanying Guide text will elaborate on the meaning of solicitation in each procurement method, in particular that in the auctions where initial bids are requested for assessment of their responsiveness or evaluation, the solicitation starts already from an invitation to present initial bids rather than from the invitation to bid after the opening of the auction.

<sup>24</sup> The accompanying Guide text will explain the difference in the meaning of “solicitation documents” in various procurement methods. With respect to the amendments, it will cross-refer to the relevant provisions of the Model Law, such as draft articles 13 bis, 14, 42 and 43 of this Law.

<sup>25</sup> This definition was revised pursuant to A/CN.9/690, paras. 109 and 110.

<sup>26</sup> The definition of “Successful submission” was deleted pursuant to A/CN.9/690, para 111.

<sup>27</sup> The accompanying Guide text will explain that although the Model Law refers to “tender security”, as the commonly-used term in the relevant context, this should not imply that this type of security may be requested only in the tendering proceedings. It will also explain that the definition does not intend to imply that multiple tender securities can be requested by the procuring entity in any single procurement proceedings that involve presentation of revised proposals or bids.

fulfilment of any obligation referred to in article [15 (1) (f)] of this Law and includes such arrangements as bank guarantees, surety bonds, standby letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract.

**Article 3. International obligations of this State relating to  
procurement [and intergovernmental agreements  
within (this State)]<sup>28</sup>**

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<sup>29</sup>**

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. Publication of legal texts**

(1) Except as provided for in paragraph (2) of this article, the text of this Law, procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

(2) Judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public.<sup>30</sup>

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<sup>28</sup> The accompanying Guide text will explain that the texts in square brackets in this article are relevant to, and intended for consideration by, federal States, and that although treaties have an effect on national implementation of this Law and that more stringent requirements might be applicable, international commitments should not be used as a pretext to avoid basic safeguards under the Model Law (A/CN.9/690, para. 113). It will also alert enacting States that the provisions of the article might need to be adapted to constitutional requirements or should not be enacted at all if they conflict with the constitutional law of the enacting State (A/64/17, paras. 75-78).

<sup>29</sup> The accompanying Guide text will contain a list of cross-references to all provisions of the Model Law where requirements about the content of the procurement regulations are found.

### Article 6. Information on possible forthcoming procurement

- (1) Procuring entities may publish information regarding planned procurement activities for forthcoming months or years.<sup>31</sup>
- (2) Procuring entities may also publish an advance notice of possible future procurement.<sup>32</sup>
- (3) Publication under this article does not constitute a solicitation, does not oblige the procuring entity to issue a solicitation and does not confer any rights on suppliers or contractors.<sup>33</sup>

### Article 7. Communications in procurement<sup>34</sup>

- (1) Any document, notification, decision or any other information generated in the course of a procurement and communicated as required by this Law, including in connection with review proceedings under chapter [VIII] or in the course of a meeting, or forming part of the record of procurement proceedings under article [23], shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.
- (2) Direct solicitation<sup>35</sup> and communication of information between suppliers or contractors and the procuring entity referred to in articles [15 (1) (d),<sup>36</sup> 16 (6) and (9),<sup>37</sup> 35 (2) (a),<sup>38</sup> 37 (1)<sup>39</sup> and 44 (2) to (4)]<sup>40, 41</sup> may be made by means that do

<sup>30</sup> Amended pursuant to A/CN.9/690, para. 115. The accompanying Guide text will explain that laws and regulations of the enacting State will regulate which State agency is responsible for fulfilling the obligations under this article.

<sup>31</sup> The accompanying Guide text will emphasize the need for proper procurement planning.

<sup>32</sup> The accompanying Guide text will explain that the reference to “an advance notice of possible future procurement” is made to enable procuring entities to assess the market for complex procurement, without using a term that might be confused with a notice seeking expressions of interest that is usually published in conjunction with request for proposals proceedings.

<sup>33</sup> The accompanying Guide text will explain that the provisions of this article may be applied regardless of the procurement method, and will also highlight the importance of the provisions in the light of the United Nations Convention against Corruption (UNCAC), as ensuring transparency throughout the process and eliminating any advantageous position of suppliers or contractors that otherwise may gain access to procurement planning phases in a non-transparent manner. The Guide will also explain the media where the type of information covered by the article is usually published (A/CN.9/687, para. 37).

<sup>34</sup> The accompanying Guide text will explain that: (a) in procurement containing classified information, classified information may be included in an appendix to the solicitation documents that is not made public; and (b) that the means of communication may be changed by issuing an addendum to the original solicitation documents (A/CN.9/690, para. 117).

<sup>35</sup> Corresponds to references in article 9 of the 1994 Model Law to articles 37 (3) and 47 (1) of that text.

<sup>36</sup> Id., as regards reference to article 32 (1) (d) of the 1994 text.

<sup>37</sup> Id., as regards reference to article 7 (4) and (6) of the 1994 text.

<sup>38</sup> Id., as regards reference to article 31 (2) (a) of the 1994 text.

<sup>39</sup> Id., as regards reference to article 34 (1) of the 1994 text.

<sup>40</sup> Id., as regards reference to article 44 (b) to (f) of the 1994 text (selection procedure with consecutive negotiation).

<sup>41</sup> It was decided that the other references in the 1994 text (to articles 36 (1) (notice of acceptance of the successful tender), and to article 12 (3) (notice of the rejection of all submissions)) would be deleted (A/64/17, para. 122).

not provide a record of the content of the information on the condition that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall specify:

(a) Any requirement of form;

(b) In procurement involving classified information, if the procuring entity considers it necessary, measures and requirements needed to ensure the protection of classified information at the requisite level;

(c) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to the public or by a supplier or contractor to the procuring entity or other entity acting on its behalf;

(d) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and

(e) The means to be used to hold any meeting of suppliers or contractors.

(4) The procuring entity may use only those means of communication that are in common use by suppliers or contractors in the context of the particular procurement. In any meeting held with suppliers or contractors, the procuring entity shall use only those means that ensure in addition that suppliers or contractors can fully and contemporaneously participate in the meeting.

(5) The procuring entity shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of information concerned.

#### **Article 8. Participation by suppliers or contractors<sup>42</sup>**

(1) Suppliers or contractors shall be permitted to participate in procurement proceedings without regard to nationality, except where the procuring entity decides to limit participation in procurement proceedings on the basis of nationality on grounds<sup>43</sup> specified in the procurement regulations or other provisions of law of this State.<sup>44</sup>

<sup>42</sup> Amended pursuant to A/CN.9/690, paras. 118-120.

<sup>43</sup> Although a suggestion was made during the intersessional consultations to refer explicitly in these provisions to “the extent of domestic content,” the view prevailed that such reference would be unadvisable. In this respect, practical difficulties with calculating the extent of the domestic content, especially since supply chain is becoming more complex and international, were highlighted. Difficulties with defining nationality as opposed to domestic content were also mentioned. It was agreed that the accompanying Guide text would stress that any restriction under these provisions would be against free trade.

<sup>44</sup> Amended pursuant to A/CN.9/690, paras. 118-120. In particular, paragraph (1) (a) in the previous draft reading “Where the procuring entity decides, in view of the low value of the goods, construction or services to be procured, that only domestic suppliers or contractors are likely to be interested in presenting submissions” was deleted. This was on the understanding that, as is the case in the 1994 text (article 23), the procuring entity cannot have recourse to domestic procurement on the sole basis that the subject matter of the procurement is of the low value and thus only domestic suppliers or contractors are likely to be interested in presenting

(2) Except when authorized or required<sup>45</sup> to do so by the procurement regulations or other provisions of law of this State,<sup>46</sup> the procuring entity shall establish no other requirement aimed at limiting participation of suppliers or contractors in procurement proceedings that discriminates<sup>47</sup> against or among suppliers or contractors or against categories thereof.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare whether participation of suppliers or contractors in the procurement proceedings is limited pursuant to this article and on which ground. Any such declaration may not later be altered.<sup>48</sup>

(4) A procuring entity that decides to limit participation of suppliers or contractors in procurement proceedings pursuant to this article shall include in the record of the procurement proceedings a statement of the reasons and circumstances<sup>49</sup> on which it relied.<sup>50</sup>

(5) The procuring entity shall make available to any member of the public, upon request, its reasons for limiting participation of suppliers or contractors in the procurement proceedings pursuant to this article.<sup>51</sup>

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submissions. What it can do in such case, but it does not have to, is to advertise such low-value procurement only domestically. This understanding was reflected in article 29 bis (4) of the current draft. The accompanying Guide text will explain that this paragraph may deal not only with cases of domestic procurement (e.g. to cover situations where nationalities subject to international or bilateral sanctions are excluded). Although socio-economic policies would most likely justify recourse to exceptions provided for in this subparagraph, the reference only to the socio-economic policies of an enacting State was not considered sufficient since limiting participation in procurement proceedings on the basis of nationality may occur on grounds other than socio-economic policies of this State, such as safety and security.

<sup>45</sup> Amended pursuant to A/CN.9/690, para. 120, and aligned with the similar wording found elsewhere in the current draft (e.g. article 11 (4) (b)).

<sup>46</sup> The accompanying Guide text will explain that this paragraph intends to cover situations when limitation of participation in procurement proceedings is not on the basis of nationality or not solely on that basis (e.g. set-aside programmes in some jurisdictions for small and medium enterprises or coming from disadvantaged areas). The paragraph may cover, as paragraph (1) does, domestic procurement (e.g. procurement with participation of only suppliers or contractors coming from disadvantaged areas within the same State) or international procurement limited to certain groups of suppliers or contractors (e.g. persons with disabilities).

<sup>47</sup> The accompanying Guide text will explain that, apart from clearly discriminatory measures, in practice some measures may be taken that produce inadvertently discriminatory effect on suppliers or contractors.

<sup>48</sup> The accompanying Guide text would specify the media where the declaration would be published.

<sup>49</sup> During the intersessional consultations, suggestion was made to replace the reference to “reasons and circumstances” with the word “grounds” to allow reference to applicable law/regulations. The Working Group may however wish to recall its decision at its earlier sessions to use the term “reasons and circumstances” consistently throughout the revised Model Law. The latter term was therefore retained in the current draft. The accompanying Guide text will elaborate on the importance of setting out in the record also the legal grounds, with reference to applicable law and regulations, for the decision.

<sup>50</sup> The paragraph was retained without square brackets pursuant to A/CN.9/690, para. 120.

<sup>51</sup> It is suggested that the Guide text that will discuss transparency requirements of the Model Law should list separately all public disclosure requirements found in the Model Law.

### Article 9. Qualifications of suppliers and contractors

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

(2) <sup>52</sup>Suppliers or contractors must meet such of the following criteria as the procuring entity considers appropriate and relevant in the circumstances of the particular procurement:

(a) That they have the necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities,<sup>53</sup> managerial capability, reliability, experience and the personnel to perform the procurement contract;

(b) That they meet applicable ethical and other standards;<sup>54</sup>

(c) That they have legal capacity to enter into the procurement contract;

(d) 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;

(e) That they have fulfilled their obligations to pay taxes and social security contributions in this State;<sup>55</sup>

(f) 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

<sup>52</sup> The opening phrase was deleted since it raised concerns in the Working Group (A/CN.9/690, para. 121) as well as, in its amended version reading “In order to participate in the procurement proceedings and be awarded the procurement contract”, during the intersessional consultations. In particular, it was noted that read together with article 16 (1), it implied that prequalification would always be necessary. This wording, it was also explained, would allow procuring entities to formulate excessively demanding qualification requirements and through their application restrict the pool of participants for the purpose of reducing the workload for themselves. The other view was that the deleted wording was adequate but the Guide should alert that assessment of qualifications at the outset of the procurement, while justifiable in some procurement, restricts the competition and should also refer to the provisions of the Model Law that allow challenge disqualification.

<sup>53</sup> The accompanying Guide text will explain that the requirement that suppliers or contractor must possess the “necessary equipment and other physical facilities” is not intended to restrict the participation of small and medium-sized enterprises in public procurement. The Guide will note that often such enterprises would not themselves possess the required equipment and other physical facilities but rather ensure through their subcontractors that the required equipment and facilities were made available for the implementation of the procurement contract.

<sup>54</sup> Amended pursuant to A/CN.9/690, para. 122. The accompanying Guide text will explain with reference to “other standards” that the procuring entity should be entitled to satisfy itself, for example, that suppliers or contractors have all the required insurances, and to impose security clearances or consider environmental aspects where necessary.

<sup>55</sup> The accompanying Guide text will explain the effect of this provision on foreign suppliers or contractors, with a cross-reference to article 8 that prevents imposing requirements other than those stipulated in the procurement regulations or other provisions of law of the enacting State, to deter participation in the procurement proceedings by foreign suppliers or contractors.

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 debarment proceedings.<sup>56</sup>

(3) 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 appropriate documentary evidence or other information to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (2).<sup>57</sup>

(4) Any requirement established pursuant to this article shall be set out in the prequalification documents, if any, and in the solicitation documents,<sup>58</sup> 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 Law.

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

(6) Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article [8] of this Law, 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, or that is not objectively justifiable.<sup>59</sup>

(7) Notwithstanding paragraph (6) of this article, the procuring entity may require the legalization of documentary evidence provided by the supplier or contractor presenting the successful submission to demonstrate its qualifications for the particular procurement. In doing so, 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.

(8) (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;

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<sup>56</sup> It was suggested that the accompanying Guide text should refer to the World Bank's guidelines on suspension procedures (A/CN.9/687, para. 50).

<sup>57</sup> At the Working Group's seventeenth session, it was agreed that the accompanying Guide text should explain the interaction between paragraphs (3) and (2), in particular paragraph (2) (a), of this article (A/CN.9/687, para. 48).

<sup>58</sup> The accompanying Guide text will note that, in some jurisdictions, standard qualifications requirements are found in procurement regulations and the prequalification documents simply cross-refer to those regulations. For reasons of transparency and equal treatment, the Model Law requires all requirements to be set out in the prequalification and solicitation documents, but the Guide will note that the requirements of paragraph (4) may be satisfied where the prequalification or solicitation documents or both refer to the qualification requirements in sources that are transparent and readily available (A/CN.9/690, para. 123).

<sup>59</sup> The accompanying Guide text will note that, despite this statement in the Model Law, some practical measures, such as a choice of the language, although objectively justifiable, may lead to discrimination against or among suppliers or contractors or against categories thereof.

(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, however, be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity;

(d) The procuring entity may require a supplier or contractor that was pre-qualified in accordance with article [16] of this Law to demonstrate its qualifications again in accordance with the same criteria used to pre-qualify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate its qualifications again if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate its qualifications again as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.<sup>60</sup>

**Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement<sup>61</sup>**

(1) The procuring entity shall set out in the prequalification documents, if any, and in the solicitation documents the description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied.<sup>62</sup>

(2) Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article [8] of this Law, no description of the subject matter of a procurement that may restrict the participation of suppliers or contractors in or their access to the procurement proceedings,<sup>63</sup> including any restriction based on nationality, shall be included or used in the prequalification documents, if any, or in the solicitation documents.

(3) The description of the subject matter of the procurement may include specifications, plans, drawings, designs, requirements, including concerning testing

<sup>60</sup> The accompanying Guide text will note that in most procurement (with the exception perhaps of complex procurement requiring long negotiations), these provisions should be limited to the winner as envisaged in articles 37 (6) and (7) and 51.

<sup>61</sup> The accompanying Guide text will elaborate on the way the socio-economic factors can be taken into account in setting out the description of the subject matter of the procurement and the terms and conditions of the procurement contract or a framework agreement.

<sup>62</sup> The accompanying Guide text will explain that the minimum requirements intend also to cover thresholds referred to in the provisions on request for proposals without negotiation and consecutive negotiations.

<sup>63</sup> Amended pursuant to A/CN.9/690, para. 124.



and test methods,<sup>64</sup> packaging, marking or labelling or conformity certification, and symbols and terminology.<sup>65</sup>

(4) To the extent practicable, any description of the subject matter of the procurement shall be objective, functional and generic, and shall set out the relevant technical and quality characteristics or the performance characteristics<sup>66</sup> of that subject matter. There shall be no requirement for or reference to a particular trademark or trade name, patent, design or type, specific origin or producer 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.<sup>67</sup>

(5) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the subject matter of the procurement shall be used, where available, in formulating any description of the subject matter of the procurement to be included in the prequalification documents, if any, and in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms and standardized conditions,<sup>68</sup> where available, in formulating the terms and conditions of the procurement and the procurement contract or the framework agreement to be entered into as a result of the procurement proceedings, and in formulating other relevant aspects of the prequalification documents, if any, and solicitation documents.

#### **Article 11. Rules concerning evaluation criteria and procedures**

(1) Except for the criteria set out in paragraph (4) of this article, the evaluation criteria shall relate to the subject matter of the procurement.

(2) The evaluation criteria may include:

(a) The price;

(b) The cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the characteristics of the subject matter of the procurement, such as the functional characteristics of goods or construction and the environmental characteristics of the

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<sup>64</sup> The accompanying Guide text will explain that the requirements may include those relevant to environment protection or other socio-economic policies of the enacting State.

<sup>65</sup> The accompanying Guide text will note the importance of ensuring that the description is sufficiently precise (A/CN.9/690, para. 125).

<sup>66</sup> The accompanying Guide text will explain that the relevant technical and quality characteristics or the performance characteristics may also cover characteristics relevant to environment protection or other socio-economic policies of the enacting State.

<sup>67</sup> The accompanying Guide text will explain that a brand name should be called out in a solicitation only where absolutely necessary, and if a brand name is called out, the solicitation should specify the salient features of the subject matter being sought, and should state specifically that the brand name item “or equivalent” may be offered.

<sup>68</sup> Amended pursuant to A/CN.9/690, para. 124.

subject matter,<sup>69</sup> the terms of payment and of guarantees in respect of the subject matter of the procurement;

(c) Where relevant in procurement conducted in accordance with articles [41, 43 and 44], experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement.

(3) All non-price evaluation criteria shall, to the extent practicable, be objective, quantifiable and expressed in monetary terms.<sup>70</sup>

(4) In addition to the criteria set out in paragraph (2), the evaluation criteria may include:

(a) Any criteria that the procurement regulations or other provisions of law of this State authorize or require to be taken into account (subject to approval by ... (the enacting State designates an organ to issue the approval));

(b) A margin of preference for the benefit of domestic suppliers or contractors or domestically produced goods, if authorized or required by the procurement regulations or other provisions of law of this State<sup>71</sup> [(and subject to approval by ... (the enacting State designates an organ to issue the approval))].<sup>72</sup> The margin of preference shall be calculated in accordance with the procurement regulations.<sup>73</sup>

(5) The procuring entity shall set out in the solicitation documents:<sup>74</sup>

(a) Whether the successful submission will be ascertained on the basis of price or of price and other criteria;<sup>75</sup>

(b) All evaluation criteria established pursuant to this article, including the price and any margin of preference;<sup>76</sup>

<sup>69</sup> The accompanying Guide text will explain that this paragraph allows the procuring entity to include characteristics such as the environmental character of the production line. More generic socio-economic policy considerations are addressed in articles 8, 9 and 10 and paragraph (4) of this article.

<sup>70</sup> The accompanying Guide text will explain that expressing all non-price evaluation criteria in monetary terms in the request for proposals with dialogue proceedings (article 43 of the current draft) would not be practicable.

<sup>71</sup> Aligned with the relevant wording in the definition "Socio-economic policies" (A/CN.9/690, para. 106. See, also, footnotes 24-27 above). See however the immediately following footnote.

<sup>72</sup> The Working Group is invited to consider whether the words in square brackets should be retained. It may wish to note a close link of these provisions with the definition "Socio-economic policies" where these words do not appear.

<sup>73</sup> The accompanying Guide text will cross-refer to the article regulating the documentary record of procurement proceeding that require putting on the record the relevant information on the use of a margin of preference in the given procurement.

<sup>74</sup> The accompanying Guide text will cross-refer to the corresponding provisions in the articles regulating the contents of solicitation documents in the context of each procurement method.

<sup>75</sup> The accompanying Guide text will explain that the solicitation documents must make it clear whether the selection will be on the basis of the lowest priced submission or the most advantageous submission, as appropriate.

<sup>76</sup> The phrase "price subject to any margin of preference" was replaced with "price and any margin of preference" in this and the following subparagraphs.

(c) Where any criteria other than price are to be used in the evaluation procedure, the relative weights of all evaluation criteria, including price and any margin of preference, except where the procurement is conducted under article [43], in which case the procuring entity shall list all evaluation criteria in descending order of importance;<sup>77</sup>

(d) The manner of application of the criteria in the evaluation procedure.

(6) In evaluating submissions and determining the successful submission, the procuring entity shall use only those criteria and procedures that have been set out in the solicitation documents, and shall apply those criteria and procedures in the manner that has been disclosed in those solicitation documents. No criterion or procedure shall be used that has not been set out in accordance with this provision.

#### **Article 12. Rules concerning estimation of the value of procurement<sup>78</sup>**

(1) A procuring entity shall neither divide its procurement nor use a particular valuation method for estimating the value of procurement so as to limit competition among suppliers or contractors or otherwise avoid obligations under this Law.

(2) In estimating the value of procurement, the procuring entity shall include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers or contractors, taking into account all forms of remuneration.<sup>79, 80</sup>

<sup>77</sup> The accompanying Guide text will explain that this provision is intended to ensure full transparency, so that suppliers will be able to see how their submissions will be evaluated. It will also explain that a basket of non-price criteria will normally include some quantifiable and objective criteria (such as maintenance costs) and some subjective elements (the relative value that the procuring entity places on speedy delivery or green production lines, for example), amalgamated into an overall quality ranking. Thus for procurement not involving negotiations, the procuring entity has to disclose both how the non-price basket factors will weigh, and how the basket will weigh against price. The accompanying Guide text will also explain the importance of setting out the appropriate level of detail of the evaluation criteria, and will cross-refer to the provisions of article 43 that require listing the evaluation criteria in descending order of importance in competitive dialogue proceedings where it is often not possible to establish the relative weight of evaluation criteria at the outset of the procurement. It will also discuss how a margin of preference is generally applied in practice, and will examine the merits and demerits of the possible alternative approaches.

<sup>78</sup> The accompanying Guide text will explain that the provisions of the article are in particular relevant in the context of low-value procurement (see articles 21 and 29 bis (4) of the current draft), restricted tendering and request for quotations proceedings.

<sup>79</sup> The accompanying Guide text will explain that in procurement that provides for the possibility of option clauses, the estimated value under the article will refer to the estimated maximum total value of the procurement, inclusive of optional purchases, as this is regulated in the respective provisions of the WTO GPA (article II.2 and 3 of the 1994 version and article II.6 of the 2006 version).

<sup>80</sup> The accompanying Guide text will explain that estimates are to be used primarily for internal purposes of the procuring entity (A/CN.9/690, para. 127). The intersessional consultations concluded that prohibiting revealing such estimates to suppliers in all cases, as suggested in the second part of paragraph 127 of A/CN.9/690, would be unjustifiable.

**Article 13. Rules concerning the language of documents**

- (1) The prequalification documents, if any, and the solicitation documents shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade unless decided otherwise by the procuring entity in a domestic procurement).
- (2) Applications to pre-qualify, if any, and submissions may be formulated and presented in the language of the prequalification documents, if any, and solicitation documents, respectively, or in any other language permitted by those documents.

**(A/CN.9/WG.I/WP.75/Add.2) (Original: English)**  
**Note by the Secretariat on possible revisions to the UNCITRAL Model**  
**Law on Procurement of Goods, Construction and Services - a revised**  
**text of the Model Law, submitted to the Working Group on**  
**Procurement at its nineteenth session**

**ADDENDUM**

This note sets out a proposal for articles 13 bis-23 bis of chapter I (General provisions).

The Secretariat's comments are set out in the accompanying footnotes.

**CHAPTER I. GENERAL PROVISIONS**  
*(continued)*

**Article 13 bis. Rules concerning the manner, place and deadline  
for presenting applications to pre-qualify or submissions<sup>1</sup>**

(1) The manner, place and deadline for presenting applications to pre-qualify shall be set out in the invitation to pre-qualify and the pre-qualification documents. The manner, place and deadline for presenting submissions shall be set out in the solicitation documents.

(2) The deadlines for presenting applications to pre-qualify or submissions shall be expressed as a specific date and time and shall allow sufficient time for suppliers or contractors to prepare and present their applications or submissions, taking into account the reasonable needs of the procuring entity.

(3) If the procuring entity issues a clarification or modification of the pre-qualification or solicitation documents, it shall, prior to the deadline for presenting applications to pre-qualify or submissions, extend the deadline if necessary or as required under article [14 (3)] of this Law, in order<sup>2</sup> to afford suppliers or contractors sufficient time to take the clarification or modification into account in their applications or submissions.<sup>3</sup>

(4) The procuring entity may, in its absolute discretion, prior to the deadline for presenting applications to pre-qualify or submissions, extend the deadline if it is not

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<sup>1</sup> The accompanying Guide text will state that: (i) the mechanism for presenting submissions must be reasonably accessible to suppliers; (ii) the procurement regulations will specify a minimum period for presenting submissions for each procurement method (reference in this regard may be made to the provisions of article XI.2 of the 1994 version, and article XI.3 of the 2006 version, of GPA, for open procedures that requires the period to be not less than 40 days); (iii) such a period must be sufficiently long in international and complex procurement to allow suppliers reasonable time to prepare their submissions; and (iv) failures in electronic presentation of submissions and the allocation of risks are to be addressed in procurement regulations or other appropriate forum (A/CN.9/690, para. 129).

<sup>2</sup> Amended further to introduction of new article 14 (3).

<sup>3</sup> The accompanying Guide text will explain that this provision also intends to cover any new suppliers that may decide to join as a result of amendments made.

possible for one or more suppliers or contractors to present their applications or submissions by the deadline owing to any circumstance beyond their control.

(5) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the pre-qualification or solicitation documents.<sup>4</sup>

#### **Article 14. Clarifications and modifications of solicitation documents<sup>5</sup>**

(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 presenting submissions. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely presentation of submissions 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 presenting submissions, 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 as a result of a clarification or modification issued in accordance with this article, the information published when first soliciting the participation of suppliers or contractors in the procurement proceedings becomes materially inaccurate, the procuring entity shall cause the amended information to be published in the same manner and place in which the original information was published, and shall extend the deadline for presentation of submissions as provided for in article [13 bis (3)] of this Law.<sup>6</sup>

(4) 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 submissions.

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<sup>4</sup> The accompanying Guide text will cross-refer to the provisions on material changes to those documents in article 14 (3).

<sup>5</sup> The accompanying Guide text will make it clear that any obligation of the procuring entity to debrief individual suppliers or contractors would arise to the extent that the identities of the suppliers or contractors are known to the procuring entity.

<sup>6</sup> New paragraph inserted pursuant to A/CN.9/690, paras. 98 and 130.

**Article 15. Tender securities<sup>7</sup>**

(1) When the procuring entity requires suppliers or contractors presenting submissions to provide a tender security:

(a) The requirement shall apply to all 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. In cases of domestic procurement, the solicitation documents may in addition stipulate that the tender security shall be issued by an issuer in this State;

(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 out in the solicitation documents, unless:

(i) The acceptance by the procuring entity of such a tender security would be in violation of a law of this State; or

(ii) The procuring entity in cases of domestic procurement requires a tender security to be issued by an issuer in this State;

(d) Prior to presenting a submission, 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 presenting the submission may relate only to:

(i) Withdrawal or modification of the submission after the deadline for presenting submissions, or before the deadline if so stipulated in the solicitation documents;

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<sup>7</sup> The accompanying Guide text will refer to the use in some jurisdictions of alternatives to a tender security, such as a bid securing declaration that the procuring entity may, in appropriate cases, require all suppliers or contractors to sign in lieu of requiring them to furnish tender securities. Under this type of declaration, the supplier or contractor agrees to submit to sanctions, such as disqualification from subsequent procurement, for the contingencies that normally are secured by a tender security. Sanctions, however, should not include debarment since the latter should not be concerned with commercial failures. These alternatives aim at promoting more competition in procurement, by increasing participation in particular of small- and medium-sized enterprises that otherwise might be prevented from participation because of formalities and expenses involved in connection with presentation of a tender security.

- (ii) Failure to sign the procurement contract if required by the procuring entity to do so; and
  - (iii) Failure to provide a required security for the performance of the contract after the successful submission 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 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 cancellation of the procurement;<sup>8</sup>
  - (d) The withdrawal of the submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

#### **Article 16. Pre-qualification proceedings**

- (1) The procuring entity may engage in pre-qualification proceedings with a view to identifying, prior to the solicitation, suppliers and contractors that are qualified. The provisions of article [9] of this Law shall apply to pre-qualification proceedings.
- (2) If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to pre-qualify is to be published).<sup>9</sup> Unless decided otherwise by the procuring entity in domestic procurement, the invitation to pre-qualify 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 or professional journal of wide international circulation.

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<sup>8</sup> Reference to “termination of the procurement proceedings without the entry into force of a procurement contract” was replaced with a reference to “the cancellation of the procurement” as a result of the amendments made to article 17 (1) of this draft.

<sup>9</sup> The accompanying Guide text to these and similar provisions throughout the Model Law will note that reference to the official gazette shall be interpreted according to the principle of the functional equivalence between paper- and non-paper means and media of information and thus may encompass any non-paper official gazette used in an enacting State or group of States, such as in the European Union. The Guide will cross-refer in this respect to the relevant discussion that will accompany article 5 on publication of legal texts.



- (3) The invitation to pre-qualify shall include the following information:
- (a) The name and address<sup>10</sup> of the procuring entity;
  - (b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into as a result of the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;
  - (c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article [9] of this Law;
  - (d) A declaration to be made in accordance with article [8] of this Law;
  - (e) The means of obtaining the pre-qualification documents and the place where they may be obtained;
  - (f) The price, if any, charged by the procuring entity for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents;
  - (g) If the price is charged, the means of payment for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents, and the currency of payment;<sup>11</sup>
  - (h) The language or languages in which the pre-qualification documents and, subsequent to pre-qualification, the solicitation documents are available;<sup>12</sup>
  - (i) The manner, place and deadline for presenting applications to pre-qualify and, if already known, the manner, place and deadline for presenting submissions, in conformity with article [13 bis] of this Law.
- (4) The procuring entity shall provide a set of pre-qualification documents to each supplier or contractor that requests them in accordance with the invitation to pre-qualify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the pre-qualification documents shall reflect only the cost of providing them to suppliers or contractors.<sup>13</sup>

<sup>10</sup> The accompanying Guide text to this and other provisions where reference to “address” is found will explain that the term intends to refer to the physical registered location as well as any other pertinent contact details (telephone numbers, e-mail address, etc. as appropriate), and that this term should be interpreted so consistently notwithstanding whether reference is to the address of the procuring entity or the address of a supplier or contractor.

<sup>11</sup> Amended pursuant to A/CN.9/690, para. 22 (b). The accompanying Guide text will note that the procuring entity may decide not to include reference to the currency of payment in domestic procurement, if it would be unnecessary in the circumstances.

<sup>12</sup> Amended pursuant to A/CN.9/690, para. 22 (b). The accompanying Guide text will note that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, and will add that an indication of the language or languages may still be important in some multilingual countries.

<sup>13</sup> The accompanying Guide text to this and similar provisions throughout the Model Law will make it clear that development costs (including consultancy fees and advertising costs) are not to be recovered through this provision and that the costs should be limited to the minimal charges of providing the documents (and printing them, where appropriate).

- (5) The pre-qualification documents shall include the following information:
- (a) Instructions for preparing and presenting pre-qualification applications;
  - (b) Any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;
  - (c) 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 pre-qualification proceedings, without the intervention of an intermediary;
  - (d) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the pre-qualification proceedings and the place<sup>14</sup> where these laws and regulations may be found;
  - (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 presentation of applications to pre-qualify and to the pre-qualification proceedings.
- (6) The procuring entity shall respond to any request by a supplier or contractor for clarification of the pre-qualification documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting applications to pre-qualify. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely presentation of its application to pre-qualify. 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 has provided the pre-qualification documents.
- (7) The procuring entity shall take a decision with respect to the qualifications of each supplier or contractor presenting an application to pre-qualify. In reaching that decision, the procuring entity shall apply only the criteria and procedures set out in the invitation to pre-qualify and in the pre-qualification documents.
- (8) Only suppliers or contractors that have been pre-qualified are entitled to participate further in the procurement proceedings.
- (9) The procuring entity shall promptly notify each supplier or contractor presenting an application to pre-qualify whether or not it has been pre-qualified. It shall also make available to any member of the public, upon request, the names of all suppliers or contractors that have been pre-qualified.<sup>15</sup>
- (10) The procuring entity shall promptly communicate to each supplier or contractor that has not been pre-qualified the reasons therefor.

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<sup>14</sup> The accompanying Guide text will explain that the place refers not to the physical location but rather to an official publication, portal, etc. where authoritative texts of laws and regulations of the enacting State are made available to the public and systematically maintained.

<sup>15</sup> The accompanying Guide text will cross-refer to the article on confidentiality that contains exceptions to the public disclosure.

**Article 17. Cancellation of the procurement<sup>16</sup>**

(1) The procuring entity may cancel the procurement at any time prior to the acceptance of the successful submission and, after the successful submission was accepted, in the circumstances referred to in article [20 (8)] of this Law.<sup>17</sup> The procuring entity shall not open any tenders or proposals after taking a decision to cancel the procurement.

(2) The decision of the procuring entity to cancel the procurement and reasons for the decision shall be included in the record of the procurement proceedings and<sup>18</sup> promptly communicated to any supplier or contractor that presented a submission. The procuring entity shall in addition promptly publish a notice of the cancellation of the procurement in the same manner and place in which the original information regarding the procurement proceedings was published, and return any tenders or proposals that remain unopened at the time of the decision to the suppliers or contractors that presented them.

(3) Unless the cancellation of the procurement was a consequence of irresponsible or dilatory conduct on the part of the procuring entity, the procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have presented submissions.<sup>19</sup>

**Article 18. Rejection of abnormally low submissions**

(1) The procuring entity may reject a submission if the procuring entity has determined that the price in combination with other constituent elements of the submission is abnormally low in relation to the subject matter of the procurement and raises concerns with the procuring entity as to the ability of the supplier or contractor that presented that submission to perform the procurement contract, provided that the procuring entity has taken the following actions:

(a) The procuring entity has requested in writing from the supplier or contractor details of the submission that gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;

(b) The procuring entity has taken account of any information provided by the supplier or contractor following this request, and the information included in the

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<sup>16</sup> The accompanying Guide text will explain that the purpose of the article is to draw the right balance between the discretion of the procuring entity to cancel the procurement at any stage of the procurement process covered by the Model Law and the need to accord appropriate protection to the market against irresponsible acts by the procuring entities, such as the abuse of discretion to cancel procurements to investigate market conditions. It will also state that, although the article does not address issues of damages and other remedies, it has implications for the review provisions in chapter VIII of the Model Law.

<sup>17</sup> Amended pursuant to A/CN.9/690, para. 133.

<sup>18</sup> The reference to the record of procurement proceedings was retained without square brackets pursuant to A/CN.9/690, para. 134.

<sup>19</sup> The accompanying Guide text will explain that the opening phrase also covers unforeseeable events and that liability will arise in exceptional circumstances. It will also explain that the procuring entity may face liability for cancelling the procurement under other branches of law and that, although suppliers or contractors present their submissions at their own risk, and bear the related expenses, cancellation may give rise to liability towards suppliers or contractors whose submissions have been opened.

submission, but continues, on the basis of all such information, to hold concerns; and

(c) The procuring entity has recorded the concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.

(2) The decision of the procuring entity to reject a submission in accordance with this article and reasons for the decision shall be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.<sup>20</sup>

**Article 19. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest<sup>21</sup>**

(1) A procuring entity shall exclude a supplier or contractor from the procurement proceedings if:

(a) The supplier or contractor 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, so as to influence an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings; or

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<sup>20</sup> The reference to the record of procurement proceedings was retained without square brackets pursuant to A/CN.9/690, para. 135.

<sup>21</sup> The accompanying Guide text will explain that the provisions of the article are subject to other branches of law of an enacting State where the issues of anti-corruption are regulated and are also without prejudice to any other sanctions, such as debarment, that may be applied to the supplier or contractor. The Guide in this context will cross-refer to article 3 of the Model Law and any available international standards against corrupt practices, in which context the Guide will explain that such standards may evolve, and will encourage enacting States to consider the relevant standards applicable at the time of enactment of the Model Law. The Guide will also emphasize that the article was intended to be consistent with those international standards and to outlaw any corrupt practices regardless of their form and how they were defined (A/CN.9/690, para. 136). While emphasizing the need to cross-refer to other branches of law in order to avoid unnecessary confusion, inconsistencies and incorrect perceptions about anti-corruption policies of an enacting State, the Guide will caution that such cross-referencing should not inadvertently convey the erroneous meaning that a criminal conviction would be a pre-requisite for exclusion of the supplier or contractor under this article. The Guide will also address: (i) applicable standards (e.g. consultants involved in drafting the solicitation documents should be prohibited from participating in the procurement proceedings where those documents are used); (ii) difficulties with establishing the fact of corruption as opposed to a bribe as the former might consist of a chain of actions over time rather than a single action; (iii) that combining provisions on conflicts of interest (which refer to a situation) and corruption (which is a wrongdoing) may lead to confusion, and should be avoided; and (iv) how the situation of a subsidiary would be treated.

(b) The supplier or contractor has an unfair competitive advantage or a conflict of interest in violation of applicable standards.<sup>22</sup>

(2) Any decision of the procuring entity to exclude a supplier or contractor from the procurement proceedings under this article and the reasons therefor shall be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.<sup>23</sup>

#### **Article 20. Acceptance of the successful submission and entry into force of the procurement contract**

(1) The procuring entity shall accept the successful submission unless:

(a) The procurement is cancelled in accordance with article [17 (1)] of this Law; or

(b) The supplier or contractor presenting the successful submission is disqualified in accordance with article [9] of this Law; or

(c) The supplier or contractor presenting the successful submission is excluded from the procurement proceedings on the grounds specified in article [19] of this Law; or

(d) The submission found successful at the end of evaluation is rejected as abnormally low under article [18] of this Law.<sup>24</sup>

(2) The procuring entity shall promptly notify each supplier or contractor that presented submissions<sup>25</sup> of its decision to accept the successful submission at the end of the standstill period. The notice shall contain, at a minimum, the following information:

(a) The name and address of the supplier or contractor presenting the successful submission;

(b) [The contract price]<sup>26</sup> or, where the successful submission was ascertained on the basis of price and other criteria, [the contract price]<sup>27</sup> and a

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<sup>22</sup> The accompanying Guide text will explain the reference to standards and stress that those standards evolve over time. The Guide will also address issues of unjustified rejection and the need for the establishment of a process including a dialogue between the procuring entity and an affected supplier or contractor to discuss potential conflicts of interest, drawing on the provisions of article 18 regulating procedures for investigating abnormally low submissions.

<sup>23</sup> The reference to the record of procurement proceedings was retained without square brackets pursuant to A/CN.9/690, para. 137.

<sup>24</sup> Cross-references to articles 18 and 19 were added. The paragraph was also aligned with article 51 of the current draft.

<sup>25</sup> The phrase “that presented submissions” replaced the phrase “whose submission was examined” as more accurate especially in the procurement where no separate examination of submissions may take place, e.g. in auctions (see chapter VI of the current draft).

<sup>26</sup> See the footnote to the same term in article 21 below.

<sup>27</sup> Ibid.

summary of other characteristics and relative advantages of the successful submission;<sup>28</sup> and

(c) The duration of the standstill period as set out in the solicitation documents, which shall be at least ... working days (the enacting State specifies the period of time)<sup>29</sup> and shall run from the date of the dispatch of the notice under this paragraph to all suppliers or contractors whose submissions were examined.

(3) Paragraph (2) of this article shall not apply to awards of procurement contracts:

(a) Under a framework agreement procedure without second stage competition;<sup>30</sup>

(b) Where the contract price is less than ... (the enacting State specifies a threshold);<sup>31</sup> or

(c) Where the procuring entity determines that urgent public interest considerations require the procurement to proceed without a standstill period.<sup>32</sup> The decision of the procuring entity that such urgent considerations exist and the reasons

<sup>28</sup> The accompanying Guide text will cross-refer to the discussion in the Guide on debriefing of unsuccessful suppliers or contractors. The Guide text on debriefing will explain reasons for addressing the issues of debriefing only in the Guide but not in the Model Law, in particular that debriefing procedures vary significantly not only from jurisdiction to jurisdiction but also from procurement to procurement, and that provisions on debriefing are not easily enforceable (A/CN.9/687, para. 93).

<sup>29</sup> Amended pursuant to A/CN.9/690, paras. 87 and 138. The Guide will explain the considerations that should be taken into account in establishing the minimum duration of the standstill period in the Law, including the impact that the duration of the standstill period would have on overall objectives of the revised Model Law as regards transparency, accountability, efficiency and equitable treatment of suppliers or contractors. Although the impact of a lengthy standstill period on the costs would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate, the Guide will note that the period should be sufficiently long to enable any challenge to the proceedings to be filed. The Guide would also draw attention of the enacting State that the period of time of a short duration should be established in working days; in other cases, it may be established in calendar days (A/CN.9/690, para. 87).

<sup>30</sup> Amended to align with the respective definition in article 2.

<sup>31</sup> The accompanying Guide text will draw the attention of an enacting State to the thresholds found in other provisions of the Model Law referring to low-value procurement, such as those justifying an exemption from the requirement of public notice of the procurement contract award (article 21 (2) of the current draft), an exemption from the requirement of international solicitation (article 29 bis (4) of the current draft) and recourse to request for quotations proceedings (article 26 (2) of the current draft). The threshold in this provision may be aligned with them. The Working Group's attention is drawn in this regard to the provisions of article 26 (2) of the current draft where it is envisaged that the threshold amount will be set out in the procurement regulations rather than in the Model Law itself. The Working Group may wish to decide that the same approach should be followed in this provision and in article 21 (2) of the current draft, in particular in the light of the fluctuating value of currencies (inflation, etc.).

<sup>32</sup> In the light of the similar provisions found in chapter VIII in the context of the suspension of the procurement proceedings (article 65), the Guide will elaborate on the appropriate considerations, which may differ, to justify an exemption under this provision and under article 65.

for the decision shall be included in the record of the procurement proceedings<sup>33</sup> [and shall be conclusive with respect to all levels of review under chapter VIII of this Law except for judicial review].<sup>34</sup>

(4) Upon expiry of the standstill period, or where there is none, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor that presented that submission, unless a competent court or ... (the enacting State designates the relevant organ) orders otherwise.

(5) Unless a written procurement contract and/or approval by a higher authority is/are required, a procurement contract in accordance with the terms and conditions of the successful submission enters into force when the notice of acceptance is dispatched to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in effect.

(6) Where the solicitation documents require the supplier or contractor whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the accepted submission:

(a) The procuring entity and the supplier or contractor concerned shall sign the procurement contract within a reasonable period of time after the notice of acceptance is dispatched to the supplier or contractor concerned;

(b) Unless the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract enters into force when the contract is signed by the supplier or contractor concerned and by the procuring entity. Between the time when the notice of acceptance is dispatched to the supplier or contractor concerned and the entry into force of the procurement contract, neither the procuring entity nor that supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(7) 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 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 submissions specified in the solicitation documents or the period of effectiveness of the tender security required under article [15] of this Law.

(8) If the supplier or contractor whose submission has been accepted fails to sign any written procurement contract as required, or fails to provide any required security for the performance of the contract, the procuring entity may either cancel the procurement, or may decide to select a successful submission, in accordance with the criteria and procedures set out in this Law and in the solicitation

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<sup>33</sup> The reference to the record of procurement proceedings was retained without square brackets pursuant to A/CN.9/690, para 138.

<sup>34</sup> The Working Group is invited to reconsider this provision in the light of the broad powers given to the administrative review body under chapter VIII of the Model Law. It may wish to note that similar provisions are to be considered in the context of article 65 of the current draft.

documents, from among the remaining submissions still in effect.<sup>35</sup> In the latter case, the provisions of this article shall apply *mutatis mutandis* to such submission.

(9) Notices under this article are dispatched when they are promptly and 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 any reliable means specified in accordance with article [7] of this Law.

(10) 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 promptly 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].<sup>36</sup>

#### **Article 21. Public notice of awards of procurement contract and framework agreement**

(1) Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name(s) of the supplier(s) or contractor(s) to whom the procurement contract or the framework agreement was awarded [and the contract price].<sup>37</sup>

(2) Paragraph (1) is not applicable to awards where the contract price is less than ... (the enacting State specifies a threshold).<sup>38</sup> The procuring entity shall publish a cumulative notice of such awards from time to time but at least once a year.

(3) The procurement regulations shall<sup>39</sup> provide for the manner of publication of the notices required by this article.

#### **Article 22. Confidentiality**

(1) In its communications with suppliers or contractors or the public, the procuring entity shall not disclose any information [if its non-disclosure is necessary

<sup>35</sup> The provisions have been revised to align them with the similar wording appearing in article 37 (7) of the current draft.

<sup>36</sup> See the footnote to the same term in article 21 below.

<sup>37</sup> Reference to the contract price was inserted as a result of the intersessional consultations and in the light of provisions in articles 20 (2) (b) and (10) and 23 (3) of the current draft. The Working Group may wish to recall in this context that the arguments against disclosing the winning price were put forward to the Working Group in the context of ERAs (to prevent collusion in subsequent ERAs, in particular). If the Working Group finds these arguments still persuasive, then restrictions on the public disclosure of the winning price should be consistently imposed in articles 20 (2) (b) and (10) and 23 (3).

<sup>38</sup> See the relevant footnote to the provisions of article 20 (3) (b) of the current draft. The accompanying Guide text will note that there is no exemption applicable to the conclusion of a framework agreement.

<sup>39</sup> Amended pursuant to A/CN.9/690, para. 139. The accompanying Guide text will suggest minimum standards for publication of this type of information.



for the protection of essential security interests of the State<sup>40</sup> or] if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition,<sup>41</sup> unless disclosure of that information is ordered by the competent court or ... (the enacting State designates the relevant organ) and in such case, subject to the conditions of such an order.

(2) Other than when providing or publishing information pursuant to<sup>42</sup> articles [20 (2) and (10), 21, 23 and 36] of this Law, the procuring entity shall treat applications to pre-qualify and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors or to any other person not authorized to have access to this type of information.<sup>43</sup>

(3) Any discussions, communications,<sup>44</sup> negotiations and dialogue between the procuring entity and a supplier or contractor pursuant to articles [42 (3) and 43 to 46] of this Law shall be confidential. Unless required by law or ordered by the competent court or ... (the enacting State designates the relevant organ) or permitted in the solicitation documents, no party to any discussions, communications, negotiations or dialogue shall disclose to any other person any technical, price or other information relating to these discussions, communications,<sup>45</sup> negotiations or dialogue without the consent of the other party.

(4) In procurement involving classified information, the procuring entity may decide or may be required to:

- (a) Withhold classified information from public disclosure;
- (b) Impose on suppliers or contractors requirements aimed at protecting classified information; and
- (c) Demand that suppliers or contractors ensure compliance with requirements aimed at protecting classified information by their subcontractors.

<sup>40</sup> The phrase in square brackets replaces the earlier references to “essential national security or essential national defence” and to the “public interest”. Both were found problematic in the Working Group (A/CN.9/690, paras. 140 and 141) as well as during the intersessional consultations. The current wording draws on the wording found in article XXIII.1 of the 1994 version of the GPA and article III.1 of the 2006 version of the GPA. The accompanying Guide text will explain that the essential security interests of the State could relate “to procurement indispensable for national security or for national defence purposes” and “relating to the procurement of arms, ammunition, or war materials” (the GPA wording) but not only (e.g. in the health sector, procurement involving medical research experiment or procurement of vaccines during pandemics). Cross-reference in this regard will be made to the discussion in the Guide applicable to the classified information (see the accompanying footnote to the definition of “procurement involving classified information” in article 2).

<sup>41</sup> The accompanying Guide text will explain that the phrase “to impede fair competition” should be interpreted as encompassing the risks of hampering competition not only in the procurement proceedings in question but also in subsequent procurements (A/CN.9/668, para. 131).

<sup>42</sup> Amended pursuant to A/CN.9/690, para. 142.

<sup>43</sup> The Guide will explain the ambit of this reference as referring to any third party outside the procuring entity (including a member of a bid committee), other than any oversight, review or other competent body authorized to have access to information in question under applicable provisions of law of the enacting State.

<sup>44</sup> Amended pursuant to A/CN.9/690, para. 142.

<sup>45</sup> Ibid.

### Article 23. Documentary record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings that includes the following information:

- (a) A brief description of the subject matter of the procurement;
- (b) The names and addresses of suppliers or contractors that presented submissions, and the name(s) and address(es) of the supplier(s) or contractor(s) with whom the procurement contract is entered into and [the contract price]<sup>46</sup> (in the case of a framework agreement procedure, in addition the name(s) and address(es) of the supplier(s) or contractor(s) with whom the framework agreement is concluded);
- (c) A statement of the reasons and circumstances relied upon by the procuring entity for the decision as regards means of communication and any requirement of form;
- (d) In the procurement proceedings in which the procuring entity, in accordance with article [8] of this Law, limits participation of suppliers or contractors, a statement of the reasons and circumstances relied upon by the procuring entity for imposing the limitation;
- (e) If the procuring entity uses a method of procurement other than open tendering, a statement of the reasons and circumstances relied upon by the procuring entity for the use of such other method;
- (f) [deleted]<sup>47</sup>
- (g) In the case of procurement by means of an auction or involving an auction as a phase preceding the award of the procurement contract, a statement of the reasons and circumstances relied upon by the procuring entity for the use of the auction, information about the date and time of the opening and closing of the auction, and the reasons and circumstances on which the procuring entity relied to justify any rejection of bids presented during the auction;
- (h) If the procurement is cancelled pursuant to article [17 (1)] of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision to cancel the procurement;
- (i) [deleted]<sup>48</sup>

<sup>46</sup> To be considered with reference to the footnote to the term “contract price” in article 21 above, for which purpose it should be read together with paragraph (2) of this article.

<sup>47</sup> The deleted wording corresponds to articles 11 (1) (j) and 41 (2) of the 1994 Model Law. In the current draft, the procuring entity is required to include in the record the reasons and circumstances relied upon by the procuring entity for the use of any procurement method other than open tendering (article 25 (3) of the current draft). The Working Group has not so far discussed the need to justify in addition the reasons and circumstances relied upon by the procuring entity for the use of the specific procurement method under chapter V. The Secretariat’s understanding is that no such additional justification for the selection of a procurement method among those under chapter V would be needed.

<sup>48</sup> The text reading “If the procurement proceedings did not result in a procurement contract, a statement to that effect and of the reasons therefore” was deleted since the preceding subparagraph encompasses it in the light of the amendments made in article 17 (1).

- (j) If the procurement proceedings resulted in the award of a procurement contract in accordance with article [20 (8)] of this Law, a statement to that effect and of the reasons therefor;
- (k) A summary of any requests for clarification of the pre-qualification documents, if any, or solicitation documents, the responses thereto, as well as a summary of any modification of those documents;
- (l) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented applications to pre-qualify, if any, or submissions;
- (m) [The price],<sup>49</sup> or the basis for determining the price, and a summary of the other principal terms and conditions of each submission and of the procurement contract, where these are known to the procuring entity (in the case of a framework agreement procedure, in addition a summary of the principal terms and conditions of the framework agreement);
- (n) A summary of the evaluation<sup>50</sup> of submissions, including the application of any margin of preference pursuant to article [11 (4) (b)] of this Law;
- (o) If any socio-economic factors were considered in the procurement proceedings, information about such factors and the manner in which they were applied;
- (p) If the submission is rejected pursuant to article [18] of this Law or the supplier or contractor is excluded from the procurement proceedings pursuant to article [19] of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision;
- (q) If no standstill period was applied, a statement of the reasons and circumstances relied upon by the procuring entity for non-application of a standstill period in accordance with article [20 (3)] of this Law;
- (r) In the case of review in conjunction with the procurement proceedings under chapter VIII of this Law, a summary of the complaint and of the review proceedings and the decision<sup>51</sup> taken at each level of the review;
- (s) In procurement involving classified information, a statement of the reasons and circumstances relied upon by the procuring entity for measures and requirements taken for the protection of the classified information, including any exemptions from the provisions of this Law calling for public disclosure;
- (t) Other information required to be included in the record in accordance with the provisions of this Law or the procurement regulations.<sup>52</sup>

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<sup>49</sup> To be considered with reference to the footnote to the term “contract price” in article 21 above, for which purpose it should be read together with paragraph (3) of this article.

<sup>50</sup> Amended pursuant to A/CN.9/690, para. 18.

<sup>51</sup> Amended pursuant to A/CN.9/690, para. 75.

(2) The portion of the record referred to in subparagraphs (a) to (f)<sup>53</sup> of paragraph (1) of this article shall, on request, be made available to any person after the successful submission has been accepted<sup>54</sup> or the procurement has been cancelled.<sup>55, 56</sup>

(3) Except as disclosed pursuant to article [36 (3)] of this Law, the portion of the record referred to in subparagraphs (g) to (p)<sup>57</sup> of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that presented submissions<sup>58</sup> after the decision on acceptance of the successful submission or on cancellation of the procurement has become known to them.<sup>59, 60</sup> Disclosure of the portion of the record referred to in subparagraphs (k) to (n)<sup>61</sup> may be ordered at an earlier stage only by a competent court or ... (the enacting State designates the relevant organ).<sup>62</sup>

<sup>52</sup> The Secretariat included a “catch-all” provision in the end of the list, which should ensure that all significant decisions in the course of the procurement proceedings and reasons therefor would have to be put on the record. The accompanying Guide text will refer to the decisions to be recorded pursuant to the relevant provisions of the Model Law, such as those related to the choice of direct solicitation when the choice between open and direct solicitations exists, or the decision and reasons for limiting participation in the auctions and open framework agreements on the ground of technological constraints. In addition, it will also refer to information that may be required to be included in the record under the procurement regulations. See, in this regard, the issues raised in A/CN.9/WG.I/WP.68/Add.1, section H, as regards some information not listed in the 1994 Model Law which may be worth adding in the record.

<sup>53</sup> See the footnote to the term “contract price” in article 21 above.

<sup>54</sup> Amended pursuant to A/CN.9/690, para. 143.

<sup>55</sup> The phrase “the procurement has been cancelled” replaced the wording in the previous drafts “after procurement proceedings have been terminated without resulting in a procurement contract (in the case of a framework agreement procedure, after the procurement proceedings have been terminated without resulting in a framework agreement)”, in the light of the amendments made in article 17 (1) of the current draft.

<sup>56</sup> The accompanying Guide text will elaborate that this provision is without prejudice to paragraph (4) of this article that sets out in subparagraph (a) grounds that would allow the procuring entity exempt information from public disclosure and in subparagraph (b) information that cannot be publicly disclosed.

<sup>57</sup> See the footnote to the term “contract price” in article 21 above.

<sup>58</sup> The phrase “or applied for pre-qualification” was deleted here, to align the wording with the wording in article 20 (2) of the current draft that limits the pool of suppliers to those that presented submissions. The Secretariat’s understanding is that suppliers disqualified as a result of pre-qualification should not have access to information relevant to examination and evaluation of submissions. The reasons for their disqualification will be communicated to them in accordance with article 16 (10) and this should give them sufficient grounds for challenge under chapter VIII of the Model Law.

<sup>59</sup> The phrase “after the decision about acceptance of the successful submission has become known to them” replaced the earlier wording “after the successful submission has been accepted”, to allow effective review under article 20 (2) and the relevant provisions of chapter VIII of the Model Law.

<sup>60</sup> Reference to “decision about cancellation of the procurement” replaced the wording in the previous drafts “after procurement proceedings have been terminated without resulting in a procurement contract (in the case of a framework agreement procedure, after the procurement proceedings have been terminated without resulting in a framework agreement)”, in the light of the amendments made in article 17 (1) of this draft.

<sup>61</sup> See the footnote to the term “contract price” in article 21 above.

<sup>62</sup> Amended pursuant to A/CN.9/690, para. 143.

(4) Except when ordered to do so by a competent court or ... (the enacting State designates the relevant organ), and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information from the record of the procurement proceedings [if its non-disclosure is necessary for the protection of essential security interests of the State or]<sup>63</sup> if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition;

(b) Information relating to the examination and evaluation<sup>64</sup> of submissions, and submission prices, other than the summary referred to in subparagraph (n) of paragraph (1) of this article.

(5) The procurement entity shall record, file and preserve all documents relating to the procurement proceedings, according to procurement regulations or other provisions of law.<sup>65</sup>

### Article 23 bis. Code of conduct

A code of conduct for officers or employees of procuring entities shall be enacted. It shall address, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements. The code of conduct so enacted shall be promptly made accessible to the public and systematically maintained.<sup>66</sup>

<sup>63</sup> Amended pursuant to the amendments made to article 22 (1) of the current draft. The accompanying Guide text will cross-refer to the relevant discussion in the Guide in connection with the respective provisions in article 22.

<sup>64</sup> Amended pursuant to A/CN.9/690, para. 18.

<sup>65</sup> The accompanying Guide text will explain that the provisions intend to reflect a requirement in the United Nations Convention against Corruption that States parties must “take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of [their] domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents” (article 9 (3)). The Guide will also explain the need for preservation of documents, and cross-refer to any applicable rules on documentary records and archiving. If the enacting State considers that applicable internal rules and guidance should also be stored with the documents for a particular procurement, it could include those items in the regulations.

<sup>66</sup> The amended wording has been agreed upon during the intersessional consultations. The accompanying Guide text will cross-refer to article 5 (1) of this Law that addresses publicity of legal texts, and to other law that includes relevant codes of conduct (A/CN.9/690, para. 144). In this regard, it will also address the concerns raised by the concept of the “revolving door” (i.e. that public officials seek or are offered employment in the private sector by entities or individuals — potential participants in procurement proceedings) and so note that codes of conduct indirectly establish boundaries for the behaviour of private sector entities or individuals with public officials (A/CN.9/690, para. 145).

**(A/CN.9/WG.I/WP.75/Add.3) (Original: English)**

**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its nineteenth session**

**ADDENDUM**

This note sets out a proposal for chapter II (Methods of procurement and their conditions for use. Solicitation and notices of the procurement) of the revised Model Law (chapter II comprising articles 24-29 quater) and for chapter III (Open tendering) of the revised Model Law, comprising articles 30-38.

The Secretariat's comments are set out in the accompanying footnotes.

**CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE. SOLICITATION AND NOTICES OF THE PROCUREMENT**

**SECTION I. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE**

**Article 24. Methods of procurement\***

- (1) The procuring entity may conduct procurement by means of:
  - (a) Open tendering;
  - (b) Restricted tendering;
  - (c) Request for quotations;
  - (d) Request for proposals without negotiation;
  - (e) Two-stage tendering;
  - (f) Request for proposals with dialogue;
  - (g) Request for proposals with consecutive negotiations;
  - (h) Competitive negotiation;
  - (i) Auction;
  - (j) Single-source procurement.
- (2) The procuring entity may engage in a framework agreement procedure in accordance with the provisions of chapter VII of this Law.

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\* States may choose not to incorporate all these methods of procurement into their national legislation, though open tendering should always be provided for. On this question, see the Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/...).

**Article 25. General rules applicable to the selection  
of a procurement method**

- (1) Except as otherwise provided for in articles [26 to 28] of this Law, a procuring entity shall conduct procurement by means of open tendering.
- (2) A procuring entity may use a method of procurement other than open tendering only in accordance with articles [26 to 28] of this Law, and shall select the other method of procurement to accommodate the circumstances of the procurement concerned, and shall seek to maximize competition to the extent practicable.
- (3) If the procuring entity uses a method of procurement other than open tendering, it shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify the use of that method.<sup>1</sup>

**Article 26. Conditions for use of methods of procurement under chapter IV of  
this Law (restricted tendering, request for quotations and request for proposals  
without negotiation)**

- (1) The procuring entity may engage in procurement by means of restricted tendering in accordance with article [39] of this Law when:
  - (a) The subject matter of the procurement, by reason of its highly complex or specialized nature, is 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 subject matter of the procurement.
- (2) A procuring entity may engage in procurement by means of a request for quotations in accordance with article [40] of this Law for the procurement of readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the threshold amount set out in the procurement regulations.
- (3) The procuring entity may engage in procurement by means of request for proposals without negotiation in accordance with article [41] of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposals.<sup>2</sup>

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<sup>1</sup> This paragraph was retained without square brackets pursuant to A/CN.9/690, para. 147.

<sup>2</sup> The Working Group's tentative view was that this procurement method should not be treated as appropriate only for procurement of advisory or consultancy services (A/CN.9/687, para. 128). As the multilateral development banks recommend its use only for such services, the Working Group may wish to note that it can be so limited in the Guide to Enactment, which can also note that a tendering-based method could be used for other procurement.

**Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)<sup>3</sup>**

(1) <sup>4</sup>A procuring entity may engage in procurement by means of two-stage tendering in accordance with article [42] of this Law where the procuring entity assesses that discussions with suppliers or contractors are needed to refine aspects of the description of the subject matter of the procurement and to formulate them with the precision required under article [10] of this Law and in order to allow the procuring entity to obtain the most satisfactory solution to its procurement needs.

(2) (Subject to approval by ... (the enacting State designates an organ to issue the approval)),<sup>5</sup> a procuring entity may engage in procurement by means of request for proposals with dialogue in accordance with article [43] of this Law where:

(a) It is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement in accordance with article [10] of this Law, and the procuring entity assesses that dialogue with suppliers or contractors is needed to obtain the most satisfactory solution to its procurement needs;

(b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

<sup>3</sup> The Working Group has confirmed its understanding that in principle all procurement methods under the Model Law were available for all types of procurement (A/CN.9/687, para. 128). It was suggested that the accompanying Guide text would explain that the conditions for use in this article could not entirely address the considerations raised by the selection of the procurement method, and indeed that it might not be appropriate for them to do so. The selection may in practice not be amenable to challenge, and the main issue should be to enable structured decision-making on the part of the procuring entity and to manage the risks that such decisions may entail. The Guide will provide detailed commentary addressing the issues in selecting between the methods listed in articles 26 and 27 and among the methods listed in article 27, from the perspective both of legislators and of procuring entities. In addition, the guidance will address the elements of that choice that could not be addressed in a legislative text and will draw on real-life examples (A/CN.9/687, paras. 121-127).

<sup>4</sup> It is the Secretariat's understanding that a higher-level approval for the use of a procurement method under chapter V was discussed at the Working Group's eighteenth session only in the context of provisions addressing the request for proposals with dialogue and competitive negotiations (A/CN.9/690, paras. 152-155). The opening phrase, like the one appearing in paragraph (2) of this article, was not therefore included in this paragraph that addresses two-stage tendering.

<sup>5</sup> The opening phrase has been added pursuant to A/CN.9/690, para. 152. It will remain in the Model Law in round brackets (to indicate that it is optional for the enacting State). The accompanying Guide text will alert the enacting State that, in the light of the risks involved in the procurement method involving dialogue, the enacting State may require that recourse to such procurement method should be subject to approval by a higher-level authority. If it so decides, its national law should include the phrase without brackets.



(c) Where the procuring entity determines that the selected method is the most appropriate method of procurement for the protection of essential security interests of the State;<sup>6</sup> or

(d) When open tendering was engaged in but no tenders were presented or the procurement was cancelled by the procuring entity pursuant to article [17 (1)] of this Law<sup>7</sup> and when, in the judgement of the procuring entity, engaging in new open tendering proceedings or a procurement method under chapter IV of this Law would be unlikely to result in a procurement contract.<sup>8</sup>

(3) <sup>9</sup>A procuring entity may engage in procurement by means of request for proposals with consecutive negotiations in accordance with article [44] of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposals, and it assesses that consecutive negotiations with suppliers or contractors are needed in order to ensure that the financial terms and conditions of the procurement contract are acceptable to the procuring entity.

(4) A procuring entity may engage in competitive negotiations, in accordance with the provisions of article [45] of this Law, in the following circumstances:<sup>10</sup>

(a) There is an urgent need for the subject matter of the procurement, and engaging in open tendering proceedings or any other method of procurement because of the time involved in using those methods 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;

(b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use open tendering proceedings or any other method of procurement because of the time involved in using those methods;<sup>11</sup> and

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<sup>6</sup> Amended in order to align with the relevant wording in articles 22 (1) and 23 (4) (a) of the current draft.

<sup>7</sup> Amended pursuant to the amendments introduced in article 17 (1).

<sup>8</sup> The Working Group is invited to consider whether this last ground can also justify recourse to two-stage tendering. If so, the provisions of this subparagraph are also to be reflected under paragraph (1) of this article.

<sup>9</sup> It is the Secretariat's understanding that desirability of a higher-level approval for the use of a procurement method under chapter V was discussed at the Working Group's eighteenth session only in the context of provisions addressing the request for proposals with dialogue and competitive negotiations (A/CN.9/690, paras. 152-155). The opening phrase, like the one appearing in paragraph (2) of this article, was not therefore included in this paragraph that addresses request for proposals with consecutive negotiations.

<sup>10</sup> At its eighteenth session, the Working Group deferred consideration of suggestions to include a reference to a higher-level approval either in the text of the Model Law (in the chapeau of paragraph (4) or in subparagraph (c)) or in the Guide (A/CN.9/690, paras. 152 and 155).

<sup>11</sup> The accompanying Guide text will explain that the phrase excludes reference to single-source procurement.

(c) Where the procuring entity determines that the use of any other method of procurement is not appropriate for the protection of essential security interests of the State.<sup>12, 13</sup>

(5) A procuring entity may engage in single-source procurement in accordance with the provisions of article [46] of this Law in the following exceptional circumstances:

(a) The subject matter of the procurement is available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible;

(b) Owing to a catastrophic event, there is an extremely urgent need for the subject matter of the procurement, and engaging in any other method of procurement would be impractical because of the time involved in using those methods;<sup>14</sup>

(c) The procuring entity, having procured goods, equipment, technology or services 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, technology or services, 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 or services in question;

(d) Where the procuring entity determines that the use of any other method of procurement is not appropriate for the protection of essential security interests of the State;<sup>15</sup> or

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<sup>12</sup> Amended in order to align with the relevant wording in articles 22 (1) and 23 (4) (a) of the current draft.

<sup>13</sup> The accompanying Guide will explain that the provisions in subparagraphs (a) to (c) are without prejudice to the general principle contained in article 25 (2) according to which the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method. It is therefore understood that when an alternative to competitive negotiation, such as restricted tendering or request for quotations, is appropriate, the procuring entity must select such an alternative procurement method that would ensure most competition in the circumstances of the given procurement without jeopardizing other not less important considerations, such as urgency of delivery of the subject matter of the procurement.

<sup>14</sup> Revised pursuant to the deliberations at the Working Group's eighteenth session (A/CN.9/690, para. 34). The accompanying Guide text will explain that this provision is without prejudice to the general principle contained in article 25 (2) according to which the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method. It is therefore understood that when an alternative to single-source procurement, such as competitive negotiation, restricted tendering or request for quotations, is appropriate, the procuring entity must select such an alternative procurement method that would ensure most competition in the circumstances of the given procurement without jeopardizing, however, other not less important considerations, such as urgency of delivery of subject matter of the procurement.

<sup>15</sup> Amended in order to align with the relevant wording in articles 22 (1) and 23 (4) (a) of the current draft.

(e) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, where procurement from a particular supplier or contractor is necessary in order to implement a socio-economic policy of this State set out in the procurement regulations, provided that procurement from no other supplier or contractor is capable of promoting that policy.

#### **Article 28. Conditions for use of an<sup>16</sup> auction**

(1) A procuring entity may engage in procurement by means of an auction in accordance with the provisions of chapter VI of this Law, under the following conditions:

(a) Where it is feasible for the procuring entity to formulate a detailed and precise description of the subject matter of the procurement;

(b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the auction, such that effective competition is ensured; and

(c) Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.

(2) A procuring entity may use an auction as a phase preceding the award of the procurement contract in a procurement method as appropriate under the provisions of this Law. It may also use an auction for award of a procurement contract in a framework agreement procedure with second stage competition in accordance with the provisions of this Law.<sup>17</sup>

#### **Article 29. Conditions for use of a framework agreement procedure<sup>18, 19</sup>**

(1) A procuring entity may engage in a framework agreement procedure in accordance with chapter VII of this Law where it determines that:

(a) The need for the subject matter of the procurement is expected to arise on a [repeated or indefinite]<sup>20</sup> basis during a given period of time; or

<sup>16</sup> References to “electronic reverse” auctions have been removed, pursuant to A/CN.9/690, para. 39(a). See, also, the definition of the auction in article 2, which makes express reference to the fact that the auctions are held online and that they are reverse auctions.

<sup>17</sup> The article was split into two parts since the conditions set out in paragraph (1) would make it impossible to use ERAs as a phase in procurement methods under the Model Law. The text in this paragraph was amended pursuant to A/CN.9/690, para. 42 (b). The accompanying Guide text will elaborate on the procurement methods in which it would be appropriate to hold the auctions and on the procurement methods in which it would be inappropriate to do so.

<sup>18</sup> For lack of time the Working Group was not able to consider at its eighteenth session the provisions of this and the following articles up to article 41, of the draft Model Law.

<sup>19</sup> The article has been moved from chapter VII.

<sup>20</sup> One of the issues deferred by the Working Group was a proposal presented at the fifteenth session to reconsider the inclusion and extent of conditions for use of framework agreements (A/CN.9/668, paras. 227-229). The alternatives in square brackets were provided by participants at the session to the Secretariat, for further consideration by the Working Group, with the comment that the term “indefinite” indicates unknown timing and/or unknown quantities. The

(b) By virtue of the nature of the subject matter of the procurement, the need for it may arise on an urgent basis during a given period of time.<sup>21</sup>

(2) The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify the recourse to a framework agreement procedure and the type of framework agreement selected.<sup>22</sup>

## SECTION II. SOLICITATION AND NOTICES OF THE PROCUREMENT

### Article 29 bis. Solicitation in open tendering, two-stage tendering and in procurement by means of an auction

(1) An invitation to tender in open tendering or two-stage tendering and an invitation to the auction under article [47] of this Law shall be published in ... (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published).

(2) The invitation 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 or professional journal of wide international circulation.<sup>23</sup>

(3) The provisions of this article shall not apply where the procuring entity engages in pre-qualification proceedings in accordance with article [16] of this Law.

(4) The procuring entity shall not be required to publish the invitation in accordance with paragraph (2) of this article in domestic procurement and in procurement proceedings where the procuring entity decides, in view of the low

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informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America, recommended that the Guide to Enactment should explain that a procuring entity should offer estimates of future quantities in the solicitation documents, in part to guide prospective vendors as to the government's likely requirements. The Guide to Enactment should also explain why the Model Law refers to indefinite quantities, e.g. because it is possible that an item may be ordered only once.

<sup>21</sup> At the Working Group's fifteenth session, it was suggested that an additional open-ended subparagraph (c) could be included reading "Other grounds and circumstances that justify recourse to a framework agreement procedure", which would allow the procuring entity to have recourse to framework agreement procedures subject to the justification of its decision in the record of the procurement proceedings (A/CN.9/668, para. 228). The informal drafting party, July 2009, recommended that the Guide to Enactment should give examples of what these circumstances might be. The Working Group is invited to consider whether such additional open-ended subparagraph should be included in the text of the article.

<sup>22</sup> This paragraph was retained without square brackets pursuant to the Working Group's decision on similar provisions in other articles of the draft revised Model Law.

<sup>23</sup> The accompanying Guide text will explain that international advertisement is on the increase to promote regional trade and cross-border protests. It will cross-refer to paragraph (4) of the article that permits an exemption from the requirement in paragraph (2).

value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in presenting submissions.<sup>24</sup>

**Article 29 ter. Solicitation and notices of the procurement in restricted tendering, competitive negotiations and single-source procurement**

(1) (a) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified in article [26 (1) (a)] of this Law,<sup>25</sup> it shall solicit tenders from all suppliers and contractors from whom the subject matter of the procurement is available;<sup>26</sup>

(b) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified in article [26 (1) (b)] of this Law, 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.<sup>27</sup>

(2) Where the procuring entity engages in procurement by means of request for quotations in accordance with article [26 (2)] of this Law, it shall request quotations from as many suppliers or contractors as practicable, but from at least three.<sup>28</sup>

<sup>24</sup> This paragraph is based on article 23 of the 1994 Model Law. It has been included pursuant to A/CN.9/690, paras. 118-120. The accompanying Guide text will stress that foreign suppliers should be allowed to participate in low-value procurement if they so chose, but (following the 1994 Model Law approach) the procuring entity would not be required to publish the invitation in a newspaper of wide international circulation in a language customarily used in international trade. The Guide will also explain what is meant by low-value procurement, to prevent enacting States from setting the threshold high to exclude the bulk of its procurement from requirement of international publication. Although the threshold for the low-value procurement will not be the same, and it will be impossible to set out a single threshold, for all enacting States, the Guide should promote a common understanding what low value is meant to involve. The accompanying Guide text will further explain that the low value consideration should be taken into account alongside an anticipated lack of a cross-border interest in participating in the procurement concerned (i.e. even if the procuring entity publicized the procurement internationally, no international participation would result in the absence of interest on the part of foreign suppliers or contractors, and thus such publication would involve additional cost (in particular, translation costs if applicable)). The Guide may cross-refer to other provisions of the Guide that address other exemptions in the case of the domestic procurement that may be applicable also to the low-value procurement, such as exemption from the requirement to indicate in the solicitation documents information about currency and languages, which is usually pertinent in the context of the international procurement.

<sup>25</sup> The accompanying Guide text will provide examples of the exceptional cases in which these grounds will apply (A/CN.9/687, paras. 159-160).

<sup>26</sup> The accompanying Guide text will elaborate on the implications of this provision on the procuring entity if it receives requests from suppliers or contractors to allow them to tender in response to the notice of the procurement published in accordance with paragraph (5) of this article. The Secretariat's understanding is that such suppliers will have to be allowed to tender unless they are disqualified (if pre-qualification took place) or do not comply with the terms of the notice of the procurement (e.g. the declaration made pursuant to article 8 of the Law).

<sup>27</sup> The provisions of paragraph (1) of this article are based on article 39 (2) of A/CN.9/WG.I/WP.73/Add.4.

<sup>28</sup> The provisions of this paragraph are based on the first sentence of article 40 (1) of A/CN.9/WG.I/WP.73/Add.4.

(3) Where the procuring entity engages in procurement by means of competitive negotiations in accordance with article [27 (4)] of this Law, it shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.<sup>29</sup>

(4) Where the procuring entity engages in single-source procurement in accordance with article [27 (5)] of this Law, it shall solicit a proposal or price quotation from a single supplier or contractor.<sup>30</sup>

(5) <sup>31</sup>Prior to direct solicitation in accordance with the provisions of paragraphs (1), (3) and (4) of this article, the procuring entity shall publish a notice of the procurement in ... (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published). The notice shall contain at a minimum the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into as a result of the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) A declaration pursuant to article [8] of this Law; and

(d) The method of procurement to be used.

(6) The requirements of paragraph (5) shall not apply in the case of urgency as referred to in articles [27 (4) (b) and 27 (5) (b)]. The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify an exemption from the requirement of publication of the notice of the procurement under paragraph (5) of this article.<sup>32</sup>

#### **Article 29 quater. Solicitation in request for proposals proceedings**

(1) An invitation to participate in the request for proposals proceedings shall be published in accordance with article [29 bis (1) and (2)], except where:

(a) The procuring entity engages in pre-qualification proceedings in accordance with article [16] of this Law or in pre-selection proceedings in accordance with article [43] of this Law; or

<sup>29</sup> The provisions of this paragraph are based on the first sentence of article 45 (1) of A/CN.9/WG.I/WP.73/Add.5.

<sup>30</sup> The provisions of this paragraph are based on the first sentence of article 46 of A/CN.9/WG.I/WP.73/Add.5.

<sup>31</sup> The Working Group, at its seventeenth session, decided that the requirement of publishing the notice of procurement should not apply to request for quotations proceedings (A/CN.9/687, para. 171). No cross-reference to paragraph (2) of this article is therefore made in this paragraph. The accompanying Guide text would need to set out reasons for this exemption.

<sup>32</sup> The last sentence was retained without square brackets pursuant to the Working Group's decision on similar provisions in other articles of the draft revised Model Law.

(b) The procuring entity engages in direct solicitation under the conditions set out in paragraph (2) of this article; or

(c) The procuring entity decides not to publish the invitation in accordance with article [29 bis (2)] of this Law under the conditions set out in article [29 bis (4)] of this Law.

(2) The procuring entity may engage in direct solicitation in request for proposals proceedings if:

(a) The subject matter to be procured is available only from a limited number of suppliers or contractors, provided that the procuring entity solicits proposals from all those suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the subject matter to be procured, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) The procurement involves classified information, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.<sup>33</sup>

(3) The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify recourse to direct solicitation in request for proposals proceedings.<sup>34</sup>

(4) The procuring entity shall publish a notice of the procurement in accordance with the requirements set out in article [29 ter (5)] where it engages in direct solicitation in request for proposals proceedings.

## **CHAPTER III. OPEN TENDERING**

### **SECTION I. SOLICITATION OF TENDERS**

#### **Article 30. Procedures for soliciting tenders**

The procuring entity shall solicit tenders by issuing an invitation to tender in accordance with the provisions of article [29 bis] of this Law.

#### **Article 31. Contents of invitation to tender**

The invitation to tender shall include the following information:

(a) The name and address of the procuring entity;

(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, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the

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<sup>33</sup> Based on provisions of article 37 (3) of the 1994 Model Law and A/64/17, para. 265.

<sup>34</sup> This paragraph was retained without square brackets pursuant to the Working Group's decision on similar provisions in other articles of the draft revised Model Law.

services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, and any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications, in conformity with article [9] of this Law;

(d) A declaration pursuant to article [8] of this Law;

(e) The means of obtaining the solicitation documents and the place where they may be obtained;

(f) The price, if any, charged by the procuring entity for the solicitation documents;

(g) If a price is charged for the solicitation documents, the means and currency of payment;<sup>35</sup>

(h) The language or languages in which the solicitation documents are available;<sup>36</sup>

(i) The manner, place and deadline for presenting tenders.

#### **Article 32. Provision of solicitation documents**

The procuring entity shall provide the solicitation documents to each supplier or contractor that responds to the invitation to tender in accordance with the procedures and requirements specified therein. If pre-qualification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been pre-qualified 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 providing them to suppliers or contractors.<sup>37</sup>

#### **Article 33. Contents of solicitation documents**

The solicitation documents shall include<sup>38</sup> the following information:

(a) Instructions for preparing tenders;

<sup>35</sup> Amended pursuant to A/CN.9/690, para. 22 (b). The accompanying Guide text will note that the procuring entity may decide not to include reference to the currency of payment in domestic procurement, if it would be unnecessary in the circumstances.

<sup>36</sup> Amended pursuant to A/CN.9/690, para. 22 (b). The accompanying Guide text will note that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, and will add that an indication of the language or languages may still be important in some multilingual countries.

<sup>37</sup> The accompanying Guide text to this and similar provisions throughout the Model Law will make it clear that development costs (including consultancy fees and advertising costs) are not to be recovered through this provision and that the costs should be limited to the minimal charges of providing the documents (and printing them, where appropriate).

<sup>38</sup> A/CN.9/687, para. 133.



(b) The criteria and procedures, in conformity with the provisions of article [9] of this Law, that will be applied in the ascertainment of the qualifications of suppliers or contractors and in any further demonstration of qualifications pursuant to article [37 (6)] of this Law;

(c) The requirements as to documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;

(d) The description of the subject matter of the procurement, in conformity with article [10] of this Law; the quantity of the goods;<sup>39</sup> services to be performed; the location where the goods are to be delivered, construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;<sup>40</sup>

(e) 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;<sup>41</sup>

(f) If alternatives to the characteristics of the subject matter of the procurement, contractual terms and conditions or other requirements set out 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;

(g) If suppliers or contractors are permitted to present tenders for only a portion of the subject matter of the procurement, a description of the portion or portions for which tenders may be presented;

(h) 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 subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(i) The currency or currencies in which the tender price is to be formulated and expressed;<sup>42</sup>

(j) The language or languages, in conformity with article [13] of this Law, in which tenders are to be prepared;<sup>43</sup>

(k) 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 presenting tenders in accordance with article [15] of this Law, and any such requirements for any security for the

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<sup>39</sup> The accompanying Guide text will explain that in some cases this may refer to an estimated quantity, with cross-references to the relevant provisions in the chapter on framework agreements.

<sup>40</sup> A/CN.9/687, para. 136.

<sup>41</sup> The accompanying Guide text will explain the meaning of the term “contract form” in this provision as distinct from contract form requirements found in subparagraph (x) of this article.

<sup>42</sup> Amended pursuant to A/CN.9/690, para. 22 (b). The accompanying Guide text will note that the procuring entity may decide not to include reference to the currency in domestic procurement, if it would be unnecessary in the circumstances.

<sup>43</sup> Amended pursuant to A/CN.9/690, para. 22 (b). The accompanying Guide text will note that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, and will add that an indication of the language or languages may still be important in some multilingual countries.

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 material bonds;

(l) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security, a statement to that effect;

(m) The manner, place and deadline for presenting tenders, in conformity with article [13 bis] of this Law;<sup>44</sup>

(n) The means by which, pursuant to article [14] of this Law, 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;

(o) The period of time during which tenders shall be in effect, in conformity with article [35] of this Law;

(p) The manner, place, date and time for the opening of tenders, in conformity with article [36] of this Law;<sup>45</sup>

(q) The criteria and procedure for the examination of tenders against the description of the subject matter of the procurement;

(r) The criteria and procedure for evaluation of tenders in accordance with article [11] of this Law;

(s) The currency that will be used for the purpose of evaluating tenders pursuant to article [37 (5)] of this Law 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;<sup>46</sup>

(t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place<sup>47</sup> where these laws and regulations may be found;

(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) [deleted]<sup>48</sup>

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<sup>44</sup> A/CN.9/687, para. 139.

<sup>45</sup> A/CN.9/687, para. 139.

<sup>46</sup> Amended pursuant to A/CN.9/690, para. 22 (b). The accompanying Guide text will note that the procuring entity may decide not to include reference to the currency in domestic procurement, if it would be unnecessary in the circumstances.

<sup>47</sup> Reference to the place was added by the Secretariat further to the suggestions of experts. The accompanying Guide text will explain that the place refers not to the physical location but rather an official publication, portal etc. where authoritative texts of laws and regulations of the enacting State are made available to the public and systematically maintained.

<sup>48</sup> Reference to any commitments outside the procurement contract was deleted in this article and elsewhere in the current draft where it was found, pursuant to A/CN.9/690, para. 39 (h).

(w) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(x) Any formalities that will be required once a successful 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 [20] of this Law, 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 presentation of tenders and to other aspects of the procurement proceedings.<sup>49</sup>

## SECTION II. PRESENTATION OF TENDERS

### Article 34. Presentation of tenders

*[The old paras. 1 to 4 were deleted in the light of the newly proposed article 13 bis.]*

(1) Tenders shall be presented in the manner, at the place and by the deadline specified in the solicitation documents.

(2) (a) A tender shall be presented in writing, and signed, and:

(i) If in paper form, in a sealed envelope; or

(ii) If in any other form, according to requirements specified by the procuring entity in the solicitation documents, which ensure at least a similar degree of authenticity, security, integrity and confidentiality;

(b) The procuring entity shall provide to the supplier or contractor a receipt showing the date and time when its tender was received;<sup>50</sup>

(c) The procuring entity shall preserve the security, integrity and confidentiality of a tender, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law.

(3) A tender received by the procuring entity after the deadline for presenting tenders shall not be opened and shall be returned unopened to the supplier or contractor that presented it.

<sup>49</sup> In the context of the discussion at the Working Group's seventeenth session of correction of arithmetical errors (draft article 37 (1)), a query was raised as to whether it might be useful to require the solicitation documents to specify the manner in which arithmetical errors would be corrected (A/CN.9/687, para. 151). The Working Group may wish therefore consider whether the article should be amended to provide for such a requirement.

<sup>50</sup> The accompanying Guide text will discuss the nature of the receipt to be provided, and will state that the certification of receipt provided by the procuring entity would be conclusive (A/CN.9/668, para. 173).

**Article 35. 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;<sup>51</sup>

(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 presenting 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 presenting tenders.

**SECTION III. EVALUATION OF TENDERS**

**Article 36. Opening of tenders**

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for presenting tenders.<sup>52</sup> They shall be opened at the place and in accordance with the manner and procedures specified in the solicitation documents.<sup>53</sup>

(2) All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they have been given opportunity to be fully and contemporaneously apprised of the opening of the tenders.<sup>54</sup>

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<sup>51</sup> The accompanying Guide text will explain that in such case the effectiveness of the tender of the supplier or contractor will terminate upon the expiry of the original period of effectiveness specified in the solicitation documents (A/CN.9/687, para. 143).

<sup>52</sup> The words “or at the deadline specified in any extension of the deadline” were deleted in the light of the definition of the solicitation documents as incorporating any amendments thereto: any extension of the deadline originally set out in the solicitation documents will be considered the amendments to the originally issued solicitation documents.

<sup>53</sup> The accompanying Guide text will explain risks of departing from the requirements of the Model Law that tenders must be opened at the time specified in the solicitation documents as the deadline for presenting tenders, and practical considerations that should be taken into account in implementing that requirement (A/CN.9/687, para. 150).

<sup>54</sup> The accompanying Guide text will highlight that the place, manner and procedures for the opening of tenders established by the procuring entity should allow for the presence of suppliers

(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 presented tenders but that are not present or represented at the opening of tenders, and included immediately in the record of the tendering proceedings required by article [23].<sup>55</sup>

### **Article 37. Examination and evaluation of tenders**

(1) (a) The procuring entity may ask a supplier or contractor for clarifications of its tender in order to assist in the examination and evaluation of tenders;

(b) 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 presented the tender;<sup>56</sup>

(c) 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.<sup>57</sup>

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with article [10] of this Law;

(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 out 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 of tenders.

(3) The procuring entity shall reject a tender:

(a) If the supplier or contractor that presented the tender is not qualified;

(b) If the supplier or contractor that presented 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 [18 or 19] of this Law.

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or contractors (A/CN.9/668, para. 178). The Guide will also elaborate on “deemed” present or “virtual” presence of suppliers or contractors at the opening of tenders.

<sup>55</sup> The accompanying Guide text will explain that any late tenders would be returned unopened, and their (late) submission would be noted in the record.

<sup>56</sup> The accompanying Guide text will explain the rules and principles applicable to the correction by the procuring entity of arithmetical errors.

<sup>57</sup> The paragraph was redrafted to make the requirement of subparagraph (c) applicable to both subparagraphs (a) and (b). In the 1994 text, this requirement was found only in subparagraph (a), raising questions on the extent of the permissible corrections of arithmetical errors under subparagraph (b). The Secretariat’s understanding is that under both subparagraphs (a) and (b), no change can be made in a matter of substance of the tender.

(4) (a) The procuring entity shall evaluate the tenders that have not been rejected in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set out in the solicitation documents. No criterion shall be used that has not been set out in the solicitation documents;

(b) The successful tender shall be:

(i) Where price is the only award criterion, the tender with the lowest tender price;<sup>58</sup> or

(ii) Where there are price and other award criteria, the most advantageous tender<sup>59</sup> ascertained on the basis of the criteria and procedures for evaluating tenders specified in the solicitation documents in accordance with article [11] of this Law.

(5) When tender prices are expressed in two or more currencies, for the purpose of evaluating and comparing tenders the tender prices of all tenders shall be converted to the currency specified in the solicitation documents according to the rate specified in those documents, pursuant to article [33 (s)] of this Law.<sup>60</sup>

(6) Whether or not it has engaged in pre-qualification proceedings pursuant to article [16] of this Law, the procuring entity may require the supplier or contractor presenting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate its qualifications again, in accordance with the criteria and procedures conforming to the provisions of article [9] of this Law. The criteria and procedures to be used for such further demonstration shall be set out in the solicitation documents. Where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings.

(7) If the supplier or contractor presenting the successful tender is requested to demonstrate its qualifications again 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 still in effect, subject to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)] of this Law.

(8) Information relating to the examination, clarification and evaluation of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination or evaluation of tenders or in the decision on which tender should be accepted, except as provided in articles [20, 22, 23 and 36 (3)] of this Law.<sup>61</sup>

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<sup>58</sup> A/CN.9/687, para. 153.

<sup>59</sup> A/CN.9/687, paras. 153 and 155. The Guide will elaborate on evolution of procurement practices since 1994 that justified the replacement of the term the “lowest evaluated tender” used in this context in the 1994 Model Law.

<sup>60</sup> A/CN.9/687, para. 157.

<sup>61</sup> The Working Group may wish to consider the need for this provision in the light of article 22.

**Article 38. 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 presented by the supplier or contractor.

**(A/CN.9/WG.I/WP.75/Add.4) (Original: English)**

**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its nineteenth session**

**ADDENDUM**

This note sets out a proposal for chapter IV (Procedures for restricted tendering, request for quotations and request for proposals without negotiation) of the revised Model Law, comprising articles 39-41.

The Secretariat's comments are set out in the accompanying footnotes.

**CHAPTER IV. PROCEDURES FOR RESTRICTED TENDERING, REQUEST FOR QUOTATIONS AND REQUEST FOR PROPOSALS WITHOUT NEGOTIATION<sup>1</sup>**

**Article 39. Restricted tendering<sup>2</sup>**

- (1) The procuring entity shall solicit tenders in accordance with the provisions of article [29 ter] of this Law.
- (2) The provisions of chapter III of this Law shall apply to restricted tendering proceedings, except to the extent that those provisions are derogated from this article.

**Article 40. Request for quotations**

- (1) The procuring entity shall request quotations in accordance with the provisions of article [29 ter] of this Law.<sup>3</sup> Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the subject matters of the procurement themselves, such as any applicable 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 presented by the supplier or contractor.

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<sup>1</sup> The title of the chapter was revised pursuant to A/CN.9/690, para. 149.

<sup>2</sup> The article was revised pursuant to the deliberations at the Working Group's seventeenth session (in particular, provisions on a pre-selection procedure have been deleted) (A/CN.9/687, paras. 159-169) and in the light of the newly proposed section II of chapter II, in particular article 29 ter that incorporates some of the provisions that were previously in this article.

<sup>3</sup> Amended in the light of new article 29 ter.



(3) The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity as set out in the request for quotations.<sup>4</sup>

#### **Article 41. Request for proposals without negotiation**

(1) The procuring entity shall solicit proposals by issuing an invitation to participate in the request for proposals without negotiation proceedings in accordance with article [29 quater] of this Law except as otherwise provided for in that article.

(2) The invitation shall include:

- (a) The name and address of the procuring entity;
- (b) A description of the subject matter of the procurement, and the desired or required time and location for the provision of such subject matter;
- (c) 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;
- (d) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article [9] of this Law;
- (e) The criteria and procedures for opening the proposals and for examining and evaluating the proposals in accordance with articles [10 and 11] of this Law, including the minimum requirements with respect to technical and quality characteristics that proposals must meet in order to be considered responsive in accordance with article [10] of this Law, and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;
- (f) A declaration pursuant to article [8] of this Law;
- (g) The means of obtaining the request for proposals and the place where it may be obtained;
- (h) The price, if any, charged by the procuring entity for the request for proposals;
- (i) If a price is charged for the request for proposals, the means and currency of payment for the request for proposals;<sup>5</sup>
- (j) The language or languages in which the requests for proposals are available;<sup>6</sup>
- (k) The manner, place and deadline for presenting proposals.

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<sup>4</sup> A/CN.9/687, para. 170.

<sup>5</sup> Amended pursuant to A/CN.9/690, para. 22(b). The accompanying Guide text will note that the procuring entity may decide not to include reference to the currency of payment in domestic procurement, if it would be unnecessary in the circumstances.

<sup>6</sup> Amended pursuant to A/CN.9/690, para. 22(b). The accompanying Guide text will note that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, and will add that an indication of the language or languages may still be important in some multilingual countries.

(3) The procuring entity shall issue the request for proposals:

(a) Where an invitation to participate in the request for proposals without negotiation proceedings has been published in accordance with the provisions of article [29 quater] of this Law, to each supplier or contractor that responds to the invitation in accordance with the procedures and requirements specified therein;

(b) In the case of pre-qualification, to each supplier or contractor pre-qualified in accordance with article [16] of this Law;

(c) In the case of direct solicitation, to each supplier or contractor selected by the procuring entity;<sup>7</sup>

and that pays the price, if any, charged for the request for proposals. The price that the procuring entity may charge for the request for proposals shall reflect only the cost of providing it to suppliers or contractors.<sup>8</sup>

(4) The request for proposals shall include, in addition to the information referred to in paragraphs (2)(a) to (e) and (k) of this article, the following information:

(a) Instructions for preparing and presenting proposals, including instructions to suppliers or contractors to present simultaneously to the procuring entity proposals in two envelopes: one envelope containing the technical and quality characteristics of the proposal and the other envelope containing the financial aspects of the proposal;

(b) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;<sup>9</sup>

(c) The currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;<sup>10</sup>

(d) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;<sup>11</sup>

(e) The means by which, pursuant to article [14] of this Law, suppliers or contractors may seek clarifications of the request for proposals, and a statement as

<sup>7</sup> It is the Secretariat's understanding that provisions on pre-selection of article 43 would not be applicable to this procurement method, and thus no mention of pre-selection is made here as compared to the similar provisions in article 43 of the current draft.

<sup>8</sup> Amended to align with the similar wording found elsewhere in the current draft.

<sup>9</sup> Based on article 38 (i) of the 1994 Model Law.

<sup>10</sup> Based on article 38 (j) and (n) of the 1994 Model Law. Amended pursuant to A/CN.9/690, para. 22(b). The accompanying Guide text will note that the procuring entity may decide not to include reference to the currency in domestic procurement, if it would be unnecessary in the circumstances.

<sup>11</sup> Based on article 38 (k) of the 1994 Model Law.

to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;<sup>12</sup>

(f) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place<sup>13</sup> where these laws and regulations may be found;<sup>14</sup>

(g) 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;<sup>15</sup>

(h) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of a standstill period and, if none will apply, a statement to that effect and reasons therefor;<sup>16</sup>

(i) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;<sup>17</sup>

(j) 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 presentation of proposals and to the procurement proceedings.<sup>18</sup>

(5) Before opening the envelopes containing the financial aspects of the proposals, the procuring entity shall examine and evaluate the technical and quality characteristics of proposals in accordance with the criteria and procedures specified in the request for proposals.

(6) The results of the examination and evaluation of the technical and quality characteristics of the proposals shall be immediately included in the record of the procurement proceedings.

(7) The proposals whose technical and quality characteristics fail to meet the relevant minimum requirements shall be considered to be non-responsive and shall be rejected on that ground. The notice of rejection and reasons for rejection,<sup>19</sup> together with an unopened envelope containing the financial aspects of the proposal, shall be promptly dispatched to each respective supplier or contractor whose proposal was rejected.

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<sup>12</sup> Based on article 38 (q) of the 1994 Model Law.

<sup>13</sup> Reference to the place was added by the Secretariat further to the suggestions of experts. The accompanying Guide text will explain that the place refers not to the physical location but rather an official publication, portal, etc. where authoritative texts of laws and regulations of the enacting State are made available to the public and systematically maintained.

<sup>14</sup> Based on article 38 (s) of the 1994 Model Law.

<sup>15</sup> Based on article 38 (p) of the 1994 Model Law.

<sup>16</sup> Based on article 38 (t) of the 1994 Model Law.

<sup>17</sup> Based on article 38 (u) of the 1994 Model Law.

<sup>18</sup> Based on article 38 (v) of the 1994 Model Law.

<sup>19</sup> A/CN.9/687, para. 178.

(8) The proposals whose technical and quality characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive. The procuring entity shall promptly communicate to each supplier or contractor presenting such a proposal the score of the technical and quality characteristics of its respective proposal. The procuring entity shall invite all such suppliers or contractors to the opening of the envelopes containing the financial aspects of their proposals.

(9) The score of the technical and quality characteristics of each responsive proposal and the corresponding financial aspect of that proposal shall be read out in the presence of the suppliers or contractors invited in accordance with paragraph (8) of this article to the opening of the envelopes containing the financial aspects of the proposals.

(10) The procuring entity shall compare the financial aspects of the responsive proposals and on that basis identify the successful proposal in accordance with the criteria and the procedure set out in the request for proposals. The successful proposal shall be the proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price.<sup>20</sup>

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<sup>20</sup> A/CN.9/687, paras. 179-181. The article is designed for the award of the contract on the basis of the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price. The accompanying Guide text will explain that the procuring entity can award on the basis of the lowest price alone if it sets out sufficiently high the relevant threshold for the minimum quality and technical characteristics of the proposals. In such case, the procuring entity, before opening the envelopes containing the financial aspects of the proposals, would examine the technical and quality characteristics of proposals and reject non-responsive ones. No evaluation of quality and technical characteristics of responsive proposals would take place and thus no scores or ratings would be assigned since scores or ratings would not be relevant where the award is made to the responsive proposal with the lowest price.

**(A/CN.9/WG.I/WP.75/Add.5) (Original: English)****Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its nineteenth session****ADDENDUM**

This note sets out a proposal for chapter V of the revised Model Law (Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)), comprising articles 42-46.

The Secretariat's comments are set out in the accompanying footnotes.

**CHAPTER V. PROCEDURES FOR TWO-STAGE TENDERING, REQUEST FOR PROPOSALS WITH DIALOGUE, REQUEST FOR PROPOSALS WITH CONSECUTIVE NEGOTIATIONS, COMPETITIVE NEGOTIATIONS AND SINGLE-SOURCE PROCUREMENT<sup>1</sup>****Article 42. Two-stage tendering<sup>2</sup>**

- (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 present, 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 subject matter of the procurement as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.
- (3) The procuring entity may, in the first stage, engage in discussions with suppliers or contractors whose tenders have not been rejected pursuant to provisions of this Law,<sup>3</sup> concerning any aspect of their tenders. When the procuring entity

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<sup>1</sup> The title of the chapter was revised pursuant to A/CN.9/690, para. 149.

<sup>2</sup> The accompanying Guide text will discuss the variants of the two-stage tendering used in practice, and will explain that the article accommodates the essential characteristics of this method, and will explain the risks of collusion posed by this procurement method.

<sup>3</sup> The accompanying Guide text will cross-refer to the relevant provisions, highlighting that this procedure involves an assessment of responsiveness. The Working Group may wish to consider, as suggested during the intersessional consultations, that this provision itself should contain a specific cross-reference to the provisions of article 37 (3) (a) to (c) and article 19 of this draft (no mention is made of article 37 (3) (d) since it also refers to article 18 (rejection of the

engages in discussions with any supplier or contractor, it shall extend an equal opportunity to participate in discussions to all suppliers or contractors.

(4) (a) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite all suppliers or contractors whose tenders were not rejected at the first stage to present final tenders with prices with respect to a single description of the subject matter of the procurement;

(b) In formulating that description,<sup>4</sup> the procuring entity may delete or modify any aspect of the technical or quality characteristics of the subject matter of the procurement as set out in the solicitation documents and add any new characteristic that conforms to the requirements of this Law;

(c) The procuring entity may delete or modify any criterion for examining or evaluating tenders set out in the solicitation documents and may add any new criterion that conforms to the requirements of this Law, to the extent only that the deletion or modification is required as a result of changes made in the technical or quality characteristics of the subject matter of the procurement;<sup>5</sup>

(d) Any deletion, modification or addition made pursuant to subparagraphs (b) or (c) of this paragraph shall be communicated to suppliers or contractors in the invitation to present final tenders;

(e) A supplier or contractor not wishing to present 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;<sup>6</sup>

(f) The final tenders shall be evaluated<sup>7</sup> in order to ascertain the successful tender as defined in article [37 (4) (b)] of this Law.

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submission as abnormally low), which is not applicable here since no tender price is known to the procuring entity at this stage of examination).

<sup>4</sup> Suggestions were made during the intersessional consultations to refer in these provisions to article [22] of this Law. Since article 22 in the relevant part is applicable not only to this subparagraph but also to subparagraphs (c) and (d) as well as to paragraph (3) above, the Secretariat's understanding is that making a cross-reference to article 22 only in this provision will be misleading. Since article 22 is of general application, the Working Group may wish to consider that cross-references to it, where appropriate, in the accompanying Guide text alone would be sufficient. As regards specifically this article, the accompanying Guide text would explain which provisions of article 22 are relevant to paragraph (3), which to subparagraphs (b) and (c) and which to subparagraphs (d), of paragraph (4). The overall objective is to emphasize, that not only during the discussions, but also in revising the solicitation documents and communicating revisions to the suppliers or contractors, the procuring entity should respect the confidentiality of the suppliers or contractors' technical proposals used in the first stage, consistent with requirements of article 22 of the Law. It will highlight the importance of this safeguard to ensure participation of suppliers or contractors in this type of two-stage procurement proceedings.

<sup>5</sup> The accompanying Guide text will explain that changes to technical or quality characteristics may necessarily require changes to the examination and/or evaluation criteria, as otherwise the examination and/or evaluation criteria at the second stage would not reflect the applicable technical and quality criteria.

<sup>6</sup> The accompanying Guide text will explain the application of the article on tender securities in the context of two-stage proceedings, in particular at which stage of the proceedings tender securities may be required.

<sup>7</sup> Amended pursuant to A/CN.9/690, para. 18.

**Article 43. Request for proposals with dialogue<sup>8</sup>**

(1) The procuring entity shall solicit proposals by issuing an invitation to participate in the request for proposals with dialogue proceedings in accordance with article [29 quater] of this Law except as otherwise provided for in that article.

(2) The invitation shall include:

(a) The name and address of the procuring entity;

(b) A description of the subject matter of the procurement to the extent known, and the desired or required time and location for the provision of such subject matter;

(c) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(d) The intended stages of the procedure;

(e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article [9] of this Law;

(f) The minimum requirements that proposals must meet in order to be considered responsive in accordance with article [10] of this Law, and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;

(g) A declaration pursuant to article [8] of this Law;

(h) The means of obtaining the request for proposals and the place where it may be obtained;

(i) The price, if any, charged by the procuring entity for the request for proposals;

(j) If a price is charged for the request for proposals, the means and currency of payment for the request for proposals;<sup>9</sup>

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<sup>8</sup> The accompanying Guide text will explain that this procurement method is available for all types of procurement, including the procurement of non-quantifiable advisory services. It will further explain that in the latter type of procurement, regulations could provide additional steps or provisions. For example, proposals need not contain financial elements or prices where the cost is not an evaluation criterion or not a significant evaluation criterion. As regards evaluation criteria in such type of procurement, the Guide could explain that for non-quantifiable advisory services, they usually include (i) the service-provider's experience for the specific assignment, (ii) the quality of the understanding of the assignment under consideration and of the methodology proposed, (iii) the qualifications of the key staff proposed, (iv) transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the description of the assignment, and (v) when applicable, the extent of participation by nationals among key staff in the performance of the services.

<sup>9</sup> Amended pursuant to A/CN.9/690, para. 22(b). The accompanying Guide text will note that the procuring entity may decide not to include reference to the currency of payment in domestic procurement, if it would be unnecessary in the circumstances.

(k) The language or languages in which the requests for proposals are available;<sup>10</sup>

(l) The manner, place and deadline for presenting proposals.<sup>11</sup>

(3) For the purpose of limiting the number of suppliers or contractors from whom to request proposals, the procuring entity may engage in pre-selection proceedings. The provisions of article [16] of this Law shall apply *mutatis mutandis* to the pre-selection proceedings, except to the extent that those provisions are derogated from in this paragraph:

(a) The procuring entity shall specify in the pre-selection documents that it will request proposals only from a limited number of pre-selected suppliers or contractors that best meet the qualification criteria specified in the pre-selection documents;

(b) The pre-selection documents shall set out the maximum number of pre-selected suppliers or contractors from whom the proposals will be requested and the manner in which the selection of that number will be carried out. In establishing such a number the procuring entity shall bear in mind the need to ensure the effective competition;

(c) The procuring entity shall rate the suppliers or contractors that meet the qualifications criteria specified in the pre-selection documents according to the manner of rating that is set out in the invitation to pre-selection and the pre-selection documents.

(d) The procuring entity shall pre-select suppliers or contractors that acquired the best rating up to the maximum number indicated in the pre-selection documents but at least three if possible;

(e) The procuring entity shall promptly notify each supplier or contractor whether or not it has been pre-selected and shall upon request communicate to suppliers or contractors that have not been pre-selected the reasons therefor. It shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been pre-selected.

(4) The procuring entity shall issue the request for proposals:

(a) Where an invitation to participate in the request for proposals with dialogue proceedings has been issued in accordance with the provisions of article [29 quater] of this Law, to each supplier or contractor that responds to the invitation in accordance with the procedures and requirements specified therein;

(b) In the case of pre-qualification, to each supplier or contractor pre-qualified in accordance with article [16] of this Law;

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<sup>10</sup> Amended pursuant to A/CN.9/690, para. 22(b). The accompanying Guide text will note that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, and will add that an indication of the language or languages may still be important in some multilingual countries.

<sup>11</sup> Some amendments were made in the listing to align it with the list in article 41 of the current draft.



(c) Where pre-selection proceedings have been engaged in, to each pre-selected supplier or contractor in accordance with the procedures and requirements specified in the pre-selection documents;

(d) In the case of direct solicitation, to each supplier or contractor selected by the procuring entity;

that pays the price, if any, charged for the request for proposals. The price that the procuring entity may charge for the request for proposals shall reflect only the cost of providing it to suppliers or contractors.<sup>12</sup>

(5) The request for proposals shall include, in addition to the information referred to in paragraphs (2)(a) to (f) and (l) of this article, the following information:

(a) Instructions for preparing and presenting proposals;

(b) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;

(c) The currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;<sup>13</sup>

(d) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(e) The means by which, pursuant to article [14] of this Law, suppliers or contractors may seek clarifications of the request for proposals, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(f) Any elements of the description of the subject matter of the procurement or term or condition of the procurement contract that will not be the subject of dialogue during the procedure;

(g) Where the procuring entity intends to limit the number of suppliers or contractors that it will invite to participate in the dialogue, the minimum number of suppliers or contractors, which shall be not lower than three, if possible, and, where appropriate, the maximum number and the criteria and procedure, in conformity with the provisions of this Law, that will be followed in selecting it;

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<sup>12</sup> Amended to align with the similar wording found elsewhere in the current draft.

<sup>13</sup> Based on article 38 (j) and (n) of the 1994 Model Law. Amended pursuant to A/CN.9/690, para. 22(b). The accompanying Guide text will note that the procuring entity may decide not to include reference to the currency in domestic procurement, if it would be unnecessary in the circumstances.

(h) The criteria and procedure for evaluating the proposals in accordance with article [11] of this Law;<sup>14</sup>

(i) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(j) 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;

(k) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of a standstill period and, if none will apply, a statement to that effect and reasons therefor;

(l) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;

(m) 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 presentation of proposals and to the procurement proceedings.<sup>15, 16</sup>

(6) (a) The procuring entity shall examine all proposals received against the established minimum requirements and shall reject each proposal that fails to meet these minimum requirements on the ground that it is non-responsive;

(b) Where the limitation on the number of suppliers or contractors that can be invited to participate in the dialogue was established and the number of responsive proposals exceeds that maximum, the procuring entity shall select the maximum number of responsive proposals in accordance with the criteria and procedure specified in the request for proposals;

(c) The notice of rejection and reasons for rejection shall be promptly dispatched to each respective supplier or contractor whose proposal was rejected.

(7) The procuring entity shall invite each supplier or contractor that presented a responsive proposal, within any applicable maximum, to participate in dialogue. The procuring entity shall ensure that the number of suppliers invited to participate in the dialogue is sufficient to ensure effective competition, and shall be at least three, if possible.

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<sup>14</sup> The accompanying Guide text will address the question of sub-criteria and provide the guidance that would be needed to ensure that a true picture of the evaluation criteria is given. Different procurements might require different levels of flexibility in this regard.

<sup>15</sup> Amended pursuant to A/CN.9/690, para. 22(c). The accompanying Guide text will elaborate on the benefit of including information as regards the timetable envisaged for the procedure.

<sup>16</sup> Some amendments were made in the listing to align it with the list in article 41 of the current draft.

(8) The dialogue shall be conducted by the same representatives of the procuring entity on a concurrent basis.

(9) During the course of the dialogue, the procuring entity shall not modify the subject matter of the procurement, nor any qualification or evaluation criterion, nor any minimum requirements established pursuant to paragraph (2) (f) of this article, nor any elements of the description of the subject matter of the procurement or term or condition of the procurement contract<sup>17</sup> that is not subject to the dialogue as notified in the request for proposals.<sup>18</sup>

(10) Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that are communicated by the procuring entity to a supplier or contractor shall be communicated at the same time on an equal basis to all other participating suppliers or contractors, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article [22] of this Law.<sup>19</sup>

(11) Following the dialogue, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request shall be in writing, and shall specify the manner, place and deadline for presenting best and final offers.

(12) No negotiations shall take place between the procuring entity and suppliers or contractors with respect to their best and final offers.<sup>20</sup>

(13) The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

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<sup>17</sup> Amended to align with paragraphs (2)(f) and (5)(f) of this article.

<sup>18</sup> The accompanying Guide text will explain why other changes need to be permitted in this procurement method, and that the evaluation criteria should be drafted at a level of detail that will avoid arbitrariness. It will further explain that the provisions seek to prevent the procuring entity from making the changes described (but would not prevent suppliers from making changes in their proposals as a result of the dialogue) (A/CN.9/690, para. 22(d)).

<sup>19</sup> The accompanying Guide text will cross-refer to article 22 that addresses consent to disclosure of the confidential information among suppliers.

<sup>20</sup> Added to mitigate one of the concerns raised by multilateral development banks as regards this procurement method.

#### Article 44. Request for proposals with consecutive negotiations<sup>21</sup>

(1) The provisions of article [41 (1)-(7)]<sup>22</sup> of this Law shall apply mutatis mutandis to procurement conducted by means of request for proposals with consecutive negotiations, except to the extent those provisions are derogated from in this article.

<sup>21</sup> The Working Group has decided that this procurement method should not be limited to advisory services, but that the accompanying Guide text will discuss the history and use of the method, in particular in the projects financed by multilateral development banks, to enable enacting States to decide whether to restrict it when drafting legislation based on the Model Law (A/CN.9/690, para. 26). The suggestions during the intersessional consultations were to the effect that the accompanying Guide text should also discuss the significant negotiating disadvantage caused by consecutive negotiations, in particular through losing benefit of leverage of concurrent negotiations (the procuring entity being at a disadvantage since the first ranked supplier has little incentive to negotiate). The accompanying Guide text, it was suggested, will point out that these disadvantages might be partly mitigated by the solicitation documents fixing a period for the negotiations and by the first ranking supplier facing a risk that negotiations with the procuring entity may be terminated at any time and may succeed with other participating suppliers since they will have incentive to improve their bids to win. The accompanying Guide text will nevertheless point out that the procuring entity may still incur transaction costs and face embarrassment risk if it has to terminate negotiations with the first ranked supplier (the procuring entity will unavoidably face criticism for saving at expense of quality and technical considerations). The Guide should discuss therefore that whether this method is appropriate depends on circumstances (e.g. where the procuring entity can indeed afford to compromise on quality; if it cannot, the article 41 procurement method seems to be the only alternative) as will also depend on circumstances whether the procuring entity would ever want to go to the second, third, fourth, etc., best supplier (if the quality gap between them is very big, the procuring entity can always cancel the procurement). Despite all these disadvantages, the Guide will explain that for the type of procurement intended to be covered by this procurement method, envisaging simultaneous negotiations in this procurement method as the alternative to consecutive negotiations, because of corruption risk, is not appropriate. The accompanying Guide text will also have to discuss why the Working Group decided to abandon the idea of permitting the procuring entity to select the best offer at the end of the consecutive negotiations with all the responsive suppliers, and decided to provide instead that the procuring entity should not be able to award the contract to a supplier with which negotiations had been terminated (A/CN.9/690, para. 30). In this respect, the Working Group may wish to review the adequacy of the explanation in the relevant footnote below.

<sup>22</sup> Although the previous drafts cross-referred to the provisions of article 43, in the light of the amendments made in the conditions for use of this procurement method in article 27 (3) of the current draft, the Secretariat's understanding is that this method should be considered as a variation of the article 41 rather than the article 43 method (which would also be consistent with the approach of the 1994 Model Law (see article 44)). The paragraph in this draft was redrafted accordingly. Although at its eighteenth session the Working Group agreed that pre-selection should be envisaged in this procurement method (A/CN.9/690, para. 31), the Secretariat's understanding is that pre-selection would not be appropriate either in the article 41 or article 44 procurement method. The Working Group agreed to introduce provisions on pre-selection in article 43 on the ground that holding simultaneous negotiations with a large number of qualified suppliers will be time- and cost-consuming, especially in the light of the type of procurement intended to be covered by article 43 (large and complex, similar to the ones covered by the UNCITRAL instruments on privately financed infrastructure projects, where pre-selection is also provided for). The situation is different in the article 41 and 44 procurement methods intended to deal with simpler types of procurement, where the bigger the pool of the responsive bidders the higher are chances of selecting the submission that meets best the needs of a procuring entity. Both of those methods provide for a straightforward procedure for the selection of the successful submission and thus time and cost considerations are not relevant.

(2) The proposals whose technical and quality characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive.<sup>23</sup> The procuring entity shall rate<sup>24</sup> each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals, and shall:

(a) Promptly communicate to each supplier or contractor presenting the responsive proposal the score of the technical and quality characteristics of its respective proposal and its rating;<sup>25</sup>

(b) Invite the supplier or contractor that has attained the best rating in accordance with those criteria and procedure for negotiations on the financial aspects of its proposal;<sup>26</sup> and

(c) Inform other suppliers or contractors that presented responsive proposals that they may be considered for negotiation if the negotiations with the suppliers or contractors with better ratings do not result in a procurement contract.

(3) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (2)(b) 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.<sup>27</sup>

(4) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second best rating; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors still participating in the procurement

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<sup>23</sup> The first sentence was added to align with the corresponding provisions in article 41 (8) of the current draft.

<sup>24</sup> The Working Group may wish to consider whether the terms “rank” and “ranking” should replace the words “rate” and “rating” throughout this article as compared to article 41.

<sup>25</sup> This subparagraph was added to align with the corresponding provisions in article 41 (8) of the current draft.

<sup>26</sup> Amended pursuant to A/CN.9/690, para. 29. The accompanying Guide text will explain, with a cross-reference to paragraph (5) of this article, that no aspects of the proposal that have been considered as part of the assessment of responsiveness and evaluation of quality and technical characteristics of proposals should subsequently be open for negotiation.

<sup>27</sup> The accompanying Guide text to this and other provisions in this article referring to the notion “termination of negotiations” will explain that this notion means to encompass the rejection of a supplier’s final price proposal and the consequent exclusion of that supplier from further participation in the procurement proceedings. Thus no procurement contract could be awarded to the supplier(s) with whom the negotiations were terminated pursuant to article 44 (3) and (4). The Guide will further point out that UNCITRAL carefully considered views that this approach might be viewed as excessively rigid, since only at the end of the process would the procuring entity know which was in fact the best offer, and further views that, although the procuring entity should not be permitted to reopen negotiations, to avoid open-ended negotiations that could lead to abuse and cause delay, it should be permitted to accept that best offer (and award the contract to the supplier that had proposed it). UNCITRAL however chose to impose the prohibition in article 44 (6), in order not to overemphasize competition on financial aspects in types of procurement for which this procurement method is primarily designed (such as in the procurement of architectural and engineering services) where considerations of technical quality are particularly important (A/CN.9/690, para. 30, and the relevant wording from the 1994 Guide to Enactment).

proceedings for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

(5) During the course of the negotiations, the procuring entity shall not modify the subject matter of the procurement, nor any qualification, examination or evaluation criterion, including any established minimum requirements, nor any elements of the description of the subject matter of the procurement or term or condition of the procurement contract other than financial aspects of proposals that are subject to the negotiations as notified in the request for proposals.<sup>28</sup>

(6) The procuring entity may not reopen negotiations with any supplier or contractor with which it has terminated negotiations.<sup>29</sup>

#### **Article 45. Competitive negotiations<sup>30</sup>**

(1) The provisions of article [29 ter] of this Law shall apply to the procedure preceding the negotiations.<sup>31</sup>

(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 before or during the negotiations shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article [22] of this Law.

(3) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present, by a specified date, a best and final offer with respect to all aspects of their proposals.<sup>32</sup>

<sup>28</sup> Amended pursuant to A/CN.9/690, para. 29, and in the light of the deletion of the definition “material change”. The provisions draw on article 43 (9) of the current draft.

<sup>29</sup> Amended pursuant to A/CN.9/690, para. 30. The Guide will explain what is meant by “termination” of negotiations. See the relevant footnote above.

<sup>30</sup> The accompanying Guide text will explain that this method is an alternative to single-source procurement rather than to the other methods in chapter V of the Model Law, and that it primarily aims to address situations of urgency. The Guide will explain that in selecting between competitive negotiations and single-source procurement under appropriate circumstances, the procuring entity will have to take into account the requirement of article 25 (2) of the Law to maximize competition, and the need to assess the level of urgency (A/CN.9/690, paras. 33 and 34).

<sup>31</sup> Amended pursuant to the new article 29 ter that incorporates what was the first sentence in this paragraph.

<sup>32</sup> It was suggested during the intersessional consultations that this paragraph should be deleted as no request of best and final offers will follow this type of negotiations. The Secretariat draws the Working Group’s attention that the provisions are based on article 49 (4) of the 1994 Model Law, which the Working Group has not so far decided to amend. The Working Group may wish to consider that the deletion of this paragraph may eliminate the only safeguard against abuses in this procurement method. In particular, the referred stage puts all participating suppliers on an equal footing as regards receiving information about termination of negotiations. It also leaves traces for the audit as regards all actual offers that were before the procuring entity and that it should have considered in making the selection in accordance with paragraph (4) of this article. Without that stage, much discretion is given to the procuring entity to decide with whom

(4) The successful offer shall be the offer that best meets the needs of the procuring entity.

#### **Article 46. Single-source procurement**

The provisions of article [29 ter] of this Law shall apply to the procedure preceding the solicitation of a proposal or price quotation from a single supplier or contractor. The procuring entity shall engage in negotiations with the supplier or contractor from which a proposal or price quotation is solicited unless such negotiations are not feasible in the circumstances of the procurement concerned.<sup>33</sup>

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to conclude the contract, with no transparency and verifiable traces in the process that would allow effective challenge.

<sup>33</sup> Amended pursuant to A/CN.9/690, paras. 36 and 37, and new article 29 ter that incorporates what was the old first sentence of this article. The first sentence of this article in the current draft was revised accordingly. The accompanying Guide text will elaborate on the utility for the procuring entity to negotiate and request, when feasible and necessary, market data or costs clarifications, in order to avoid unreasonably priced proposals or quotations. It will also underscore single-source procurement as the method of last resort after all other alternatives had been exhausted, and will encourage the use of framework agreements to anticipate urgent procurement (A/CN.9/690, para. 36).

**(A/CN.9/WG.I/WP.75/Add.6) (Original: English)**

**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its nineteenth session**

**ADDENDUM**

This note sets out a proposal for chapter VI (Auctions) of the revised Model Law, comprising articles 47 to 51.

The Secretariat's comments are set out in the accompanying footnotes.

**CHAPTER VI. AUCTIONS**

**Article 47. Procedures for soliciting participation in procurement by means of an auction**

(1) The procuring entity shall solicit bids by issuing an invitation to the auction in accordance with the provisions of article [29 bis]. The invitation shall include:

- (a) The name and address of the procuring entity;
- (b) A description of the subject matter of the procurement, in conformity with article [10] of this Law, and the desired or required time and location for the provision of such subject matter;
- (c) 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;
- (d) A declaration pursuant to article [8] of this Law;
- (e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article [9] of this Law;
- (f) The criteria and procedure for examination of bids against the description of the subject matter of the procurement;<sup>1</sup>
- (g) The criteria and procedure for evaluation of bids in conformity with article [11 (5)] of this Law, including any mathematical formula that will be used in the evaluation procedure during the auction;<sup>2</sup>
- (h) [deleted];<sup>3</sup>

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<sup>1</sup> The accompanying Guide text will explain that the examination might take place after the auction, as provided in article 51.

<sup>2</sup> The reference to "any criteria that cannot be varied during the auction" used in the end of this provision in the previous drafts was deleted since it seems referring to examination/responsiveness criteria already covered by subparagraph (f) of this paragraph.



(i) The manner in which the bid 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 subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(j) The currency or currencies in which the bid price is to be formulated and expressed;<sup>4</sup>

(k) The minimum number of suppliers or contractors required to register for the auction in order for the auction to be held, which shall be sufficient to ensure effective competition;<sup>5</sup>

(l) If any limitation on the number of suppliers or contractors that can be registered for the auction is imposed in accordance with paragraph (2) of this article, the relevant maximum number and the criteria and procedure, in conformity with the provisions of this Law, that will be followed in selecting it;

(m) How the auction can be accessed, including appropriate information for connection to the auction;<sup>6</sup>

(n) The deadline by which the suppliers and contractors shall register for the auction and the requirements for registration;

(o) The date and time of the opening of the auction and the requirements for identification of bidders at the opening of the auction;

(p) [deleted];<sup>7</sup>

(q) The criteria governing the closing of the auction;

(r) Other rules for the conduct of the auction, including the information that will be made available to the bidders in the course of the auction, the language in

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<sup>3</sup> Reference to possibility of submitting bids for a portion or portions of the subject matter of the procurement was deleted since this would imply holding several separate auctions within the same procurement proceedings.

<sup>4</sup> Amended pursuant to A/CN.9/690, para. 22 (b). The accompanying Guide text will note that the procuring entity may decide not to include this information in domestic procurement if it would be unnecessary in the circumstances.

<sup>5</sup> The accompanying Guide text will address the issues of objectivity and fairness of treatment, as was suggested in the Working Group, and reasons for not setting any minimum in the Model Law as is done for example in request for proposals proceedings.

<sup>6</sup> The phrase “including appropriate information for connection to the auction” replaced the phrase “information about the equipment being used and technical specifications for connection” used in the previous drafts, as the former is more technology neutral. The accompanying Guide text will specify technical aspects that should be provided (such as website, any particular software, features, capacity, the equipment being used and technical specifications for connection).

<sup>7</sup> The provisions reading “whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage)” were deleted on the understanding that there will be no need for separate stages if there is no exclusion of bidders at the end of each stage. The Working Group may wish to consider that, even if the possibility of holding a multi-staged auction is to be preserved, information at this level of detail can be provided in the rules for the conduct of the auction referred to in subparagraph (r) of this paragraph.

which it will be made available<sup>8</sup> and the conditions under which the bidders will be able to bid;

(s) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(t) The means by which suppliers or contractors may seek clarifications of information relating to the procurement proceedings;<sup>9</sup>

(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 before and after the auction,<sup>10</sup> without the intervention of an intermediary;

(v) [deleted];<sup>11</sup>

(w) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(x) Any formalities that will be required after the auction for a procurement contract to enter into force, including, where applicable, ascertainment of qualifications or responsiveness in accordance with article [51] of this Law and the execution of a written procurement contract pursuant to article [20] of this Law;<sup>12</sup>

(y) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the procurement proceedings.<sup>13</sup>

<sup>8</sup> The Secretariat's understanding is that the accompanying Guide text should note (so as to be consistent with the Working Group's decisions on similar provisions regarding language) that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, but that an indication of the language or languages may still be important in some multilingual countries (see A/CN.9/690, para. 22 (b)).

<sup>9</sup> The additional standard provisions used in this context throughout the Model Law reading "and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors" were omitted here since they will be inappropriate in the auction setting where preserving the anonymity of bidders is paramount. The accompanying Guide text will elaborate on this discrepancy.

<sup>10</sup> The phrase "before and after the auction" was added in the light of article 50 (2) (d) of the current draft.

<sup>11</sup> Reference to any commitments to be made by the supplier or contractor outside the procurement contract was deleted pursuant to A/CN.9/690, para. 39 (h).

<sup>12</sup> The additional standard provisions used in this context throughout the Model Law reading "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" were omitted here in the light of the conditions for the use of stand-alone auctions. It is unlikely that approval by a higher authority or the Government would be required for procurement of subject matter envisaged by article 28 (1) of the current draft.

<sup>13</sup> It was suggested during the intersessional consultations that the accompanying Guide text should highlight that if there were to be any entry fee for the auction (not recommended in the

(2) The procuring entity may impose a maximum number of suppliers or contractors that can be registered for the auction only to the extent that capacity limitations in its communication system so require.<sup>14</sup> The procuring entity shall include a statement of the reasons and circumstances upon which it relied to justify the imposition of such a maximum in the record required under article [23] of this Law.

(3)<sup>15</sup> The procuring entity may decide in the light of the circumstances of the given procurement that the auction shall be preceded by an examination or evaluation of initial bids.<sup>16</sup> In such case, the invitation to the auction shall, in addition to information listed in paragraph (1) of this article, include:

(a) An invitation to present initial bids together with the instructions for preparing initial bids;<sup>17</sup>

(b) The manner, place and deadline for presenting initial bids.<sup>18</sup>

(4) Where the auction has been preceded by the examination or evaluation of initial bids, the procuring entity shall promptly after the completion of the examination or evaluation of initial bids:

(a) Dispatch the notice of rejection and reasons for rejection to each supplier or contractor whose initial bid was rejected;

(b) Issue an invitation to the auction to each qualified supplier or contractor whose initial bid is responsive, providing all information required to participate in the auction;

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light of the Working Group's conclusions at its earlier sessions in the context of discussion of the article 7 provisions and ERAs), at a minimum it must be disclosed at the outset of the procurement.

<sup>14</sup> The phrase "only to the extent that capacity limitations in its communication system so require" replaced the previously used phrase "for technical reasons or capacity limitations". The Secretariat's understanding is that there should be no capacity limitations other than arising out of technical reasons. The suggested wording is aligned with article 50 (5) with reference to "its communication system".

<sup>15</sup> The accompanying Guide text will explain that the enacting State may omit the next two paragraphs if it decides to provide in its national public procurement law only for very simple auctions, not involving any pre-auction stage other than registration for the auction. The Guide will point out however that even in this type of auctions, if the procuring entity has to impose a limit on the number of bidders because of capacity limitations in its communication system (see para. (2) of this article), it may prefer to limit the pool to those qualified and responsive bidders rather than to the defined maximum number of the bidders that were registered first.

<sup>16</sup> The accompanying Guide text will note that the ascertainment of qualifications of suppliers is inherent in examination or evaluation of initial bids.

<sup>17</sup> The phrase reading "including the language or languages, in conformity with article [13] of this Law, in which initial bids are to be prepared" that had been included in the end of this provision in the previous drafts was deleted in the current draft. It is the Secretariat's understanding that it would be sufficient for the accompanying Guide text to refer to this point. To be consistent with the Working Group's decisions on similar provisions regarding language, the Guide would also point out that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, but that an indication of the language or languages may still be important in some multilingual countries (see A/CN.9/690, para. 22 (b)).

<sup>18</sup> The accompanying Guide text will cross-refer to paragraph (1) (f) and (g) as regards the criteria for examination and evaluation of bids, which will also be applicable to initial bids.

(c) Where an evaluation of initial bids has taken place, each invitation to the auction shall also be accompanied by the outcome of the evaluation as relevant to the supplier or contractor to which the invitation is addressed.<sup>19, 20</sup>

**Article 48. Procedures for soliciting participation in procurement proceedings involving an auction as a phase preceding the award of the procurement contract<sup>21</sup>**

(1) Where an auction is to be used as a phase preceding the award of the procurement contract in a procurement method, as appropriate, or in a framework agreement procedure with second stage competition, the procuring entity shall notify suppliers and contractors when first soliciting their participation in the procurement proceedings, that an auction will be held and shall provide, in addition to other information required to be included under provisions of this Law, the following information about the auction:

(a) The mathematical formula<sup>22</sup> that will be used in the evaluation procedure during the auction;<sup>23</sup>

(b) How the auction can be accessed, including appropriate information for connection to the auction.

(2) Before the auction is held, the procuring entity shall issue an invitation to the auction to all suppliers or contractors remaining in the proceedings specifying:

(a) The deadline by which the suppliers and contractors shall register for the auction and requirements for registration;

(b) The date and time of the opening of the auction and requirements for identification of bidders at the opening of the auction;

(c) [deleted];<sup>24</sup>

(d) Criteria governing the closing of the auction;

(e) Other rules for the conduct of the auction, including the information that will be made available to the bidders in the course of the auction, the language in

<sup>19</sup> The accompanying Guide text will address the extent of the information on the outcome of the full evaluation that should be provided.

<sup>20</sup> The provisions referring to the obligation of the procuring entity to ensure that the number of suppliers or contractors invited to register for the auction is sufficient to ensure effective competition were deleted in the current draft since the procuring entity would have no means to ensure that: all responsive bidders would have to be invited up to any maximum specified in the invitation to the auction. The procuring entity cannot enlarge the pool of responsive bidders if it turned out to be small. In such case, provisions of article 49 (2) would apply.

<sup>21</sup> The title was shortened pursuant to A/CN.9/690, para. 42 (a).

<sup>22</sup> The Working Group, at its eighteenth session, agreed to amend this wording by replacing the narrow reference to a mathematical formula with a broader reference to an automatic evaluation method, including a formula, drawing on the relevant wording of the 2006 version of the GPA (A/CN.9/690, para. 42 (c)). This has been done by an addition to the definition of the auction in article 2, and is addressed in article 50 (2) (b).

<sup>23</sup> Reference to “any criteria that cannot be varied during the auction” used in the end of this provision in the previous drafts was deleted. See the relevant footnote above as regards article 47 (1) (g).

<sup>24</sup> See the relevant footnote above regarding the stages of the auction.

which it will be made available<sup>25</sup> and the conditions under which the bidders will be able to bid.

#### **Article 49. Registration for the auction and timing of holding of the auction**

- (1) Confirmation of registration for the auction shall be communicated promptly to each registered supplier or contractor.
- (2) If the number of suppliers or contractors registered for the auction is insufficient to ensure effective competition,<sup>26</sup> the procuring entity may cancel the auction. The cancellation of the auction shall be communicated promptly to each registered supplier or contractor.
- (3) The period of time between the issuance of the invitation to the auction and the auction shall be sufficiently long to allow suppliers or contractors to prepare for the auction, taking into account the reasonable needs of the procuring entity.<sup>27</sup>

#### **Article 50. Requirements during the auction**

- (1) The auction shall be based on:
  - (a) Price, where the procurement contract is to be awarded to the lowest priced bid; or
  - (b) Price and other criteria specified to suppliers or contractors under articles [47 and 48] of this Law, as applicable, where the procurement contract is to be awarded to the most advantageous bid.
- (2) During the auction:
  - (a) All bidders shall have an equal and continuous opportunity to present their bids;
  - (b) There shall be automatic evaluation of all bids in accordance with the criteria, procedure and formula provided to suppliers or contractors under articles [47 and 48] of this Law, as applicable;
  - (c) Each bidder must receive, instantaneously and on a continuous basis during the auction, sufficient information allowing it to determine the standing of its bid vis-à-vis other bids;<sup>28</sup>

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<sup>25</sup> The Secretariat's understanding is that the accompanying Guide text should note (so as to be consistent with the Working Group's decisions on similar provisions regarding language) that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, but that an indication of the language or languages may still be important in some multilingual countries (see A/CN.9/690, para. 22 (b)).

<sup>26</sup> Amended pursuant to A/CN.9/690, para. 45.

<sup>27</sup> The accompanying Guide text will explain that this period must be sufficiently long also to allow effective review of the terms of solicitation under chapter VIII of this Law. According to the relevant provisions of that chapter in the current draft, the terms of solicitation can be challenged only up to the deadline for presentation of submissions, which in simple auctions (with no pre-auction examination or evaluation of initial bids) will mean up to the opening of the auction.

<sup>28</sup> The accompanying Guide text will highlight the risks of collusion that might arise where information about other bids is provided. It will also highlight risks of suppliers being able to

(d) There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in subparagraphs (a) and (c) of this paragraph.

(3) The procuring entity shall not disclose the identity of any bidder during the auction.

(4) The auction shall be closed in accordance with the criteria specified to suppliers or contractors under articles [47 and 48] of this Law, as applicable.

(5) The procuring entity shall suspend or terminate the auction in the case of failures in its communication system that risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.<sup>29</sup>

#### **Article 51. Requirements after the auction**

(1) The bid that at the closure of the auction is the lowest priced bid or the most advantageous bid, as applicable, shall be the successful bid.

(2) In procurement by means of an auction where the auction was not preceded by examination or evaluation of initial bids,<sup>30</sup> the procuring entity shall ascertain after the auction the responsiveness of the successful bid and the qualifications of the supplier or contractor submitting it. The procuring entity shall reject that bid if it is found to be unresponsive or the supplier or contractor submitting it is found unqualified. Without prejudice to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)] of this Law, the procuring entity shall select the bid that was the next lowest priced or next most advantageous bid at the closure of the auction, provided that that bid is ascertained to be responsive and the supplier submitting it is ascertained to be qualified.

(3) Where the successful bid at the closure of the auction appears to the procuring entity to be abnormally low and gives rise to concerns of the procuring entity as to the ability of the bidder that presented it to perform the procurement contract, the procuring entity may follow the procedures described in article [18] of this Law. If the procuring entity rejects the bid as abnormally low under article [18], it shall select the bid that at the closure of the auction was the next lowest priced or next most advantageous bid. This provision is without prejudice to the right of the

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reverse engineering others' bids in more complex auctions using the provided mathematical formula. It will discuss difficulties of preventing that and difficulties of ensuring meaningful bidding process and automatic evaluation while not revealing commercially sensitive information. It will also highlight difficulties of preserving anonymity of bidders, despite the provisions of this article and the chapter as a whole, in procurement of subject matters for which more or less stable pool of providers exists, albeit competition among them may be ensured. The Guide therefore should provide examples of existing good practices to mitigate all these risks.

<sup>29</sup> The accompanying Guide text will note that the effect of the termination of the auction may be cancellation of the procurement.

<sup>30</sup> The accompanying Guide text will note that the ascertainment of qualifications of suppliers is inherent in examination or evaluation of initial bids.

procuring entity to cancel the procurement in accordance with article [17 (1)] of this Law.<sup>31</sup>

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<sup>31</sup> During the intersessional consultations, the suggestions were made that the accompanying Guide text should explain the nature of bids (binding/non-binding and under which conditions) and applications of provisions of this Law on a standstill period and review in the context of the auctions.

**(A/CN.9/WG.I/WP.75/Add.7) (Original: English)****Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its nineteenth session****ADDENDUM**

This note sets out a proposal for chapter VII (Framework agreements procedures) of the revised Model Law, comprising articles 52 to 57.

The Secretariat's comments are set out in the accompanying footnotes.

**CHAPTER VII. FRAMEWORK AGREEMENTS PROCEDURES****Article 52. Award of a closed framework agreement<sup>1</sup>**

(1) The procuring entity shall award a closed framework agreement:<sup>2</sup>

(a) By means of open tendering proceedings, in accordance with provisions of chapter III of this Law except to the extent that those provisions are derogated from in this chapter; or

(b) By means of other procurement methods, in accordance with the relevant provisions of chapters II, IV and V of this Law except to the extent that those provisions are derogated from in this chapter;<sup>3</sup>

(c) In the case of a framework agreement concluded with only one supplier or contractor, in addition<sup>4</sup> by means of single-source procurement under the conditions set out in article [27 (5)] of this Law.

(2) The provisions of this Law regulating the contents of the solicitation in the context of the procurement methods referred to in paragraph (1) (a) and (b) of this

<sup>1</sup> The accompanying Guide text will alert enacting States to both the benefits of framework agreements and the risks to competition, including the risk of creating monopolies or highly concentrated oligopolies through the use of framework agreements in relatively concentrated markets, and of driving potential suppliers out of the market altogether.

<sup>2</sup> The accompanying Guide will cross-refer to the definition of the closed framework agreement in article 2 that specifies that in this type of agreement no supplier or contractor who is not initially a party to the framework agreement may subsequently become a party.

<sup>3</sup> The accompanying Guide will explain that there are no derogations from the substantive provisions on choice of procurement methods in chapter II of this Law, and that the derogations are limited to procedural issues in chapters IV and V.

<sup>4</sup> The accompanying Guide text will explain that the phrase "in addition" in this provision intends to convey that a single-supplier closed framework agreement can be awarded also by means of the proceedings referred to in paragraphs 1 (a) and (b) of this article. It would also point out that, under the general principle contained in article 25 (2) of the current draft, the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method. It is therefore understood that when an alternative to single-source procurement is appropriate, the procuring entity must select such an alternative procurement method that would ensure most competition in the circumstances of the given procurement.



article shall apply *mutatis mutandis*<sup>5</sup> to the information to be provided to suppliers or contractors when first soliciting their participation in a closed framework agreement procedure. The procuring entity shall in addition specify at that stage:

(a) That the procurement will be conducted as a framework agreement procedure, leading to a closed framework agreement;

(b) Whether the framework agreement is to be concluded with one or more than one supplier or contractor;

(c) If the framework agreement will be concluded with more than one supplier or contractor, any minimum or maximum number of suppliers or contractors that will be parties thereto;

(d) The form, terms and conditions of the framework agreement in accordance with article [53] of this Law.

(3) The provisions of article [20] of this Law shall apply *mutatis mutandis*<sup>6</sup> to the award of a closed framework agreement.

### **Article 53. Requirements of closed framework agreements**

<sup>7</sup>(1) A closed framework agreement shall be concluded in writing and shall set out:

(a) The duration of the framework agreement, which shall not exceed [...] (the enacting State specifies a maximum duration)) [the maximum duration established by the procurement regulations];<sup>8</sup>

(b) The description of the subject matter of the procurement and all other terms and conditions of the procurement established when the framework agreement is concluded;

(c) To the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded;

(d) Whether in a closed framework agreement concluded with more than one supplier or contractor there will be a second stage competition to award a procurement contract under the framework agreement and, if so:

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<sup>5</sup> The accompanying Guide text will explain what will need to be changed in the context of framework agreement procedures.

<sup>6</sup> Ibid.

<sup>7</sup> Paragraph (1) of this article in previous drafts was deleted as being superfluous. It read: "(1) A closed framework agreement may be concluded between one or more procuring entities and one or more suppliers or contractors as selected in accordance with the criteria and procedures specified when first soliciting their participation in the framework agreement procedure."

<sup>8</sup> The text in the first set of square brackets reflects the understanding in the Working Group (A/CN.9/690, para. 55 (b)). Since the maximum duration will be different for different types of subject matter of the procurement, the Working Group may wish to consider that the procurement regulations, not the Law, shall specify appropriate maximum duration per each group of subject matters (hence the proposed text in the second set of square brackets). For example, as was pointed out in the Working Group, the maximum duration for framework agreements dealing with such items as IT products, whose price might fluctuate rapidly, should be established in months rather than years.

- (i) A statement of the terms and conditions that are to be established or refined through second stage competition;
  - (ii) The procedures for and the anticipated frequency<sup>9</sup> of any second stage competition and envisaged deadlines for presenting second stage submissions;
  - (iii) Whether the award of a procurement contract under the framework agreement will be to the lowest priced or to the most advantageous submission;<sup>10</sup>
  - (iv) The procedures and criteria to be applied during the second stage competition, including the relative weight of such criteria and the manner in which they will be applied, in accordance with articles [10 and 11] of this Law. If the relative weights of the evaluation criteria may be varied during second stage competition, the framework agreement shall specify the permissible range.<sup>11</sup>
- (2) A closed framework agreement with more than one supplier or contractor shall be concluded as one agreement between all parties unless:
- (a) The procuring entity determines that it is in the interests of either party that separate agreements with each supplier or contractor party to the framework agreement be concluded; and
  - (b) The procuring entity includes in the record required under article [23] of this Law a statement of the reasons and circumstances on which it relied to justify the conclusion of separate agreements;<sup>12</sup> and
  - (c) Any variation in the terms and conditions of the separate agreements for a given procurement is minor and concerns only those provisions that justify the conclusion of separate agreements.
- (3) The framework agreement shall in addition to information specified elsewhere in this article contain all information necessary to allow the effective operation of the framework agreement, including information on how the agreement and notifications of forthcoming procurement contracts thereunder can be accessed and appropriate information for connection where applicable.<sup>13</sup>

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<sup>9</sup> Amended pursuant to A/CN.9/690, para. 55 (c). The accompanying Guide will explain that the frequency of second stage competition may not easily be anticipated, and that this information is not binding on the procuring entity.

<sup>10</sup> Amended pursuant to A/CN.9/690, para. 55 (d). The accompanying Guide will explain why UNCITRAL changed the term the “lowest evaluated” used in the 1994 Model Law to the term the “most advantageous”.

<sup>11</sup> The accompanying Guide will cross-refer to the provisions of article 57, prohibiting any material change to the procurement during the operation of the framework agreement.

<sup>12</sup> The provisions have been retained pursuant to A/CN.9/690, para. 55 (e).

<sup>13</sup> Amended pursuant to A/CN.9/690, para. 55 (f) and aligned with the similar wording in chapter VI of the current draft (articles 47 (1) (m) and 48 (1) (b)). The Guide will address the issues arising from the use of electronic means of communication in procurement proceedings.

**Article 54. Establishment of an open framework agreement**

(1) The procuring entity shall establish and maintain an open framework agreement online.<sup>14</sup>

(2) The procuring entity shall solicit participation in the open framework agreement by issuing an invitation to become a party to the open framework agreement in accordance with article [29 bis] of this Law.

(3) The invitation to become a party to the open framework agreement shall include the following information:

(a) The name and address of the procuring entity that establishes and maintains the open framework agreement and the name and address of any other procuring entities that will have the right to award procurement contracts under the framework agreement;<sup>15</sup>

(b) That the procurement will be conducted as a framework agreement procedure leading to an open framework agreement;

(c) That it is an open framework agreement that is to be concluded;

(d) The language or languages of the open framework agreement<sup>16</sup> and all information about the operation of the agreement, including how the agreement and notifications of forthcoming procurement contracts thereunder can be accessed and appropriate information for connection;<sup>17</sup>

(e) The terms and conditions for suppliers or contractors to be admitted to the open framework agreement, including:

(i) A declaration pursuant to article [8] of this Law;

(ii) If any limitation on the number of suppliers or contractors that are parties to the open framework agreement is imposed in accordance with paragraph (7) of this article, the relevant maximum number and the criteria and procedure, in conformity with this Law, that will be followed in selecting it;

(iii) Instructions for preparing and presenting indicative submissions necessary to become a party to the open framework agreement, including the

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<sup>14</sup> The term “online” replaced the phrase “in electronic form” used in previous drafts.

<sup>15</sup> These provisions have been retained without square brackets pursuant to A/CN.9/690, para 58. The accompanying Guide text will explain the interaction between these provisions and the definition of the procuring entity, the importance of identifying the procuring entity at the outset of the procurement proceedings as an element of transparency under the Model Law, that the provisions enable multiple users of a framework agreement, that suppliers are to be adequately informed about the administrative arrangements for the operation of the framework agreement, and that both the parties to and users of the framework agreement are to be appropriately described.

<sup>16</sup> The accompanying Guide text will note that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances. The Guide would also note that an indication of the language or languages may still be important in some multilingual countries.

<sup>17</sup> Aligned with the similar wording in article 53 (3).

currency(ies) and the language(s) to be used,<sup>18</sup> as well as the criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article [9] of this Law;

(iv) An explicit statement that suppliers or contractors may apply to become parties to the framework agreement at any time during the period of its operation by presenting indicative submissions, subject to any maximum number of suppliers, if any, and any declaration made pursuant to article [8] of this Law;

(f) Other terms and conditions of the open framework agreement, including all information required to be set out in the open framework agreement in accordance with article [55] of this Law;

(g) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(h) 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.

(4) Suppliers and contractors may apply to become a party or parties to the framework agreement at any time during its operation by presenting indicative submissions to the procuring entity in compliance with the requirements of the invitation to become a party to the framework agreement.

(5) The procuring entity shall examine all indicative submissions received during the period of operation of the framework agreement within a maximum of ... working days (the enacting State specifies the maximum period of time)<sup>19</sup> in accordance with the procedures set out in the invitation to become a party to the framework agreement.

(6) The framework agreement shall be concluded with all qualified suppliers or contractors that presented submissions unless their submissions have been rejected on the grounds specified in the invitation to become a party to the framework agreement.

(7) The procuring entity may impose a maximum number of parties to the open framework agreement only to the extent that capacity limitations in its communication system so require.<sup>20</sup> The procuring entity shall include a statement

<sup>18</sup> A/CN.9/690, para. 22 (b). The accompanying Guide text will note that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances.

<sup>19</sup> The accompanying Guide text will in this context again draw attention of the enacting State that the period of time of a short duration should be established in working days; in other cases, it may be established in calendar days (A/CN.9/690, para. 87).

<sup>20</sup> As in the corresponding provisions applicable to auctions, the phrase “only to the extent that capacity limitations in its communication system so require” replaced the previously used phrase “for technical reasons or capacity limitations.”

of the reasons and circumstances upon which it relied to justify the imposition of such a maximum in the record required under article [23] of this Law.<sup>21</sup>

(8) The procuring entity shall promptly notify the suppliers or contractors whether they have become parties to the framework agreement and of the reasons for the rejection of their indicative submissions if they have not.

#### **Article 55. Requirements of open framework agreements**

(1) An open framework agreement shall provide for second stage competition for the award of a procurement contract under the agreement and shall include:

- (a) The duration of the framework agreement;
  - (b) The description of the subject matter of the procurement and all other terms and conditions of the procurement known when the open framework agreement is established;
  - (c) Any terms and conditions that may be refined through second stage competition;
  - (d) The procedures and the anticipated frequency<sup>22</sup> of second stage competition;
  - (e) Whether the award of a procurement contract under the framework agreement will be to the lowest priced or the most advantageous submission;
  - (f) The procedures and criteria to be applied during the second stage competition, including the relative weight of the evaluation criteria and the manner in which they will be applied, in accordance with articles [10 and 11] of this Law. If the relative weights of the evaluation criteria may be varied during second stage competition, the framework agreement shall specify the permissible range.<sup>23</sup>
- (2) The procuring entity shall, during the entire period of operation of the open framework agreement, republish at least annually the invitation to become a party to the open framework agreement and shall in addition ensure unrestricted, direct and full access to the terms and conditions of the framework agreement and to any other necessary information relevant to its operation.<sup>24</sup>

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<sup>21</sup> The last sentence has been retained without square brackets pursuant to A/CN.9/690, para. 59.

<sup>22</sup> Amended pursuant to A/CN.9/690, para. 55 (c). The accompanying Guide will explain that the frequency of second stage competition may not easily be anticipated, and that this information is not binding on the procuring entity.

<sup>23</sup> The accompanying Guide will cross-refer to the provision of article 57 of this Law, prohibiting any material change to the procurement during the operation of the framework agreement.

<sup>24</sup> The accompanying Guide will explain, with a cross-reference to article 54 (3) (d) of this Law, that republication and maintenance of the relevant information shall be at the place where the original invitation was published or at the place (website or other electronic address) set out in the original invitation.

**Article 56. Second stage of a framework agreement procedure**

(1) Any procurement contract under a framework agreement shall be awarded in accordance with the terms and conditions of the framework agreement and the provisions of this article.

(2) A procurement contract under a framework agreement may only be awarded to a supplier or contractor that is a party to the framework agreement.

(3) The provisions of article [20] of this Law, except for its paragraph (2),<sup>25</sup> shall apply to the acceptance of the successful submission under framework agreements without second stage competition.

(4) In a closed framework agreement with second stage competition and in an open framework agreement, the following procedures shall apply to the award of a procurement contract:

(a) The procuring entity<sup>26</sup> shall issue a written invitation to present submissions simultaneously to each supplier or contractor party to the framework agreement, or only to each of those parties of the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement;

(b) The invitation to present submissions shall include the following information:

(i) A restatement of the existing terms and conditions of the framework agreement to be included in the anticipated procurement contract, set out the terms and conditions that are to be subject to the second stage competition and provide further detail of the terms and conditions where necessary;

(ii) A restatement of the procedures and criteria for the award of the anticipated procurement contract (including their relative weight and the manner of their application);

(iii) Instructions for preparing submissions;

(iv) The manner, place and deadline for presenting submissions;

(v) If suppliers or contractors are permitted to present submissions for only a portion of the subject matter of the procurement, a description of the portion or portions for which submissions may be presented;

(vi) The manner in which the submission 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 subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(vii) Reference to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those

<sup>25</sup> The accompanying Guide text will explain reasons why provisions on the standstill period of article 20 do not apply to framework agreements without second stage competition.

<sup>26</sup> Amended pursuant to A/CN.9/690, para. 62. The definition of the procuring entity provides for multi-user frameworks, and the accompanying Guide will stress the importance of ensuring that suppliers are aware of the administrative arrangements for the operation of framework agreement, as noted in the relevant footnote above.

applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(viii) 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 second stage competition, without the intervention of an intermediary;

(ix) <sup>27</sup>Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(x) Any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article [20] of this Law, [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];<sup>28</sup>

(xi) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of submissions and to other aspects of the second stage competition;

(c) The procuring entity<sup>29</sup> shall evaluate all submissions received and determine the successful submission in accordance with the evaluation criteria and the procedures set out in the invitation to present submissions;

(d) The procuring entity shall accept the successful submission in accordance with article [20] of this Law.

#### **Article 57. No material change during the operation of a framework agreement**

During the operation of a framework agreement, no change shall be allowed to the description of the subject-matter of the procurement. Changes to other terms and conditions of the procurement, including to the criteria (and their relative weight and the manner of their application) and procedures for the award of the anticipated

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<sup>27</sup> Reference to any commitments to be made by the supplier or contractor outside the procurement contract has been deleted pursuant to A/CN.9/690, para. 62.

<sup>28</sup> The Working Group may wish to consider appropriateness of the provision put in square brackets in the context of the award of procurement contracts under the framework agreement procedures. It may consider that this provision may be relevant only in the context of the award of the framework agreement itself rather than procurement contracts thereunder (especially under open framework agreements). If it is to be deleted, the accompanying Guide text will elaborate on justifications for this deviation, as will be the case with respect to the corresponding provisions applicable to auctions (article 47 (1) (x) of the current draft).

<sup>29</sup> Amended pursuant to A/CN.9/690, para. 62. See the relevant footnote above.

procurement contract, may occur only to the extent expressly permitted in the framework agreement.<sup>30</sup>

*[Articles 58-60 are not used]*

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<sup>30</sup> The accompanying Guide text will explain that the phrase “to the extent expressly permitted” is intended to ensure that any such changes must respect any estimates, variables or permissible range of variation set out in the framework agreement. It will also note that any change to the qualification or responsiveness criteria that would change the parties to the framework agreement would effectively contravene articles 52 and 54 that require establishing these criteria at the outset of the procurement proceedings.



**(A/CN.9/WG.I/WP.75/Add.8) (Original: English)****Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its nineteenth session****ADDENDUM**

This note sets out a proposal for chapter VIII (Review) of the revised Model Law, comprising articles 61 to 66.

The Secretariat's comments are set out in the accompanying footnotes.

**CHAPTER VIII. REVIEW<sup>1</sup>****Article 61. Right to review**

(1) A supplier or contractor that claims to have suffered or claims that it may suffer, loss or injury due to alleged non-compliance with the provisions of this Law may submit a complaint seeking review of the alleged non-compliance in accordance with articles [62 to 66] of this Law or other provisions of applicable law of this State.

(2) A supplier or contractor may appeal any decision taken by a review body in review proceedings initiated pursuant to paragraph (1) of this article, or institute proceedings following the failure of a review body to take a decision within the prescribed time limits or to suspend the procurement proceedings in accordance with article [65 (1)] of this Law.<sup>2</sup>

**Article 62. Review by the procuring entity or the approving authority**

(1) A supplier or contractor seeking review shall submit a complaint in writing to the procuring entity or, where applicable, to the approving authority.<sup>3</sup>

(2) Complaints shall be submitted within the following time periods:

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<sup>1</sup> The Guide provisions accompanying chapter VIII will note that the chapter contains a minimum set of provisions aimed at ensuring an effective review process, and will encourage enacting States to incorporate all the provisions of the chapter to the extent that the legal system of the enacting State so permits (A/CN.9/690, para. 68). They will also refer to the applicable provisions of the United Nations Convention against Corruption and will contain a discussion of the relevance of other branches of law and of other bodies if a review were triggered for example by fraud or corruption (including the need to alert the relevant authorities to ensure that appropriate action is taken). They will cross-refer in this regard to the relevant discussion in the Guide in conjunction with the provisions of article [19] (A/CN.9/690, para. 93).

<sup>2</sup> The second paragraph was added pursuant to A/CN.9/690, para. 69 (b). The accompanying Guide text will explain that, apart from suppliers or contractors, various State bodies may have the right to initiate review or appeals under chapter VIII (A/CN.9/690, para. 67).

<sup>3</sup> The opening words in the chapeau provisions were deleted pursuant to A/CN.9/690, para. 69 (a). The accompanying Guide text will explain that regulations or other guidance should address the evidentiary support to be provided to substantiate the complaint.

(a) Complaints as regards the terms of solicitation,<sup>4</sup> pre-qualification or pre-selection or arising from the pre-qualification or pre-selection proceedings shall be submitted no later than the deadline for presenting submissions;

(b) All other complaints arising from the procurement proceedings shall be submitted:

(i) Within the standstill period applied pursuant to article [20 (2)] of this Law;<sup>5</sup> or

(ii) If no standstill period is applied under circumstances of article [20 (3)] of this Law, within ... working days (the enacting State specifies the period)<sup>6</sup> of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or when that supplier or contractor should have become aware of those circumstances, whichever is earlier, provided that the procuring entity or, where applicable, the approving authority need not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force or the decision to cancel the procurement has been taken, as the case may be.<sup>7</sup>

<sup>4</sup> The accompanying Guide text will explain the intended meaning of the phrase “terms of solicitation” as encompassing all issues arising from the procurement proceedings before the deadline for presenting submissions (other than those covered by pre-qualification or pre-selection, separately mentioned in the subparagraph), such as the selection of a method of procurement or a method of solicitation where the choice between open and direct solicitation exists, and the limitation of participation in the procurement proceedings in accordance with article 8. It thus excludes issues arising from examination and evaluation of submissions. It will further explain that the terms of the solicitation, pre-qualification or pre-selection include the contents of any addenda issued pursuant to article 14 (A/CN.9/690, para. 69 (c)).

<sup>5</sup> Amended pursuant to A/CN.9/690, para. 69 (f).

<sup>6</sup> The accompanying Guide text will note that the determination of the specific deadline is left to enacting States as is done with respect to the standstill period, and that the enacting States should ensure that all the relevant time limits left for their determination should be aligned throughout the Model Law (A/CN.9/690, para. 86). It will also bring to the attention of enacting States the time period specified in the 1994 and 2006 versions of the GPA to assist in inserting the requisite number of days.

<sup>7</sup> Differing views were expressed during the Working Group’s eighteenth session on whether this article should allow submission of complaints after the entry into force of the procurement contract. The Working Group did not finalize the consideration of this issue as well as the suggestion to include a provision to prevent suppliers from disrupting the entry into force of the procurement contract by filing a complaint immediately before the contract is to be signed (A/CN.9/690, para. 69 (d) and (e)). The Working Group may consider that the wording “need not entertain a complaint, or continue to entertain a complaint,” used in this subparagraph, is sufficiently flexible to address both concerns. In order to mitigate risks of abuse of the discretion given to the procuring entity under such flexible wording, the accompanying Guide text will need to refer to provisions of article 65 (1) on automatic suspension of the procurement proceedings. The Working Group may wish to consider that it is unlikely that complaints about procurement proceedings after the entry into force of the procurement contract will be submitted to the procuring entity or the approving authority; most likely that they will be submitted directly to the administrative review body or to the court, taking into account that these bodies will most certainly have the prerogative to overturn the award of the contract (the administrative review body has such a prerogative under article 63 (3) (f) of the current draft). The prerogative of the procuring entity or the approving authority to that effect may differ from jurisdiction to jurisdiction.

(3) Unless the complaint is resolved by mutual agreement of the parties, the procuring entity or the approving authority, as the case may be, shall ... working days (the enacting State specifies the period)<sup>8</sup> 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, state the corrective measures that shall be undertaken.

(4) If the procuring entity or the approving authority, as the case may be, does not issue a decision by the time specified in paragraph (3) of this article, the supplier or contractor submitting the complaint<sup>9</sup> is entitled immediately thereafter to institute proceedings under article [63 or 66]. Upon the institution of such proceedings, the competence of the procuring entity or the approving authority, as the case may be, to entertain the complaint, ceases.<sup>10</sup>

(5) The procuring entity or the approving authority, as the case may be, shall communicate its decision to all participants in the review proceedings in accordance with article 64 (5).<sup>11</sup>

### **Article 63. Review before an independent administrative body<sup>\*,12</sup>**

(1) A supplier or contractor seeking review shall submit a complaint or an appeal in writing to ... (the enacting State inserts the name of the independent administrative body) within the following time periods:<sup>13</sup>

<sup>8</sup> Amended pursuant to A/CN.9/690, para. 69 (g).

<sup>9</sup> The words “or the procuring entity” taken from the 1994 text (see article 53 (5)) were deleted in the current draft. Although they intended to cover possible appeal by the procuring entity of the decisions by the approving authority taken against it, the Secretariat’s understanding is that issues related to possibility of appeals by the procuring entity are outside the scope of the chapter and the Model Law.

<sup>10</sup> The accompanying Guide text will draw a clear distinction between review proceedings under this article and debriefing proceedings.

<sup>11</sup> The accompanying Guide text will explain that the term “participants in the review proceedings” could include a different pool of participants depending on the timing of the review proceedings and subject of the complaint. In this respect, it will cross-refer to the provisions of article 64 (1) and (2).

<sup>\*</sup> States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit this article and provide only for judicial review (article [66]), on the condition that in the enacting State exists an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption. [States may provide for the system of appeal judicially, or administratively, to reflect the legal system in the jurisdiction concerned.]

<sup>12</sup> The accompanying Guide text will clarify the meaning of the term “independent administrative body”, in particular whether the body should be composed of outside experts, independent from the Government. It was noted that the Guide might highlight the disruptions to the procurement proceedings if decision-taking at the review stage lacked independence since decisions might be challenged in the court and this would cause further delays. The Guide will note that the Model Law establishes the principle of independence of the administrative review body, but does not prescribe the manner in which that independence should be achieved, with the understanding that there would be various ways of so doing in various jurisdictions depending on their prevailing conditions (A/CN.9/690, para. 71 (o)).

(a) Complaints as regards the terms of solicitation, pre-qualification or pre-selection or arising from the pre-qualification or pre-selection proceedings shall be submitted no later than the deadline for presenting submissions;

(b) All other complaints arising from the procurement proceedings shall be submitted no later than ... (the enacting State specifies the period of time)<sup>14</sup> after the entry into force of the procurement contract or the decision to cancel the procurement, as the case may be, provided that the review body need not entertain the complaint.<sup>15</sup>

(i) If it was submitted after the expiry of the standstill period applied pursuant to article [20 (2)] of this Law; or if no standstill period has been applied pursuant to article [20 (3)] of this Law;

(ii) If it was submitted later than ... working days (the enacting State specifies the period) of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or when that supplier or contractor should have become aware of those circumstances, whichever is earlier;<sup>16</sup>

<sup>13</sup> Amended pursuant to A/CN.9/690, para. 71 (a) and 69 (b). The accompanying Guide text will note that judicial review at any level may also be available as an alternative to proceedings before an administrative body in some States, as provided for in article [66]. It will also note that regulations or other guidance should address the evidentiary support to be provided to substantiate the complaint or appeal.

<sup>14</sup> The accompanying Guide text will note that the determination of the specific deadline is left to enacting States as is done with respect to the standstill period (A/CN.9/690, para. 86) and will note that the period here will most likely be expressed in months or year(s) than calendar or working days since the provisions intend to provide for the absolute maximum (see the explanation in the relevant footnote below).

<sup>15</sup> Amended pursuant to A/CN.9/690, paras. 69 (d) to (g), 85 and 86.

<sup>16</sup> Amended to reconcile differing views in the Working Group and during the intersessional consultations on whether the supplier should be able to submit complaints after the entry into force of the procurement contract, regardless of whether the standstill period was applied or not. The provisions would allow suppliers to do so but would impose (i) in the chapeau the absolute maximum time limit after expiry of which no complaints can be entertained and (ii) an additional time limit equal to the duration of the standstill period if it was applied or an additional time limit to be determined by the enacting State if no standstill period was applied. The provisions would also give the review body discretion to decide on whether to entertain complaints submitted after those additional time limits. The provisions also intend to cover situations where, although the complaint was submitted on time, the procurement contract entered into force (e.g. due to the failure to suspend the procurement proceedings or due to the decision to lift the suspension). With respect to provisions in (ii), the accompanying Guide text would cross-refer to article 20 (3) that sets out grounds for exceptions to application of the standstill period, including on the ground of urgency/emergency. The Guide in this respect will stress that, although in such cases the notice of the procurement contract award to be published under article 21 would most likely serve as the time point when the supplier or contractor submitting the complaint will become aware of the circumstances giving rise to the complaint or when that supplier or contractor should become aware of those circumstances, this would not necessarily be always the case. For example, the urgency/emergency ground would most likely justify the exemption from publication of the procurement contract award for reasons of confidentiality (e.g. protection of essential national interests of State). Hence the provisions as drafted do not link the time point to the notice of the procurement contract award but take more flexible approach, which is necessary in order to allow review in situations where transparency safeguards of the Model Law do not apply.

(c) Appeals shall be submitted within ... working days (the enacting State specifies the period) after the issuance of the decision in accordance with article [62 (3)] of this Law or, if no decision was issued or the procurement proceedings was not suspended in accordance with article [65 (1)], proceedings shall be instituted within ... working days (the enacting State specifies the period) after the expiry of the prescribed time limit for issuance of such a decision or for suspension.<sup>17</sup>

(2) Upon receipt of a complaint or an appeal, the ... (the enacting State inserts the name of the independent administrative body) shall give notice thereof promptly to the procuring entity and to the approving authority where applicable.

(3) The [insert name of administrative body] may declare the legal rules or principles that govern the subject matter of the complaint or appeal and shall be empowered to take one or more of the following actions:<sup>18</sup>

(a) Prohibit the procuring entity, or the approving authority as the case may be, from acting or deciding unlawfully or from following an unlawful procedure;

(b) Require the procuring entity, or the approving authority as the case may be, 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;

(c) Overturn<sup>19</sup> in whole or in part an unlawful act or decision of the procuring entity, or the approving authority as the case may be, [or a decision of the procuring entity or the approving authority on a complaint submitted to that entity or authority];<sup>20</sup>

(d) Revise an unlawful decision by the procuring entity, or the approving authority as the case may be, or substitute its own decision for such a decision, [other than any act or decision bringing the procurement contract into force] or confirm a lawful decision by the procuring entity or the approving authority;<sup>21</sup>

(e) Order that the procurement proceedings be terminated;

(f) Overturn the award of a procurement contract or the framework agreement that has entered into force unlawfully and, if notice of the award of the

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<sup>17</sup> The accompanying Guide text will explain that article [65 (1)] prescribes a very short time limit for suspension to take place as it refers to “prompt” action.

<sup>18</sup> Amended pursuant to A/CN.9/690, paras. 71 (b) and (d) and 72. The accompanying Guide text will emphasize the importance of ensuring that the administrative body can exercise any of these remedies in any combination, as appropriate, in order to ensure an effective and independent administrative system of review (A/CN.9/690, para. 73).

<sup>19</sup> The accompanying Guide text will explain that this term does not carry any particular consequences (it is not to be treated as declaring the decision of no effect), so that the enacting State may provide for the consequences appropriate in the light of the legal tradition in the jurisdiction concerned (A/CN.9/690, paras. 71 (f) and 72).

<sup>20</sup> The Working Group may wish to consider the need for this additional wording in square brackets to allow for appeals. The decision on a complaint is not necessarily unlawful decision (it may be wrong on merits but taken in accordance with law) and when it is not, then it is not covered by this subparagraph.

<sup>21</sup> The accompanying Guide text will explain that this text may be omitted in those enacting States where administrative review body may impose its own decision as to the award of the contract.

procurement contract or the framework agreement has been published, order the publication of notice of the overturning of the award;<sup>22</sup>

(g) Dismiss the complaint or appeal;<sup>23</sup> and

(h) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint or appeal as a result of an unlawful act or decision of, or procedure followed by, the procuring entity or the approving authority in the procurement proceedings, and for any loss or damages suffered, which shall be limited to costs for the preparation of the submission, or the costs relating to the complaint and the appeal where applicable, or both;<sup>24</sup> and the [insert name of administrative body] shall take the decision appropriate in the circumstances.<sup>25</sup>

(4) The [insert name of administrative body] shall within [...] days after receipt of the complaint or appeal issue a written decision concerning the complaint or appeal, stating the reasons for the decision and the action taken.

(5) The [insert name of administrative body] shall communicate its decision to all participants in the review proceedings in accordance with article 64 (5).

#### **Article 64. Certain rules applicable to review proceedings under articles [62 and 63]**

(1) Promptly after the receipt of a complaint under article [62 or 63] of this Law, or appeal under article [63] of this Law, the review body shall notify all suppliers or contractors participating in the procurement proceedings<sup>26</sup> to which the complaint

<sup>22</sup> See the relevant footnote above as regards the term “overturn” used in the current draft. At the Working Group’s eighteenth session, the point was made that all other remedies were linked to stages of the procurement proceedings before the entry into force of the procurement contract or framework agreement, and thus were limited in time, while the possibility of overturning the procurement contract or framework agreement appeared to be open-ended (A/CN.9/690, para. 71 (m)). The Working Group may wish to consider that the amendments made in paragraph (1) of this article as regards the absolute maximum timeframe for submission of complaints will address this concern.

<sup>23</sup> Amended pursuant to A/CN.9/690, paras. 71 (c) and 72.

<sup>24</sup> The accompanying Guide text will discuss that unlike the 1994 Model Law, the revised Model Law prefers only one approach towards compensation of costs, which will support a speedy and effective administrative review process. It will also note that this approach does not exclude the possibility of seeking anticipatory losses through court action (or in proceedings before administrative review bodies where the legal system in an enacting State so permitted, or in an action under a contract that has been executed and where performance has commenced) (A/CN.9/690, para. 71 (j)).

<sup>25</sup> Amended pursuant to A/CN.9/690, para. 72. The accompanying Guide text will emphasize the list of measures in paragraph (3) is a minimum set of measures that the administrative review body should be able to take according to the circumstances, in order to ensure an effective and independent administrative review, and the enacting State will therefore be directed to incorporate all of the measures listed except when so doing would be in violation of the constitution or other laws of the State. The Guide text will also state that the last phrase in this paragraph (3) is aimed at ensuring an effective review process (A/CN.9/690, para. 73).

<sup>26</sup> The Guide will explain that the term “participating in the procurement proceedings” could include a different pool of participants depending on the timing of the review proceedings and subject of the complaint, and will specify that those suppliers who were disqualified as a result of pre-qualification proceedings may not become participants in the review proceedings that

or appeal relates as well as any governmental authority whose interests are or could be affected about the submission of the complaint or appeal and its substance.

(2) Any such supplier or contractor or governmental authority has the right to participate in the review proceedings. A supplier or contractor or the governmental authority that fails to participate in the review proceedings is barred from subsequently making the same type of complaint or appeal.<sup>27</sup>

(3) The participants to the review proceedings shall have access to all proceedings and shall have the right to be heard prior to a decision of the review body being made on the complaint or appeal, the right to be represented and accompanied, the right to request that the proceedings take place in public<sup>28</sup> and the right to present evidence, including witnesses.<sup>29</sup>

(4) In the cases of review by the approving authority or the [insert name of administrative body], the procuring entity shall provide to the review body all documents pertinent to the complaint, including the record of the procurement proceedings, in timely fashion.<sup>30</sup>

(5) A copy of the decision of the review body shall be communicated to the participants in the review proceedings within ... working days (the enacting State specifies the period) after the issuance of the decision. In addition, after the decision has been issued, the complaint and the decision shall promptly be made available to the public.

(6) No information under paragraphs (3) to (5) of this article shall be disclosed and no public proceedings shall take place if so doing would be against the protection of essential security interests of the State<sup>31</sup> or contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition.

(7) The decision by the review body and the reasons and circumstances therefor shall be made part of the record of the procurement proceedings.<sup>32</sup>

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concern subsequent stages of the procurement proceedings (e.g. examination and evaluation of submissions).

<sup>27</sup> Amended pursuant to A/CN.9/690, para. 75.

<sup>28</sup> Retained without square brackets pursuant to A/CN.9/690, para. 75. The accompanying Guide text will note that these provisions are to be read together with those in paragraph (6) permitting the review body to refuse a request to hold public proceedings on the grounds of confidentiality.

<sup>29</sup> Amended pursuant to A/CN.9/690, para. 75.

<sup>30</sup> The accompanying Guide text will refer to the need for practice directions or similar guidance on time periods.

<sup>31</sup> Aligned in the relevant part with articles 22 (1) and 23 (4).

<sup>32</sup> The accompanying Guide text will refer to the need for practice directions or similar guidance on time periods. It will explain the importance of this provision to ensuring transparency and that the record of the procurement is complete.

**Article 65. Suspension of the procurement proceedings,  
the framework agreement or the procurement contract<sup>33</sup>**

(1) Promptly after the timely submission of a complaint under article [62 or 63] of this Law or an appeal under article [63] of this Law, the review body shall suspend<sup>34</sup> the procurement proceedings, the framework agreement or the procurement contract, for a period to be determined by the review body, except as provided for in paragraphs (2) of this article.

[deleted]<sup>35</sup>

(2) The review body need not suspend the procurement proceedings if it decides that the complaint or appeal is manifestly without merit.<sup>36</sup>

(3) The review body may lift the suspension applied in accordance with paragraph (1) of this article if it decides that the suspension will cause or has caused disproportionate harm to the procuring entity or to other suppliers or contractors, or that urgent public interest considerations require the procurement, or the procurement contract or framework agreement, to proceed. The review body's decision is conclusive with respect to all levels of review except judicial review.<sup>37</sup>

(4) Where the procuring entity is not the review body, it may request in writing the review body to lift the suspension on the grounds referred to in paragraph (3) of this article.<sup>38</sup>

(5) The review body may extend the originally determined period of suspension in order to preserve the rights of the supplier or contractor submitting the complaint or appeal or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed the period required for the review body to take a decision in accordance with article [62 or 63] as

<sup>33</sup> This article has been redrafted to reflect the Secretariat's understanding of the Working Group's decisions in A/CN.9/690, para. 79. The accompanying Guide text will note that the article does not purport to address the question of court-ordered suspension.

<sup>34</sup> The accompanying Guide text would explain which steps will be involved for the suspension to take place depending on the body reviewing the complaint. In particular, it will draw a distinction between steps that the procuring entity will have to take if it is the review body and steps that it has to take (and may in addition take) if it receives a notice of the suspension from the review body. A cross-reference in this context will be made to article 64 (1).

<sup>35</sup> The provisions referring to the declaration to be submitted by suppliers or contractors (A/CN.9/690, para. 79 (b). See also article 56 (1) of the 1994 Model Law) were deleted. The Secretariat's understanding is that the complaint or the appeal itself would demonstrate the likelihood of its success, and a declaration is no longer necessary as the suspension is automatic.

<sup>36</sup> Redrafted pursuant to A/CN.9/690, para. 79 (a).

<sup>37</sup> The Working Group may wish to consider significant deviation from the approach in article 56 (4) of the 1994 Model Law that refers in this context to certification by the procuring entity as the only sufficient ground for not applying suspension. The Working Group may also wish to recall its consideration in A/CN.9/690, para. 79 (c), and consider whether the last sentence should be retained, taking into account that the "review body" in this provision cumulatively refers to the procuring entity, the approving authority and the administrative review body, as the case may be.

<sup>38</sup> The accompanying Guide text will elaborate that the approving authority or the administrative body may request the procuring entity to provide to the review body necessary documents to substantiate its request.



applicable and the sufficiently long period thereafter for a supplier or contractor to file any appeal against a decision of a review body.<sup>39</sup>

(6) (a) The fact of the suspension and the duration of the suspension or the decision by the review body not to suspend the procurement proceedings or the procurement contract or the framework agreement, as the case may be, shall be included in the notification of the submission of the complaint or appeal issued in accordance with article [64 (1)] of this Law and shall in addition be promptly communicated by the review body to the supplier or contractor submitting the complaint or appeal;

(b) The decision on an extension of the suspension indicating the duration of the extension or the decision to lift the suspension and all other decisions taken by the review body pursuant to this article and the reasons therefor shall be promptly communicated to all participants in the review proceedings.

(7) The fact of the suspension and the duration of the suspension and any decision by the review body under this article and the reasons and circumstances therefor shall be made part of the record of the procurement proceedings.<sup>40</sup>

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<sup>39</sup> Amended pursuant to A/CN.9/690, paras. 80 and 81.

<sup>40</sup> Retained without square brackets pursuant to A/CN.9/690, para. 75.

**Article 66. Judicial review\*,<sup>41</sup>**

The [insert name of court or courts] has jurisdiction over actions pursuant to article [61].<sup>42, 43</sup>

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\* States that provide only for judicial review of the decisions of the procuring entity or approving authority, are required to put in place an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption. Such an effective system of judicial review shall in particular ensure: (i) that deadlines for submission of complaints or petitions for judicial review of decisions of the procuring entity, the approving authority or the administrative body as the case may be shall be appropriate in the procurement context, in particular the provisions of this Law on the standstill period shall be taken into account; (ii) that the court or courts with jurisdiction over actions pursuant to article [61] may take any or any combination of the actions contemplated in article [63(3)] of this Law and to grant interim measures that it considers necessary to ensure effective review, including suspension of the procurement proceedings or performance of the procurement contract or the framework agreement, as applicable; and (iii) that minimum safeguards as regards the participation in the review proceedings, submission of evidence and protection of confidential information in the procurement context, contemplated in article [64] of this Law, are in place.

<sup>41</sup> An accompanying footnote to this article has been inserted pursuant to A/CN.9/690, paras. 90-92. It is the Secretariat's understanding that the footnote will remain in the text of the Model Law.

<sup>42</sup> article has been amended pursuant to the changes made in article 61. In particular, the portion of the text that was based on the text in the 1994 Model Law, reading "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 [62 or 63]" was deleted as being superfluous in the light of the similar provisions added in article 61.

<sup>43</sup> The accompanying Guide text, in particular with reference to the accompanying footnote to this article, will emphasize that the Model Law does not intend to interfere into the prerogatives of courts, which are regulated or are supposed to be regulated in a separate body of law in enacting States. It will further point out that the Model Law neither intends to inadvertently restrict broader powers that most likely exist for courts under legislation of enacting States. Specific mention in this regards will be made of the powers to award compensation for anticipatory losses or to grant interim measures (A/CN.9/690, para. 90). The accompanying Guide text in this context will cross-refer to the provisions of article 63 (3) (h) addressing the issues of compensation for costs incurred by the supplier or contractor submitting the complaint and appeal where applicable. It will note that although the provisions there exclude possibility of seeking in the course of administrative review compensation for anticipatory losses, such possibility may still exist through court action, including under a contract that has been executed and where performance has commenced, if the legal system of the enacting State so permits (A/CN.9/690, para. 71 (j)). The accompanying Guide text will also refer to the provisions of article 65 on suspension and will reiterate that the article did not refer to the court-ordered suspension.

**C. Report of the Working Group on Procurement on the work of its twentieth session (New York, 14-18 March 2011)**  
**(A/CN.9/718)**

**[Original: English]**

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## I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the “Commission”) entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “1994 Model Law”, A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82).

2. The Working Group began its work on the elaboration of proposals for the revision of the 1994 Model Law at its sixth session (Vienna, 30 August-3 September 2004) and completed that work at its nineteenth session (Vienna, 1-5 November 2010).<sup>1</sup>

3. At its thirty-eighth to forty-first sessions, in 2005 to 2008, respectively, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the revised Model Law (A/60/17, para. 172, A/61/17, para. 192, A/62/17, part I, para. 170, and A/63/17 and Corr.1, para. 307). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the 1994 Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the revised Model Law (A/61/17, para. 192). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17, part I, para. 170). At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time (A/63/17 and Corr.1, para. 307).

4. At its forty-second session, in 2009, the Commission considered chapter I of the draft revised model law and noted that most provisions of that chapter had been agreed upon, although some issues remained outstanding. The Commission noted that the draft revised model law was not ready for adoption at that session of the Commission. It entrusted the Secretariat to prepare drafting suggestions for consideration by the Working Group to address those outstanding issues. At that session, the importance of completing the revised Model Law as soon as reasonably possible was highlighted (A/64/17, paras. 283-285).

5. At its forty-third session, in 2010, the Commission requested the Working Group to complete its work on the revision of the 1994 Model Law during the next two sessions of the Working Group and present a draft revised model law for finalization and adoption by the Commission at its forty-fourth session, in 2011. The Commission instructed the Working Group to exercise restraint in revisiting issues on which decisions had already been taken (A/65/17, para. 239).

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<sup>1</sup> For the reports of the Working Group on the work of its sixth to nineteenth sessions, see A/CN.9/568, A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640, A/CN.9/648, A/CN.9/664, A/CN.9/668, A/CN.9/672, A/CN.9/687, A/CN.9/690 and A/CN.9/713.

6. At its nineteenth session, having completed its work on the revisions of the 1994 Model Law (see para. 2 above), the Working Group reached the understanding that, according to the UNCITRAL practice, the draft Model Law on Public Procurement emanating from the nineteenth session of the Working Group (the “draft Model Law”) would be circulated to all Governments and relevant international organizations for comment. It was noted that the comments received would be before the Commission at its forty-fourth session, in 2011, together with the draft Model Law. It was emphasized that no amendments would be made to the draft Model Law after the text was circulated for comment and before the Commission considered it (A/CN.9/713, para. 137).

7. At the same session, the Working Group reached the understanding that, at its twentieth session, it would focus on proposals for a revised Guide to Enactment. Although it was understood that the Commission was not expected to adopt the revised Guide together with the revised Model Law, the Working Group noted its intention of submitting a working draft of the revised Guide emanating from the work of its twentieth session to the Commission, so as to assist the latter with its consideration of the draft Model Law (A/CN.9/713, para. 138).

8. At the same session, the Working Group recalled that it had deferred a number of issues for discussion in the revised Guide. It was agreed that decisions of the Working Group on the treatment of those issues in the revised Guide should be maintained, unless they were superseded by subsequent discussion in the Working Group or Commission. It was also recalled that additional sections addressing issues of procurement planning and contract administration, a glossary of terms and table of correlation of the revised Model Law with the 1994 Model Law were agreed to be included in the revised Guide. The understanding was that, for lack of time, it was unlikely to be feasible to prepare an expanded Guide for implementers or end-users, and thus the revised Guide would primarily be addressed to legislators (A/CN.9/713, para. 139).

9. At the same session, the Working Group requested the Secretariat to follow the following guidelines in preparing the revised Guide: (a) to produce an initial draft of the general introductory part of the revised Guide, which would ultimately be used by legislators in deciding whether the revised Model Law should be enacted in their jurisdictions; (b) in preparing that general part, to highlight changes that had been made to the 1994 Model Law and reasons therefor; (c) to issue a draft text for the revised Guide on a group of articles or a chapter at or about the same time, to facilitate the discussions on the form and structure of the revised Guide; (d) to ensure that the text of the revised Guide was user-friendly and easily understandable by parliamentarians who were not procurement experts; (e) to address sensitive policy issues, such as best value for money, with caution; and (f) to minimize to the extent possible repetitions between the general part of the revised Guide and article-by-article commentary; where they were unavoidable, consistency ought to be ensured. It was agreed that the relative emphasis between the general part of the revised Guide and article-by-article commentary of the revised Guide should be carefully considered (A/CN.9/713, para. 140).

## II. Organization of the session

10. The Working Group, which was composed of all States members of the Commission, held its twentieth session in New York, from 14 to 18 March 2011. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Benin, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Czech Republic, El Salvador, France, Germany, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mexico, Morocco, Nigeria, Pakistan, Paraguay, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Uganda, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

11. The session was attended by observers from the following States: Congo (Democratic Republic of), Cuba, Indonesia, Iraq, Kuwait, Lithuania, Myanmar, Romania, Sweden and Zambia.

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

(a) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: European Bank for Reconstruction and Development (EBRD), European Space Agency (ESA), European Union (EU) and International Development Law Organization (IDLO);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICACIC), International Federation of Consulting Engineers (FIDIC) and International Law Institute (ILI).

13. The Working Group elected the following officers:

*Chairman*: Mr. Tore WIWEN-NILSSON (Sweden)<sup>2</sup>

*Rapporteur*: Sra. Ligia GONZÁLEZ LOZANO (Mexico)

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

(a) Annotated provisional agenda (A/CN.9/WG.I/WP. 76);

(b) Note by the Secretariat containing proposals for a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/WG.I/WP.77 and Add.1-9).

15. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for a Guide to Enactment of the UNCITRAL Model Law on Public Procurement.
5. Other business.
6. Adoption of the report of the Working Group.

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<sup>2</sup> Elected in his personal capacity.

### **III. Deliberations and decisions**

16. At its twentieth session, the Working Group commenced its work on the elaboration of proposals for a Guide to Enactment of the UNCITRAL Model Law on Public Procurement.

### **IV. Consideration of proposals for a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/WG.I/WP.77 and Add.1-9)**

17. The Working Group recalled guidelines for preparing the revised Guide formulated at its nineteenth session, reproduced in paragraph 9 above. The Working Group confirmed its understanding that the Guide should consist of two parts: the first describing the general approach to drafting the revised Model Law and the second part containing article-by-article commentary. The importance of Part I in particular for legislators in understanding complex provisions of the revised Model Law, reasons for changes made to the 1994 Model Law and policy choices involved in enacting procurement legislation on the basis of the revised Model Law was highlighted.

18. With reference to the draft before the Working Group, the general view was that the optimal balance in the discussion of various issues in the two parts of the Guide was still to be achieved. It was considered that many provisions currently set out in Part I were more appropriate for Part II while some points raised in the article-by-article commentary might be worth highlighting in Part I.

19. As regards Part I in particular, the importance of the text being easily understandable by legislators was emphasized. The point was made that legislators often did not have the resources or time to read through long and complex materials. Extensive discussion on any topic and the use of technical terms requiring expert knowledge or additional research for their understanding should therefore be avoided in Part I. There was also suggestion to move references to particular articles of international instruments to footnotes.

20. The Working Group decided to consider first the proposed guidance on challenges and appeals contained in addenda 3 and 4 of document A/CN.9/WG.I/WP.77 and defer the consideration of addenda 1 and 2 to a later stage at the session.

#### **1. Part I. General remarks to provisions of the revised Model Law on challenges and appeals (A/CN.9/WG.I/WP.77/Add.3)**

21. The general view was that the general remarks to provisions of the revised Model Law on challenges and appeals in Part I of the Guide should substantially be reduced. It was considered that many provisions, in particular paragraphs 112, 113 and 118-120, might be removed to the commentary to the relevant provisions of chapter VIII of the revised Model Law and some might be moved to an introduction to that chapter. It was emphasized that only provisions setting out policy considerations for drafting chapter VIII and the main objectives and principles achieved through chapter VIII should remain in Part I. Examples of the latter provisions, it was said, were contained in paragraphs 121, 124, 125 and 130.

Concern was expressed about some repetitive provisions, which raised issues of inconsistency and confusion.

22. The Working Group agreed that the general remarks to provisions of the revised Model Law on challenges and appeals should be redrafted: provisions that were linked to specific articles of chapter VIII should be moved to the commentary to those articles; and provisions explaining general technical aspects as related to chapter VIII as a whole might be consolidated in an introduction to chapter VIII.

23. With respect to footnote 1, support was expressed for the suggestion to avoid extensive discussion in the Guide of the notion of “independent body”, the ideal degree of separation of powers and whether authorities under article 66 should be given to a newly established or existing body. It was explained that these issues were to be addressed by enacting States in the light of prevailing local circumstances. The suggestion was made to refer instead in the Guide to the guidelines of the Organization for Economic Cooperation and Development (OECD) on integrity of review bodies where the relevant issues were adequately covered.

24. Another view was that more specific guidelines as regards the independent body should be provided in the Guide. It was explained that such discussion might in particular benefit vulnerable States that did not have resources to create any new body for the purpose of fulfilling article 66 provisions and might have doubts regarding existing bodies to which the powers under article 66 should be given. Defining basic requirements that such an independent body should fulfil, and in particular specifying which bodies would not be suitable to perform article 66 functions, was considered important for those States.

25. The Working Group agreed to consider the issues raised in footnote 1 in connection with the relevant commentary to article 66 (for further discussion on these issues, see para. 36 below).

26. With respect to footnote 2, opposition was expressed to describing rules of procedure and rules of evidence in detail in any part of the Guide. The view was shared that those issues were outside the scope of the Guide and the revised Model Law and it would be impossible to present exhaustive and accurate discussion of such issues in a concise manner in the Guide.

27. The view was expressed that the term “peer-based system” or “peer system” with reference to challenge mechanism under article 65 should be avoided since that description was not accurate. It was also suggested that references to “options” in paragraphs 127-129 might be replaced with references to “alternatives”.

## **2. Part II. Article-by-article commentary to chapter VIII. Challenges and appeals (A/CN.9/WG.I/WP.77/Add.4)**

### *Article 63*

28. The Working Group agreed that the penultimate sentence in paragraph 2 of the commentary to article 63 should be revised to convey more accurately the intended meaning. It was suggested in particular in this context that reference to “capacities” should be replaced with reference to “abilities” or “possibilities”. Another view was that the reference should be to conditions under which suppliers or contractors could seek the review. The latter however was considered excessively broad since some



conditions were already covered in article 63 while the goal of the last sentences of paragraph 2 was to give examples of issues that were not regulated in the revised Model Law, such as eligibility of persons to file complaints under provisions of law of enacting States.

29. It was also suggested that reference in the provisions in question to “the nature or degree of interest or detriment” should be replaced with reference to “the nature or degree of loss or injury”, in order to make guidance closer to the wording of article 63. There was general understanding that reference in that context was intended to be made to requirements that might be found in other provisions of law of enacting States as regards proof of loss or injury, or likelihood thereof.

30. It was understood that abilities or possibilities to seek review and the nature or degree of loss or injury would differentiate frivolous complaints or applicants without standing from complaints that ought to be entertained and eligible applicants. After discussion, the Working Group agreed to replace the penultimate sentence in paragraph 2 with the following wording: “In addition, this article does not deal with the requirements under domestic law that a supplier or contractor must satisfy in order to be able to seek review or obtain a remedy.”

#### *Article 64*

31. As regards paragraph 3 of the commentary to article 64, the suggestion was made that the use of the term “inquisitorial” should be reconsidered; the phrase “inquisitorial rather than adversarial” was considered clearer. It was also agreed that in the last sentence reference to “evidence” should be replaced with a reference to “elements”.

#### *Article 65*

32. As regards a cross-reference in paragraph 1 of the commentary to article 65 to possible provisions of the Guide on debriefing, the view was shared that including discussion on debriefing in the Guide was essential. The impact of effective debriefing systems on reducing the number of complaints was noted. Reference was made to jurisprudence that supported the importance of effective and timely debriefing. A delegation suggested assisting the Secretariat with drafting the relevant provisions for the Guide and subsequently proposed the following text:

“As a best practice, procuring entities should provide a debriefing to any supplier or contractor that requests one; debriefings may be provided to suppliers or contractors excluded during the course of the procurement (such as during a pre-qualification proceeding), or after award. A debriefing should be provided as soon as practically possible. Debriefings of successful and unsuccessful suppliers or contractors may be done orally, in writing, or by any other method acceptable to the procuring entity. At a minimum, the debriefing information should include:

- (1) The procuring entity’s evaluation of the significant weaknesses or deficiencies in the requesting supplier or contractor’s bid or proposal, if applicable;
- (2) The overall evaluated price (including unit prices) and technical rating, if applicable, of any successful supplier or contractor and the requesting supplier

or contractor, and qualification information regarding the requesting supplier or offeror;

(3) The overall ranking of all bidders or offerors, when any ranking was developed by the agency during the procurement process;

(4) A summary of the rationale for any award;

(5) A precise description of the product or service to be delivered by the successful supplier or contractor; and

(6) Reasonable responses to relevant questions about whether the procurement procedures contained in the solicitation, applicable regulations, and other applicable authorities, were followed.

The debriefing shall not reveal any commercially sensitive information prohibited by this law, or otherwise, from disclosure. A summary of the debriefing shall be included in the contract file.”

33. As regards a query raised in the first sentence of footnote 1, it was reiterated (see para. 26 above) that no detailed information on rules of evidence or procedures should be included in the Guide in the context of article 65 or any other provisions of the revised Model Law. As regards queries in the remaining part of that footnote, the Working Group agreed that no additional wording should be included in the Guide since the suggested addition conveyed the wrong idea that no corrective action could be taken by the procuring entity after the procurement contract entered into force. Including such wording, it was noted, would contradict the statement in paragraph 7 of the commentary to article 65 of the draft Guide that the procuring entity might take some limited corrective actions after the award, such as some disciplinary measures against personnel involved in improprieties. The possibility of taking such limited corrective actions was, it was emphasized, without prejudice to the provisions of the revised Model Law setting time limits for submission of complaints to the procuring entity before the entry into force of the procurement contract. It was also generally understood that such possibility would exist regardless of whether the concluded procurement contract was cancelled or not.

34. The Working Group agreed to amend the last sentence of paragraph 7 to read “the latter cases may fall instead within the purview of quasi-judicial or judicial review”. That wording, it was explained, conveyed more accurately the idea that some corrective measures, such as cancellation of the procurement contract that entered into force, under the revised Model Law would fall generally under the purview of the independent body or judicial authority.

#### *Article 66*

35. The level of detail in the first two sentences in paragraph 2 of the commentary to article 66 was considered excessive. The suggestion was made to replace those sentences with a sentence reading “The enacting State may consider not enacting article 66.” It was observed that this option was not a condition of anything, as indicated in the draft text of the Guide.

36. Recalling its consideration earlier at the session about the notion of an “independent body” (see paras. 23 and 24 above), the Working Group agreed that paragraphs 4 and 5 of the commentary to article 66 should be redrafted on the basis

of provisions contained therein as well as provisions of paragraphs 118-119 of addendum 3 of document A/CN.9/WG.I/WP.77. It was pointed out that such issues as appointment and removal of the independent body's officers and determining to which body the independent body should be accountable, involved many sensitive issues that should be approached with caution. The Secretariat was also requested to reconsider the reference to "vulnerable States". Emphasizing in this context points raised in the last part of paragraph 5 of the commentary to article 66 was considered sufficient. It was also suggested referring to "authorities of the independent body" in lieu of "competence of the independent body".

37. It was suggested that paragraph 10 of the commentary to article 66 and paragraph 6 of the commentary to article 65 should be redrafted to make them consistent as regards powers of an independent body in the case of cancellation of the procurement proceedings. Reference in this regard was made to provisions of article 66 (2) (b) (ii) of the draft Model Law that referred to two possibilities that might exist in enacting States: first, where an independent body has the authority to review any challenges related to procurement that had been cancelled and second, where only courts might have such authority. It was suggested that paragraph 6 of the commentary to article 65 and paragraph 10 of the commentary to article 66 should be redrafted to reflect those two possibilities.

38. The need for consistency in references to cancellation and termination of procurement proceedings in articles 66 (2) (b) (ii) and 66 (9) (f) of the draft Model Law was queried. In response, it was observed that the use of distinct terms might be desirable in order to differentiate cancellation of the procurement proceedings by the procuring entity from termination of the procurement proceedings by the independent body. The nature of the latter as an available remedy in the challenge and appeal proceedings was emphasized. It was however noted that the consequences of cancellation and termination of the procurement proceedings were the same.

39. With reference to paragraph 25, the point was made that it might be burdensome for the independent body to review all documents related to the procurement proceedings transferred to it by the procuring entity as required under article 66 (8) of the draft Model Law. It was therefore suggested that paragraph 25 should instead refer not to all documents relating to the procurement proceedings that were in the procuring entity's possession but only to those documents that were relevant to the review proceedings. Concerns were expressed about that suggestion since it contradicted the wording in article 66 (8) and would also introduce much discretion for the procuring entity to decide which documents were relevant to the review proceedings and which were not. The exercise of such discretion might lead to abuse, in particular withholding relevant documents on purpose.

40. A related point was that instead of requiring the physical transfer of all documents, which might be burdensome for both the procuring entity and the independent body, the procuring entity should be required to provide immediate access by the independent body to all documents in the procuring entity's possession relevant to the procurement proceedings. In such cases, it was explained, the independent body would decide itself which documents were relevant to the review proceedings. In response, it was observed that electronic records and electronic transmission of data made the transfer of documents and determining their relevance considerably easier.

41. Support was expressed for retaining the provisions of paragraph 25 of the Guide as drafted, taking into accounts risks involved in the suggested alternative approach.

42. The Secretariat was requested to specify to which version of the Agreement on Government Procurement of the World Trade Organization (GPA) reference was made in paragraph 28. The attention of the Working Group was brought in this regard to paragraph 13 of Part I of the draft Guide that noted the need to ensure the accurate references to two versions of the GPA. The Secretariat took note of the need to refer throughout the Guide to the accurate version of the GPA in the context of the provisions analysed. The suggestion to relocate paragraph 28 to Part I did not raise any objection. (See also para. 119 (d) below.)

43. The Working Group agreed with the suggestion to add in the end of the wording in the second set of parentheses in paragraph 29 the words “but for the non-compliance of the procuring entity with the provisions of this Law”.

44. It was agreed that the following parts in the proposed text should be deleted: in paragraph 8, the sentence reading “It is also acknowledged that in most States, there is a determined limitation period for any civil claim”; and in paragraph 29, references to “future losses” and to “the loss of a chance” and the last part of the last sentence, reading “if the power to award financial compensation lies in a small entity or the hands of a few individuals.” It was also suggested that the wording “the term ‘overturn’ does not carry any particular consequences” and the use of the term “quash” in paragraph 27 should be reconsidered, and that guidance should be provided in the appropriate parts of the Guide as regards reasonable duration of the standstill period.

#### *Article 67*

45. The need to ensure meaningful, not necessarily literal, translation in various languages of the phrase “fishing expeditions” found in paragraph 4 was emphasized.

#### *Article 68*

46. No comments were made with respect to the portion of the draft Guide addressing this article.

#### *Article 69*

47. Different views were expressed as regards the need for the article and the footnote accompanying it in the revised Model Law. A strong view was expressed that no footnotes should appear in the revised Model Law. Another view was that footnotes appearing in the draft Model Law (as contained in addenda to document A/CN.9/729) served a useful purpose and should be retained. Most of them, it was pointed out, explained optional texts included in parentheses in the revised Model Law and made it clear that they would not be part of the national law enacted on the basis of the revised Model Law. The point was made that footnote 14 accompanying article 69 was unclear in that latter respect but that deficiency should not undermine the importance of retaining the footnote in the revised Model Law. Concern was expressed that issues raised in that footnote might be overlooked if the text of the footnote appeared only in the Guide.

48. After discussion, support was reiterated for retaining footnote 14 in the revised Model Law. Some delegations supported retaining it together with article 69 with no guidance on article 69 to be included in the Guide while others preferred deleting article 69 and moving footnote 14 to article 63 or the title of chapter VIII. The opposing view was that either that footnote (as all other footnotes currently in the draft Model Law) should be removed to the Guide or its content should be included in article 69.

49. The Working Group recognized that there were deficiencies in provisions of article 69 read together with article 63 of the draft Model Law. It was considered that the Commission should be invited to eliminate them during its finalization of the draft Model Law at its upcoming session. At that stage, it would also decide on the location of footnote 14.

### **3. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of restricted tendering (A/CN.9/WG.I/WP.77/Add.5, part A)**

50. The appropriate location for guidance on the changes to the 1994 Model Law as regards the use of procurement methods was considered. A preference was expressed for including the discussion in a separate part of the Guide, rather than putting it together with the guide to the revised Model Law. The point was made that such an approach would better accommodate two groups of readers: one group that was not familiar with the 1994 Model Law and would be interested only in guidance to the revised Model Law as such; and another that was familiar with the 1994 Model Law and would be interested in understanding the changes made to the 1994 Model Law and the reasons therefor.

51. It was agreed that the word “and” in the third sentence of paragraph 1 should be replaced with the word “or”. The Secretariat was requested to reconsider the examples given in that paragraph, in particular to replace the reference to standard cleaning services with a reference to the supply of pins intended to be traded at sporting events (as an example of procurement of goods of a very nominal value, with many suppliers capable of supplying them), and also to reconsider the use of the term “nuclear” power plants. An alternative view on the latter suggestion, which was eventually agreed, was to retain the term “nuclear” when referring to these power plants, as an indication of the type of highly complex procurement covered by article 28 (1) (a).

52. As regards paragraph 2, the fourth sentence was considered to be accurate only in situations where there was sufficient competition in the market. The Secretariat was requested to redraft the sentence accordingly. The suggestion was made that the use of open tendering with pre-qualification might be considered more appropriate in situations referred to in article 28 (1) (b).

53. Concern was raised as regards reference to the term “lottery” in paragraph 6. It was noted that in many jurisdictions the use of lotteries in public procurement was prohibited. It was therefore suggested that the term “lottery” should be replaced with references to examples of objective selection methods, such as to random selection by drawing lots, to random selection from among a pool of suppliers or contractors and to selection on a first come first served basis. The need to ensure consistency in this respect between paragraphs 6 and 10 was highlighted.

54. The Secretariat was requested to reconsider the reference to small, medium and micro enterprises (SMMEs) in paragraph 18 and elsewhere in the Guide. It was considered that the term might be confusing since the difference between small and micro enterprises was not evident. The view was expressed that the Guide should refer to a more traditional generic term “small and medium enterprises (SMEs)” and explain in the glossary that this term might include micro enterprises. (On this point, see also para. 127 (c) below.)

55. With reference to footnote 1, the suggestion was made that general points related to solicitation might be placed in introductory guidance to section II of chapter II of the revised Model Law, while discrete guidance per procurement method should be placed in the commentary to each relevant procurement method. The value of repeating guidance on advance notices in the commentary to each relevant procurement method (restricted tendering, competitive negotiations and single-source procurement) was noted, in particular in the light of the different implications of such an advance notice in different procurement methods.

56. A query was raised as regards the reference in paragraph 18 to an invitation to tender in the context of restricted tendering, and its relation to an advance notice of procurement. The Secretariat was requested to revise the guidance to avoid confusion with an invitation to tender in open tendering. The accuracy of the seventh sentence of the paragraph was also questioned: it was noted that while the provisions of the draft Model Law excluded the application of article 37 to restricted tendering, the guidance stated that only some provisions of article 37 would not apply, and the Secretariat was requested to reconsider the interaction of these items.

57. The Secretariat was requested to eliminate repetitive provisions and excessive cross-references in paragraphs 4, 11, 12 and 17. It was also requested to avoid excessive detail when referring to other procurement tools and techniques, and challenge proceedings, which might confuse the reader. The possibility of listing all relevant cross-references at the outset of the guidance to a particular article or topic was considered.

58. The Working Group decided to defer the consideration of proposed provisions of the Guide discussing changes made to the 1994 Model Law to a later stage, at which time an entire section consolidating such proposed provisions would be before the Working Group (for the discussion of this point, see para. 50 above).

#### **4. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for quotations (A/CN.9/WG.I/WP.77/Add.5, part B)**

59. With reference to footnote 3, support was expressed for harmonizing the provisions of the draft Model Law on thresholds by requiring that they should be set out in procurement regulations, rather than in the law, for example, to allow exchange rate movements and inflation to be accommodated without needing to change the law. The Working Group noted that this point would be brought to the attention of the Commission.

60. In response to a suggestion that reference to higher-value procurement should be included in paragraph 4, it was agreed that there was no need for such a reference and, indeed, the reference to complex procurement should be eliminated, since both were outside the scope of article 28 (2). It was agreed that the second sentence in

this paragraph should be replaced with a sentence reading: “For repeated purchases, establishing a framework agreement may be an appropriate alternative.”

61. The suggestion was made that examples for the use of this procurement method and suggested alternatives should be added, such as procurement of spare parts for vehicles: they could be procured using request for quotations when the need for a single small purchase existed or through a framework agreement when the need for spare parts for a fleet of vehicles might arise on a repeated basis.

62. The complexities involved in selection of a procurement method under the revised Model Law were noted. The Secretariat was requested to simplify the text of the Guide by avoiding extensive comparative analysis between various procurement methods and excessive cross-references, such as in paragraph 9. It was agreed that paragraph 5 should be moved elsewhere in the Guide, and a reference to standardized products (such as in the information technology and communication (ITC) sector) should be included in paragraph 1 as an example of off-the-shelf products that could be defined by reference to industry standards.

**5. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals without negotiation (A/CN.9/WG.I/WP.77/Add.6, part A)**

*Conditions for use*

63. The view was shared that the content of footnote 1 was of sufficient importance to be included in the Guide, and it was agreed that the appropriate location would be the guidance to articles 26 and 27 of the revised Model Law (on the selection of procurement methods). In drafting the relevant commentary on the basis of the footnote, the Secretariat was requested to consider adding the following text in the end of the second sentence of that footnote: “and it may shift certain performance risks to the supplier or contractor that presents the proposed output or solution”. It was explained that the procuring entity would bear the performance risks arising from mistakes in detailed specifications, whereas the performance risks arising from mistakes or omissions in output-based specifications would be borne by the supplier or contractor. This point was considered by some delegations to be an important consideration in the selection of a procurement method.

64. While supporting the suggestions described in the preceding paragraph, concerns were expressed that the resulting guidance should not convey the idea that output-based specifications were relevant only in request-for-proposals proceedings and not in tendering. It was noted that this element of differentiation between tendering and request for proposals proceedings was not found in the draft Model Law. The Working Group decided to defer the consideration of the issue to a later stage, at which the guidance to the request for proposals with dialogue would be considered. (For further discussion of this issue, see para. 83 below.)

65. With reference to paragraph 3 and footnote 3 of the commentary to article 28 (3), there were different views as regards the desirability of replacing the term “financial aspects” with “price-related aspects” both in the draft Model Law and consequently in supporting guidance. The latter term was considered narrower and more appropriate in the context of article 46 (9) and (10), whereas the former was considered very broad; while there might be benefits in a broader scope, it could also encompass the financial capacities of bidders, which would be evaluated

in the context of technical and quality aspects of proposals and so included in the first envelope. The method of request for proposals without negotiation, it was said, raised some uncertainties, including as regards the expected content of the first and second envelopes. The view was expressed that a term that would describe as narrowly and precisely as possible the expected content of the second envelope should be used.

66. The alternative view was that the term “financial aspects” should be retained, as it was intended to refer to all financial aspects of proposals included in the second envelope. It was added that the term was not intended to refer to the financial capacities of bidders. Delivery and warranty terms were cited as examples of financial, not price-related, aspects of proposals. In the view of other delegations, however, delivery and warranty terms would most likely be evaluated in the context of technical proposals. A further proposal was to use the term “commercial aspects” in lieu of “financial aspects”. The point was made that regardless of the term used in the revised Model Law, its intended meaning was to be clarified in the Guide, as paragraph 3 of the commentary to article 28 (3) currently sought to do. In addition, it was emphasised that the solicitation documents should set out exactly which aspects should be included in which of the two envelopes, and this would determine what the procuring entity meant by technical or quality aspects and what it meant by financial aspects.

67. The suggestion was made that references in the Guide to envelopes should appear in quotation marks, with an explanation that the term was intended to convey the separate presentation of technical/quality and financial aspects, rather than an envelope per se: in some procurement, large quantities of documents might be submitted as part of the technical proposals. It would also be emphasized that the two envelopes would be submitted simultaneously.

68. With reference to paragraph 4 and footnote 4 of the commentary to article 28 (3), the view was expressed that provisions on clarification should be introduced in article 46 of the Model Law, and in other appropriate procurement methods, where interactive clarifications mechanisms were essential, for example because excessively high or low technological solutions might be sought or proposed. A similar provision would be considered for pre-qualification proceedings and for the assessment of qualification.

69. The following amendments were proposed to the last two sentences of paragraph 5 of the commentary to article 28 (3): “Enacting States should be aware nevertheless that some multilateral development banks are of the view that the use of procurement methods sharing features of request for proposals without negotiation as provided for in the revised Model Law may apply only to the procurement of routine advisory services. Some multilateral development banks may not authorize the use of this method in projects financed by them.”

70. Reservation was expressed at including the proposed wording, as it referred to the practice of one or a few delegations or observers. The point was made that similar provisions appeared throughout the draft Guide, such as in paragraph 14 of document A/CN.9/WG.I/WP.77/Add.1 and in paragraph 19 of document A/CN.9/WG.I/WP.77/Add.8; all should be reconsidered, it was said. The point was made that the Guide should reflect the result of the Working Group’s consensus on the provisions. Concern was also expressed that the proposed wording



might reflect only current practices and not future developments; the text might become obsolete while the Guide continued to be used. It was therefore suggested that the suggested wording should not be included or, alternatively, that the last sentence should be deleted from the proposal.

71. In response to a query as regards whether the proposal would reflect the position of multilateral development banks (“MDBs”) other than the World Bank (only the latter’s position was made known at the session), the Secretariat informed the Working Group that it had received broadly consistent feedback (both formally and informally) from regional MDBs on this and similar questions, and it was recalled that some of the banks concerned had expressed such views at earlier Working Group sessions.

72. A further view was that in considering the proposal and similar provisions throughout the Guide, the needs of potential end-users of the revised Model Law, which in many cases might be those benefitting from loans extended by MDBs, should not be overlooked. Those end-users, it was noted, should be alerted that they might face difficulties in securing loans from the MDBs if they used certain procurement methods in the full range of circumstances contemplated in the revised Model Law.

73. After discussion, the Working Group agreed that the proposed discussion of the practice of the MDBs should be consolidated in one section that might be put in Part I of the Guide or as commentary to article 3. The consolidated discussion should state that certain provisions of the revised Model Law might not be consistent with the rules of certain MDBs with respect to projects financed by them, and that the latter’s policies would need to be consulted if relevant. In addition, it was agreed that the Guide should not include comparative analysis between procurement methods of the revised Model Law and the practices of MDBs. (For further discussion of this point, see paras. 120 and 133-136 below.)

#### *Solicitation*

74. The view was expressed that the Guide should discuss all the exceptions to open solicitation in request for proposals in the order in which they were dealt with in the revised Model Law. It was also suggested that guidance on solicitation within the commentary on a particular procurement method should focus on the distinct features of solicitation for that method: in this case, the guidance should address request for proposals without negotiation rather than request for proposals generally.

75. As a general observation as regards the manner of presenting discussion in the Guide, it was suggested that the provisions of the revised Model Law should not be simply repeated in the Guide for the sake of completeness: discussion should be included only where explanations were provided.

#### *Procedures*

76. With respect to footnote 5, a reservation was expressed to the suggestion to amend the description of the successful proposal to the “most advantageous proposal” in article 46. However, support was expressed for the suggestion because the current wording in different procurement methods was not consistent, even where the same concept was being addressed. The point was made that any

suggested change to the draft Model Law, including this one, would need to be considered by the Commission.

77. As regards paragraph 8 of the commentary to article 46, questions were raised as regards the scoring methods used under this procurement method and the wording in the draft Guide referring to the possibility of selecting the successful proposal under this method on the basis of price alone (the possibility not being referred to in the draft Model Law itself). The reference to price “alone” was considered inaccurate as the method presupposed always evaluation of technical and quality aspects together with price. The Secretariat was requested to redraft the relevant part of paragraph 8 to eliminate inaccuracy, stressing that the successful proposal would always be selected from those that met or exceeded the technical and quality threshold.

**6. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals with consecutive negotiations (A/CN.9/WG.I/WP.77/Add.6, part B)**

*Conditions for use*

78. The suggestion was made that examples for the use of this procurement method should be provided. It was recalled that the Working Group had already noted that this procurement method had traditionally been used for the procurement of intellectual services (e.g. advisory services such as legal and financial, design, environmental studies, engineering works). It was observed that the term “intellectual services” was not familiar to all, and that the Guide should reflect terminology used in different systems (e.g. “professional or consulting services”). A further example of the use of this procurement method was offered: procurement of accommodation (i.e. office space) for Government. It was the understanding in the Working Group that, consistent with the Working Group’s decision earlier at the session to remove specific references to the current practices of the MDBs from the guidance to specific procurement methods (see paras. 69-73 above), paragraph 4 of the commentary to article 29 (3) should be redrafted, though retaining references to the use of the method in practice mainly for such services.

79. It was agreed that the words “cannot” should be replaced with the words “may not” in the last sentence of paragraph 3 of the commentary to article 29 (3).

*Procedures*

80. The suggestion was made that guidance on the purpose of scoring in this procurement method should be provided, i.e. that the ranking was determined on the basis of the scores assigned, and that negotiations would then commence with the highest-ranked supplier.

81. The Secretariat was requested to redraft paragraph 3 of the commentary to article 49 in more balanced terms, and to reconsider the order of paragraphs 3 and 4, so as to explain the benefits and potential difficulties in the use of consecutive negotiations, with particular reference to the bargaining position of the procuring entity.

**7. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of two-stage tendering (A/CN.9/WG.I/WP.77/Add.7)**

*Conditions for use*

82. With reference to footnote 1, the view was expressed that no changes in the text of the draft Model Law were required, as the provisions accurately reflected that the envisaged need for discussions with suppliers or contractors was taken into account in deciding to use this procurement method; that the need might not actually materialize was a different consideration. It was also noted that article 47 on the procedures for two-stage tendering made the use of discussions an optional step. The alternative view was that the main justification for use of this procurement method was the need to refine aspects of the description of the subject matter, for which purpose discussions were envisaged, and that the current draft did not fully reflect this emphasis. It was agreed that the Commission should be invited to consider these points when addressing the drafting of article 47.

83. With reference to footnote 2, the suggestion was made that the following words should be added in the end of the last sentence of paragraph 2: “, with input from prospective suppliers or contractors.” It was explained that not only the procuring entity but also the suppliers or contractors that provided input for the final description of the subject matter of the procurement should be responsible for the technical solution and should assume the performance risk arising from any mistakes made therein. The point was made, however, that the last sentence of the paragraph was not intended to deal with allocation of responsibility and contract performance risks, but to convey the idea that in two-stage tendering, unlike in request for proposals with dialogue, the procuring entity remained in charge of finalizing the revised set of terms and conditions of the procurement; the drafting would be reviewed to ensure that this point was accurately reflected.

84. The Secretariat was requested to reconsider the examples provided in paragraph 2 in the light of the last sentence in that paragraph. The point was made that in turnkey projects in particular, suppliers and contractors, not the procuring entity, were in charge of finalizing the detailed description of the technical solution and were subsequently responsible for any failures, but it was acknowledged that the examples reflected in particular the experience of certain MDBs with the use of this procurement method.

85. With reference to footnote 3, the following addition was suggested at the end of the first sentence of paragraph 3: “; nor will discussions allow the procuring entity to weigh costs against potential technical benefits.” It was explained that where commercial terms and technical aspects should be compared so as to finalize the description of the subject matter of the procurement, the use of the method might not be appropriate.

86. Also with reference to the first sentence of paragraph 3, a query was raised as to whether the draft Model Law in fact prohibited any discussion of the financial aspects of proposed technical solutions. The point was made that, in practice, it was common to discuss the financial implications of certain technical aspects at the first stage.

87. The Working Group decided to consider the issues raised in connection with paragraph 3 when it reviewed the commentary to article 47 (see paras. 90-93 below). The need to consider paragraph 8 in that context was also highlighted.

88. The Working Group requested the Secretariat to reflect in the guidance to two-stage tendering that the method was a variant of open tendering; therefore all the safeguards of open tendering applied. The understanding was that the provisions on clarification of solicitation documents also applied to the second stage. Additionally, it was agreed that the guidance should emphasize that discussions were permitted only at the first stage.

#### *Solicitation*

89. With reference to paragraph 13, in the context of the second exemption from international publication in article 32 (4), it was considered that greater emphasis should be attached to the qualitative assessment that only domestic suppliers or contractors were likely to be interested in presenting submissions, among other things because of the low value of the procurement concerned. The need to elaborate on other criteria that the procuring entity would have to take into account in such qualitative assessment was emphasized. Examples provided were geographic factors and limited or the absence of supply base from abroad (indigenous crafts). With reference to footnote 4, it was explained that the exemption was not limited to a value threshold, and should therefore be distinguished from the issues arising in articles 21 (3) (b) and 22 (2), which were based on the application of a financial threshold alone. It was the understanding that in the light of this explanation, paragraph 13 should be revised (also to ensure that the interaction with article 8 (1) was clear), and most of paragraph 14 considering issues of the coherence of low-value thresholds would be more appropriately reflected in the commentary to those other articles in which threshold considerations arose.

#### *Procedures*

90. The Working Group agreed to make the following amendments in the guidance:

(a) To redraft paragraph 20 by stating from the outset that chapter III of the revised Model Law applied to two-stage tendering and subsequently explaining which provisions of chapter III applied to which stage and in which context;

(b) With reference to footnote 7, to bring to the attention of the Commission the proposal to change the terminology;

(c) To explain in paragraph 22 that initial tenders would be rejected as non-responsive if they included price, and to highlight that the scope of discussions under article 47 (3) therefore could not include price;

(d) To explain in paragraph 23 the term “equal opportunity” found in the last sentence, by highlighting the similarities and differences in achieving equal treatment of suppliers during discussions in two-stage tendering and during dialogue in request for proposals with dialogue, drawing on the provisions of article 48 (10) as appropriate, while providing for appropriate safeguards against disclosure of confidential information and the risks of collusion;

(e) To align more closely the wording of paragraph 28 as regards permissible changes in examination and/or evaluation criteria with the provisions of article 47 (4) (b) (ii); and

(f) To reflect in the guidance, perhaps in paragraph 23, the need to put on the record details of the discussions, with a cross-reference to article 24 on the documentary record of procurement proceedings.

91. In the context of paragraph 23, the Working Group recalled its consideration earlier at the session (see paras. 85, 86 and 90 (c) above) on the scope of discussions at the first stage of two-stage tendering. It was noted that at the first stage, while price bids were not allowed, informal discussions on market data might take place.

92. The view was expressed that it would be natural to expect the procuring entity, during the discussions, to consider all aspects of the subject matter of the procurement, including the relative price of certain items available in the market, in order to be able to arrive at the best technical solution. It was therefore proposed that paragraph 3 and other similar provisions throughout the guidance should be amended so as not to exclude the possibility of discussing price-related aspects. Doubts were expressed, however, as to the extent to which the procuring entity could base its choice of the technical solution on non-binding information about market or general prices supplied during discussions, which might turn out to be speculative. It was also noted that it would be unrealistic to disregard the implications of price and price-related aspects in the choice of the technical solution. In this regard, it was noted that the guidelines of certain MDBs prohibited the submission of price at the first stage.

93. The Secretariat was requested to consider all these issues in revising the relevant provisions of the guidance, including paragraphs 3, 8 and 23, and to ensure consistency throughout the guidance in reflecting the permissible scope of discussions.

94. As regards changes to the terms of the procurement as a result of the discussions, it was observed that the first stage solicitation documents were likely to focus on the functional aspects of the items to be procured, using broad terms of reference, and the second stage would allow for the technical aspects to be refined and included in the request for final tenders. Hence the subject matter could not be changed during the discussions, but the technical solutions to provide that function could indeed change. The Secretariat was also requested to provide practical examples in the context of paragraph 26 that would illustrate how changes to technical and quality aspects might or might not change the description of the subject matter of the procurement, so as to allow for an easier understanding of the concepts at issue.

95. The Working Group recalled its consideration of this topic at its earlier sessions and that it had not defined the concept of material change to the description of the subject matter, because the many variables involved had indicated that a descriptive approach allowing a procurement-by-procurement consideration would be the better approach. It was considered that it would similarly not be possible to provide a definition of when the description of the subject matter changed in this context; it would require a case-by-case analysis, reflecting, for example, whether a different group of potential suppliers or contractors might participate as a result of the change (for example, changes in the type of trains procured or length of the

roads to be built might change the pool of suppliers in some cases and might not in others). In this regard, it was noted that it would be helpful for the Guide to indicate criteria that would illustrate whether a change was to technical aspects or to the description as a whole. It was also agreed that the Guide should cross refer to the provisions of article 10 (4) which regulated the description of the subject matter of the procurement. The suggestion was made that general issues might better be discussed in the commentary to that article with a cross-reference in paragraph 26 to that discussion, while discrete issues arising from article 10 in the context of two-stage tendering should be discussed in paragraph 26. The implications of changes to the solicitation documents that might require a new procurement under the provisions of article 15 were also highlighted in this regard.

96. The Working Group also recalled, with reference to footnote 3, that real-life examples of the use of two-stage tendering as opposed to request for proposals with dialogue were still outstanding. In response, supply and installation of a plant was mentioned, noting that certain MDBs did not contemplate the use of request for proposals with dialogue for such procurement. Building roads and the procurement of metro cars were cited as other examples. In those examples, formulating detailed specifications from the outset of the procurement would be possible but, after discussions with suppliers, the procuring entity might refine some technical aspects of the subject matter reflecting the information supplied (such as on more sophisticated materials or methods available in the market). The point was made that the difference between two-stage tendering and request for proposals with dialogue was not so much in the subject matter of the procurement but rather in the experience of the procuring entity in the use of these procurement methods: would the procuring entity be able to procure the subject matter in question better through request for proposals with dialogue as opposed to two-stage tendering? Another point made was that the use of two-stage tendering was diminishing in practice. (For further discussion on differences between these procurement methods, see para. 97 below.)

**8. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals with dialogue (A/CN.9/WG.I/WP.77/Add.8)**

*Conditions for use*

97. The Secretariat was requested to provide real-life examples for the use of the request for proposals with dialogue in the guidance. Examples suggested related to procurement aimed at seeking innovative solutions, such as for saving energy or achieving sustainable procurement, where various technical solutions existed for the same need (e.g. in an energy-saving example, differences might be in the materials used, and the use of one source of energy as opposed to the other (wind vs. solar)). The experience of one international organization with the use of the method was shared, noting that it saved considerable time as compared with that required for the use of two-stage tendering.

98. With reference to footnote 1, reservations were expressed to changing the text of article 10. The point was made that article 10, addressing the description of the subject matter of the procurement, should remain generic and sufficiently broad to accommodate tendering and non-tendering procurement methods and detailed and output-based performance specifications. Were any changes required to ensure consistency between articles 10 and 48, they should be made to article 48.

99. Allied to this issue, the wording in paragraph 5 referring to the notion in article 48 on the feasibility of formulating a detailed description of the subject matter of the procurement was queried. It was suggested that the use of the words “cannot formulate” in the guidance was not the same test as set out in article 48, in that the guidance implied that the test would be whether the procuring entity was unable objectively to formulate a detailed description of the subject matter. It was recalled that the Working Group had taken a more flexible approach when it had drafted the provisions of the draft Model Law and that approach should not be tightened through the guidance. The point was made that the reasons for deciding not to formulate a single and detailed description of the subject matter might include a lack of sufficient resources or expertise, or that so doing was considered a sub-optimal approach (for example, where the available solutions were not fully known or not fully appreciated). The Secretariat was requested to reconsider the wording to reflect these various grounds, including that suppliers might be in a better position to formulate detailed technical solutions to meet certain needs of the procuring entity, such as those that required significant level of expertise and skills (for example, architectural works, or civil engineering services).

100. The Working Group requested the Secretariat:

- (a) To remove the reference to construction from paragraph 1;
- (b) To eliminate the automatic link between the complexity of what was to be procured and the use of request for proposals with dialogue in paragraphs 1 to 3. Concern was expressed in particular as regards inconsistent references to complex, relatively complex and highly complex procurement in various paragraphs of the guidance;
- (c) To include in paragraph 8 a cross-reference to the commentary to article 20 that addressed conflicts of interest that would arise where one supplier might be involved in designing the technical solution and subsequently participated in the procurement;
- (d) To ensure that the references to negotiations and dialogue in the guidance to chapter V as a whole were accurate, i.e. that references to bargaining and negotiations would not be made when discussing dialogue, and the term “negotiations” would be used only in the procurement methods using that term in their title;
- (e) To align the text more closely with the conditions for use in article 29 (2);
- (f) To make consequential changes in the text reflecting the decisions reached by the Working Group earlier in the session, in particular as regards issues that might more appropriately be addressed in general guidance (such as the notion of approval by an external authority and the position of certain MDBs as regards the use of some procurement methods under the Model Law (see paras. 69-73 above));
- (g) To consider relocating paragraphs 12 and 13 from the guidance to article 29 (2) to the guidance to article 48, save to the extent that the procedural aspects of the procurement method discussed in paragraphs 12 and 13 might affect the decision of the procuring entity as regards the selection of the procurement method. It was also observed that the approach to this structural question should be consistent for all procurement methods;

(h) To eliminate repetition in the discussion of best and final offers (BAFOs).

*Procedures*

101. With reference to footnote 4, the view was expressed that the wording in square brackets in the guidance should remain in the text without square brackets. It was suggested that the sentence where that wording was found should be divided into two; the first sentence should indicate that article 48 (5) listed information that must (not “should”) be included in the request for proposals; and the second sentence should explain that the procuring entity was responsible for ensuring that the information provided was adequate for suppliers to prepare their proposals and for the procuring entity to evaluate such proposals equitably.

102. The Working Group agreed:

(a) With the suggestions made in footnotes 5 and 6 that the guidance concerned should be moved from the guidance to article 48 to the discussion of qualification criteria and evaluation criteria respectively. The text of paragraph 31 should also be reviewed to ensure that it was clear that both qualification criteria and evaluation criteria could reflect the skills and experience of suppliers’ personnel;

(b) To redraft the last sentence of paragraph 34 to convey that the procuring entity was required by article 11 of the Model Law to provide a true picture of the evaluation criteria and procedure;

(c) With reference to footnote 7, to delete the last sentence in square brackets from paragraph 38, on the understanding that it would be ineffective and counterproductive to oblige suppliers to remain participating in the dialogue if they did not want to participate further, and that tender securities would not provide a workable solution to the issue of ensuring sufficient participation. (A related point, linked to para. 40 of the guidance, was that the possibility of excluding suppliers during the dialogue procedure was regulated differently in various jurisdictions.)

**9. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of competitive negotiations (A/CN.9/WG.I/WP.77/Add.9, part A)**

103. With reference to paragraph 7 and footnote 1 of the commentary to article 29 (4), it was pointed out that if the additional guidance suggested in the footnote were included, it should be borne in mind that addressing a lack of effective negotiation skills could not be addressed when an urgent procurement arose. The view was expressed that issues of capacity should not be addressed in the guidance to this procurement method, but rather should be treated as a general matter or a matter to be addressed in the context of, for example, request for proposals with dialogue.

104. The Working Group noted that in practice the method was used widely in the circumstances other than those listed in article 29 (4), such as for the procurement of services.



105. The Working Group agreed:

(a) To replace in paragraph 7 of the commentary to article 29 (4) the reference to “competitive dialogue” with a reference to “competitive negotiations”;

(b) With reference to the provisions of article 33 (5) and similar provisions throughout the Model Law, to recommend to the Commission that it might wish to reconsider specifying in the law itself, rather than in procurement regulations, the place of publishing an advance notice of procurement and similar information;

(c) As suggested in footnote 2, to explain in the glossary the term “BAFO”, but the explanation of the rule that there could be only one round of BAFOs should appear in the guidance to article 50;

(d) With reference to paragraph 13 of the commentary to article 50, to highlight the differences between concurrent negotiations in competitive negotiations and dialogue that took place concurrently in request for proposals with dialogue, emphasizing that negotiation would need to be of a very short duration given the urgency that would be involved;

(e) With reference to paragraph 17 of the commentary to article 50, to replace the phrase “freezes specifications” with the phrase “terminates the ability of the procuring entity to modify its requirements and the terms and conditions of the procurement”; and to replace the reference to “the contract terms offered by suppliers and contractors” with a reference to the “terms and conditions offered by suppliers and contractors”, and to clearly distinguish between consequences of the request for BAFOs and making BAFOs;

(f) To use consistently throughout the Guide the term “best practice” in preference to “good practice”.

106. The Secretariat was requested to ensure a uniform and structured approach in the guidance to each procurement method.

**10. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of single-source procurement (A/CN.9/WG.I/WP.77/Add.9, part B)**

*Conditions for use*

107. With reference to paragraph 1 of the commentary to article 29 (5), it was observed that a common use of single-source procurement arose in the purchase of products protected by intellectual property rights, such as spare parts; accordingly, it was suggested that the guidance should encourage procuring entities to plan for future procurements and to acquire appropriate licenses, so as to allow for competition in such future procurement. With reference to paragraph 1 and footnote 3, the Working Group’s consideration earlier at the session of the description of the subject matter of the procurement was recalled (see paras. 95 and 98 above). The suggestion was therefore made that the issues raised in footnote 3 should be addressed elsewhere.

108. The Working Group agreed to replace the word “normally” with the word “possibly” in paragraph 2 and to emphasize at the end of that paragraph that the amount procured in emergency situations should be strictly limited to the needs arising from that emergency situation.

109. With reference to paragraph 5 and footnote 4, the general view was that the example provided in the paragraph, although taken from the 1994 Guide, was inappropriate and should be removed. Another view was that the entire paragraph should be deleted. In response, it was observed that the provisions on safeguards contained in the paragraph should be retained.

110. After discussion, it was agreed that paragraph 5 should be redrafted to align it with the wording of article 29 (5) (e), which did not itself refer to cases of serious economic emergency. In redrafting the paragraph, the Secretariat was requested to highlight that risks of abuse were present in all cases of single-source procurement, but might be greater under article 29 (5) (e), and to emphasize the following points: that the use of single-source procurement was exceptional and the use of the method under article 29 (5) (e) was even more exceptional, as evidenced by the ex-ante approval and public consultation requirements (which would take the method outside the general competitive market); that urgent procurement arising from catastrophes and emergency procurement were addressed elsewhere; that the example of economic emergency taken from the 1994 Guide was misleading and should not be repeated in the revised Guide; although examples of when the method could be used should not be included here to avoid confusion, notably as regards how the exclusive ability of the supplier is to be determined, examples of cases that would be excluded from the application of the provisions should be provided; and that socio-economic policies could be better pursued through other avenues available under the revised Model Law.

111. Another view was that article 29 (5) (e) of the draft Model Law should be removed since it was contrary to the objectives of the revised Model Law. In response, it was observed that the provision had been subject to extensive discussion and the Working Group had decided to retain it. It was observed that there might be good reasons for resort to the measures referred to in that article or in the guidance, and that the deletion of article 29 (5) (e) could be counterproductive, as a State in a situations envisaged in article 29 (5) (e) might decide to pursue those types of measures. Without the provision under discussion, it could do so without the safeguards of the revised Model Law.

112. It was recalled that it would be for the Commission to decide on any proposed amendment to or deletion of the provisions of the draft Model Law. It was also noted that, as was the case with the 1994 Model Law and its Guide to Enactment, the Commission was expected to approve both the revised Model Law and the revised Guide.

113. With reference to paragraph 8, the point was made that the hierarchy between competitive negotiations and single-source procurement was not always clear. The view was expressed that one of the criteria for selecting a procurement method under article 27 — to seek to maximize competition to the extent practicable — made single-source procurement the method of last resort, as it was the only method in which no competition was envisaged. It was suggested that the guidance to articles 26 and 27 should facilitate the toolbox approach to the selection of the procurement method and could give examples of the risks (notably to competition and integrity) arising in each procurement method, and risks of extraneous considerations such as greater familiarity with certain procurement methods that might distort an objective selection.

*Solicitation*

114. A query was raised as to whether a reference to article 29 (4) (a) should be added to article 33 (6) of the Model Law. The Secretariat was requested to consider this point and, if appropriate, to bring any suggested change to the attention of the Commission.

*Procedures*

115. The Secretariat was requested to reflect in paragraph 14, consistent with the approach in paragraph 13, the exemption to the requirement for an advance notice in the case of urgency under article 29 (5) (b).

**11. Part I. General remarks (A/CN.9/WG.I/WP.77/Add.1 and 2)***General comments*

116. The view was expressed that addenda 1 and 2 should be significantly revised, to remove imprecise terms and discussion of secondary issues and consequences, and to focus more clearly on the concepts at issue.

*Sections I.A.1. and I.A.2. History and Purpose*

117. The following suggestions were made:

(a) To combine the sections on “History” and “Purpose”, explaining the original purposes in 1994 and those underlying current work;

(b) To reflect that UNCITRAL’s main objective when preparing the 1994 Model Law was to provide a mature, complete and satisfactory model for public procurement to all United Nations Member States, which could operate as an alternative to the varying procurement policies of bilateral and multilateral donors;

(c) To amend paragraph 4 to reflect the mandate for, and the objectives in, revising the 1994 Model Law;

(d) To refer in paragraph 5 to both international and national trade;

(e) To revise paragraph 6 by deleting the final sentence, and clearly delineating the remaining purposes set out in the paragraph. The substance of the final sentence would then be located elsewhere, as an introduction to the presentation of the revisions to the 1994 Model Law; cross-references between Part I and this section would be included.

*Section I.A.3. Universal application of the Model Law*

118. The following suggestions were made:

(a) To reconsider the section title, perhaps replacing the word “universal” with the word “general” and to consider including a reference to the broader scope of the revised Model Law;

(b) To replace references to “flexible and non-prescriptive provisions of the Model Law”, such as in paragraph 9 and elsewhere, with references to options envisaged in the text;

(c) To combine paragraphs 8 and 9 and to add a reference to the users of the 1994 Model Law;

(d) In paragraph 10, to reflect the concepts of neutrality and objectivity; to revise the reference to “all types of States” and to include a reference to different legal traditions; to relocate the final sentence to the proposed section “History and Purpose of the Model Law” (see para. 117 (a) above). An alternative view was to retain the first part of that final sentence, reading “Sound laws and practices for public sector procurement are necessary in all countries”, in paragraph 10;

(e) To refer to article 3 that affected the concept of universal application.

*Section I.A.4. Interaction with other international texts addressing public procurement*

119. The following suggestions were made:

(a) As the main issue was to note that the revised Model Law was subject to international agreements as per article 3, to highlight only those issues that might be of concern to enacting States; to eliminate unnecessary factual detail on other international instruments, so as to ensure that inaccurate statements were not made;

(b) To treat the points raised as regards article 3 in paragraphs 11 and 13 as a discrete item deserving separate discussion;

(c) To reconsider the drafting of the last sentence in paragraph 12 as regards the relationship between the revised Model Law and the United Nations Convention against Corruption;<sup>3</sup>

(d) To revisit the references to the GPA in paragraph 13 in due course, to ensure accuracy (see also paragraph 42 above), and to mention that preparatory work on the revised GPA had also been taken into account in preparing the revised Model Law; in the same paragraph, to refer to bilateral free trade agreements;

(e) To outline in paragraph 14 the differences between the revised Model Law and MDBs’ policies, avoiding detailed comparison;

(f) In paragraph 14, to refer to “projects” and not “procurement projects”; to link the two first sentences with the rest of the paragraph; to refer only to the harmonization of the MDBs’ internal policies; to redraft the last sentence to avoid any implication that a domestic law based on the revised Model Law would automatically be acceptable to the MDBs; and to relocate this paragraph, as it did not refer to international instruments addressing public procurement.

120. The view was expressed that the MDBs’ position on the use of some procurement methods in the Model Law in projects financed by them should be reflected in the commentary to article 26. Earlier decisions by the Working Group to provide historical background on the use of some procurement methods by MDBs were recalled. A general statement to the effect that countries seeking financing from MDBs should seek information about their current applicable policies was considered insufficient in this regard. In response, it was observed that views of the MDBs, which could change over time, should not be reflected in the Guide. (For further discussions on this point, see paras. 133-136 below.)

<sup>3</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

*Section I.B. Purpose of the Guide*

121. It was agreed to add a reference in the text to a new section of the Guide that would describe the changes made to the 1994 Model Law.

*Section II.A. Objectives*

122. The view was expressed that paragraph 19 should also provide the context and derivation of the objectives listed, and should discuss their relative importance. Another view was that such background information might involve excessive theoretical discussion and might be controversial.

123. The suggestion was made that the section should highlight that the objectives referred to public procurement, so as not to create expectations in private sector procurement, and should also include commentary on the satisfaction of public needs. It was also suggested that the section, perhaps in paragraph 20, should highlight that the objectives might be reinforcing but might also contradict each other and that in some procurement methods one or some objectives might prevail over others. The view was expressed that the discussion in the section was excessively economics-focused.

124. With reference to paragraph 20, the suggestion was made that the words “may not confer” should be replaced with the words “does not itself confer” in the first sentence or, alternatively, that the sentence might not be accurate and should be deleted. After discussion, it was agreed to retain the wording in the 1994 Guide (“does not itself”), subject to possible review by the Commission. It was also suggested that the phrase “is assured” should be replaced with the phrase “is better assured” and the phrase “abuse is absent” should be replaced with the phrase “abuse is addressed”.

Value for money

125. The following suggestions were made:

(a) To replace the word “includes” with the words “is a concept including” and add “and aimed at an optimal relationship between both for the procuring entity” in the first sentence of paragraph 21; and to reverse use of the terms economy and efficiency;

(b) Simpler examples should be provided in paragraph 21, and a more robust reference to the use of life-cycle costing should be included elsewhere;

(c) Paragraph 22 should be deleted, with its general substance being added to paragraph 21.

Participation and competition

126. Views differed as to whether participation and competition should be addressed together or separately, but it was agreed that further explanation of the objective of competition should be added. The concept, it was said, encompassed three aspects: the number of competitors; their capacity and quality; and their willingness to participate and compete. The view was expressed that the overlap between the objective of participation and the objective of competition should be explained in the Guide.

127. It was agreed:

(a) To add the words “on balance” in the first sentence of paragraph 23 after the word “effective” and to refer to “these objectives” rather than “the objectives” of the revised Model Law;

(b) In paragraph 24, to refer to the “limited and exceptional circumstances” in which international participation could be limited and to replace the words “on both a domestic and international level” with “by both domestic and international suppliers and contractors”;

(c) To delete the reference to “micro enterprises” in paragraph 27 (on this point, see also para. 54 above);

(d) To consider replacing in paragraph 28 the reference to “a more concentrated market” with a reference to a market with a limited number of suppliers or contractors capable of delivering the subject matter of the procurement concerned; to refer to concentrating rather than consolidating the market at the end of the paragraph;

(e) To delete the second sentence in paragraph 28 as it went beyond a description of the revised Model Law’s objectives. A reservation was expressed about this suggestion as the sentence included valuable concepts. It was suggested that the substance of the paragraph could be relocated, such as to a section of the Guide discussing the interaction of procurement regulation and other government policies affecting participation and competition;

(f) To use consistently the term “suppliers or contractors” or to define the term “suppliers” in the Guide as including contractors.

#### Fair and equitable treatment

128. The Secretariat was requested:

(a) To shorten paragraph 29, in particular by reconsidering the need for the text after the second sentence;

(b) In what would become the remaining text of paragraph 29, to emphasize the exceptional circumstances that were under discussion;

(c) To revise paragraph 30 by (i) explaining and illustrating appropriately equal and equitable treatment, highlighting the differences between the two terms, (ii) deleting the references to free trade agreements, and (iii) removing the reference to reciprocity in the end of the paragraph.

#### *Concluding remarks*

129. In concluding its discussion of Part I of the draft Guide, the Working Group requested the text to be as factual and concise as possible. In this regard, the view was expressed that providing detailed guidance on the objectives of the revised Model Law should be reconsidered.

*Proposals for the Guide as regards sections addressing the selection of procurement methods*

130. It was suggested that Part I should include the following wording under section II. Main features of the Model Law:

“1. The revised Model Law contains a greater variety of procurement methods than were provided in the 1994 Model Law. These methods, whether revised or new, reflect developments in the field and evolving government procurement practice in the years since the 1994 Model Law was adopted. The number of procurement methods provided reflects the view of the Commission that the objectives of the Model Law are best served by providing States with a varied menu of options from which to choose in order to address different procurement situations, provided that the conditions for use of the particular method are met. The availability of multiple procurement methods allows States to tailor the procurement procedures according to the subject matter of the procurement and the needs of the procuring entity. This in turn permits the procuring entity to maximize economy and efficiency in the procurement while promoting competition.

2. Enacting States are cautioned, however, that many of these methods are complex, and consideration should be given to the capacity of procuring entities to administer certain procurement methods effectively.”

131. Opposition was expressed to the proposed wording in paragraph 2, in that it implied that some procurement methods were simpler to conduct than others, without adequate explanation, and might indicate that some methods were less acceptable than others. In support of the proposal, it was stated that it conveyed in concrete terms the issues covered by the relevant provisions of the revised Model Law.

132. In addition, the following wording was proposed for consideration by the Secretariat for inclusion in the commentary to articles 26 and 27:

“Article 26. Methods of Procurement in the revised Model Law contains a footnote (as appears in the 1994 Model Law) advising enacting States that they ‘may choose not to incorporate all the methods of procurement listed in this article into their national legislation.’ The new footnote adds that ‘an appropriate range of options, including open tendering, should be always provided for.’

As an additional safeguard, in its provisions on conditions for use, the 1994 Model Law included, for each method of procurement other than tendering, the following optional language for enacting States to consider: ‘Subject to approval by ... (the enacting State designates an organ to issue the approval)’. In the revised Model Law, the Commission decided to remove that optional language from the individual provisions on conditions for use of procurement methods and instead to address the concern more globally in the footnote to article 26. That footnote now includes the following: ‘States may consider whether, for certain methods of procurement, to include a requirement of a high-level approval by a designated organ.’”

133. The Working Group had before it in addition the following proposal:

“Historically, the rules of some multilateral development banks have not included procurement methods equivalent to request for proposals with dialogue or competitive negotiations as provided for in the Model Law, and have included methods with features of request for proposals without negotiation and request for proposals with consecutive negotiations as provided for in the Model Law only for the procurement of advisory services. Aware of this, UNCITRAL has nevertheless decided not to base the selection of procurement method on whether it is goods, works or services that are procured, but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 27 (2)) (for the relevant guidance, see paragraphs ...). UNCITRAL wishes to note that the model law should reflect the fact that policies and practices evolve over time.”

134. Support was expressed for the substance of the text in paragraph 133 above, subject to clarification of the scope of the term “advisory services”. An alternative view was that the text should be shortened to state generally that potential borrowers from the MDBs should check the applicable public procurement policies.

135. The understanding was that the proposed wording in paragraph 133 above should be included in the commentary to article 26 and an introductory statement should also appear in Part I outlining the general approaches of the revised Model Law and MDBs and providing a cross-reference to the guidance to article 26.

136. It was proposed that an introductory statement for Part I on this subject might be added in section II.B. Scope of the Model Law under the heading “Methods of procurement” and should reflect the provisions reproduced in paragraph 130 above and the following concepts: (a) that enacting States should give consideration to the capacity of procuring entities to administer procurement methods effectively; and (b) that enacting States that considered receiving financing from MDBs might wish to consult the relevant MDBs, as noted above. While support was expressed for the substance of the proposal, the point was made that items (a) and (b) raised unrelated issues and should be discussed separately.

## V. Future work

137. The Working Group noted the need to consider more expeditious ways to reform the revised Model Law in the future, to ensure that it accurately reflected evolving practices and regulations.

138. The Working Group discussed possible topics for future work in public procurement and related areas, including updating the UNCITRAL instruments addressing privately financed infrastructure projects, to reflect the revised Model Law and developments in the use of public-private partnerships (PPPs). Possible issues included methods of selection and post-contract dispute resolution. A review of developments in the regulation of PPPs and a study on the feasibility and desirability of work by the Commission in that field were considered potentially useful. Other areas of work mentioned included procurement planning and contract administration.



139. The point was also made that there might be topics in non-procurement-related areas, such as those relating to property rights, worth considering for possible future work by UNCITRAL.

**D. Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twentieth session (A/CN.9/WG.I/WP.77 and Add.1-9)**

**[Original: English]**

1. At its nineteenth session (Vienna, 1-5 November 2010), having completed its work on the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”),<sup>1</sup> the Working Group reached the understanding that, at its twentieth session, it would focus on proposals for a revised Guide to Enactment. It was understood that the Commission would adopt the Model Law on Public Procurement (the revised Model Law) at its forty-third session, in 2011. The Working Group noted its intention of submitting a working draft of the revised Guide emanating from the work of its twentieth session to the Commission, so as to assist the latter with its consideration of the draft revised Model Law at that session (A/CN.9/713, para. 138). It was not expected that the Commission would adopt the revised Guide at that session.

2. At its nineteenth session, the Working Group recalled that it had deferred a number of issues for discussion in the revised Guide and that decisions on them should be maintained, unless they were superseded by subsequent discussion in the Working Group or Commission (A/CN.9/713, para. 139). The Working Group requested the Secretariat to prepare proposals for the revised Guide in accordance with the following guidelines: (a) to produce an initial draft of the general introductory part of the revised Guide, which would ultimately be used by legislators in deciding whether the revised Model Law should be enacted in their jurisdictions; (b) in preparing that general part, to highlight changes that had been made to the Model Law and reasons therefor; (c) to issue a draft text for the revised Guide on a group of articles or a chapter at or about the same time, to facilitate the discussions on the form and structure of the revised Guide; (d) to ensure that the text of the revised Guide was user-friendly and easily understandable by parliamentarians who were not procurement experts; (e) to address sensitive policy issues, such as best value for money, with caution; and (f) to minimize to the extent possible repetitions between the general part of the revised Guide and article-by-article commentary; where they were unavoidable, consistency should be ensured. It was agreed that the relative emphasis of the general part and article-by-article commentary of the revised Guide should be carefully considered (A/CN.9/713, para. 140).

3. This note is submitted pursuant to this request of the Working Group. Addenda 1 to 3 to the present note set out proposals for some sections of Part I (General remarks) of a draft revised Guide to Enactment to the revised Model Law. The purpose of the general part of the Guide to Enactment is to explain the main policy considerations arising when enacting national legislation on public

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<sup>1</sup> For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in the Yearbook of the United Nations Commission on International Trade Law, vol. XXV: 1994) (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website: [www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf](http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf).

procurement, and the recommendations made by the Working Group, so as to put the article-by-article remarks that will follow the general part of the Guide into context. It is intended that this structure of the Guide will assist legislators in enacting the provisions of the revised Model Law into their national legislation.

4. The Working Group is invited to consider whether any additional sections/sub-sections or topics should be added in Part I. They may include, for example: use of procurement methods, tools and techniques available under the Model Law; methods of solicitation; qualification of suppliers and contractors; the use and importance of the documentary record; debriefing; institutional issues (including considerations of centralized and decentralized procurement systems); sustainable procurement; and assistance from the UNCITRAL secretariat.

5. Addenda 4 to 9 to this note set out proposals for Part II (Article-by-article commentary) of the Guide, which purpose is to guide not only legislators in enacting the provisions of the revised Model Law into national legislation but also regulators and procuring entities in implementing the provisions of the revised Model Law. It is expected that this Part of the Guide will also be supported by practical materials, such as a glossary of terms used in the Model Law (equating them to alternatives in current use where appropriate), timetables and flow-charts, to assist practitioners. Each of these addenda contain: a summary of the purpose of the provisions under discussion; where relevant, any drafting issues that may assist legislative drafters; and guidance on the provisions themselves.

6. Addendum 4 to this note sets out a proposal for the Guide text to accompany chapter VIII (Challenges and appeals) of the revised Model Law. Addenda 5 to 9 set out proposals for guidance to the use of each procurement method referred to in chapters IV and V of the revised Model Law. Although the provisions regulating methods of procurement are found in several places of the Model Law, the relevant guidance is presented per procurement method, consolidating the guidance on related provisions of chapters II, IV and V. The manner of presenting guidance followed in the current draft of addenda 5 to 9 is thus different from the presentation of article-by-article commentary that was a feature of the 1994 text, and is also found in addendum 4 to this note. This deviation is for ease of reference in the Working Group and the Commission. That manner of presenting guidance per procurement method, if retained in the final revised Guide, may allow legislators and other policy-makers to consider how to enact the provisions to suit local circumstances in the light of both the conditions for use and procedures for each method. The Working Group is invited to consider the manner of presenting the guidance on the use of procurement methods in the final revised Guide.

7. The draft revised Guide to Enactment contained in the addenda to this note addresses the revised Model Law. A separate section of the Guide may be added that will discuss the revisions made to the 1994 text (including a correlation table).

## (A/CN.9/WG.I/WP.77/Add.1) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twentieth session****ADDENDUM**

This addendum sets out a proposal for the following sections and sub-sections of Part I (General remarks) of a draft revised Guide to Enactment to the UNCITRAL Model Law on Public Procurement: I. Introduction (“History and purpose of the UNCITRAL Model Law on Public Procurement” and “Purpose of the Guide”) and II. Main features of the Model Law (“Objectives”, “Scope” and “General approach”).

**GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT****Part I. General remarks****I. INTRODUCTION****A. History and purpose of the UNCITRAL Model Law on Public Procurement****1. History**

1. At its twenty-seventh session (New York, 31 May-17 June 1994), the United Nations Commission on International Trade Law (UNCITRAL or the Commission) adopted the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the 1994 Model Law),<sup>1</sup> and an accompanying Guide to Enactment.<sup>2</sup> The 1994 Model Law proved to be widely-used and successful. It formed the basis of procurement law in more than thirty countries across the world, and its general principles have been reflected to a greater or lesser degree in many more.

2. At its thirty-seventh session, in 2004, the Commission decided that the 1994 Model Law would benefit from being updated to reflect new practices, in particular those that resulted from the use of electronic public procurement, and the experience gained in the use of the 1994 Model Law as a basis for law reform, without departing from its basic principles.

<sup>1</sup> The text of that Model Law is found in annex I to the report of UNCITRAL on the work of its twenty-seventh session (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*), and is also available at [www.uncitral.org](http://www.uncitral.org).

<sup>2</sup> The first UNCITRAL text on public procurement was the UNCITRAL Model Law on Procurement of Goods and Construction, adopted in 1993 at the twenty-sixth session of the Commission (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)*)). This text addressed the regulation of public procurement in the area of goods and construction but did not contain provisions on non-construction services.

3. The UNCITRAL Model Law on Public Procurement, adopted by the Commission at its forty-fourth session (Vienna, 27 June-... July 2011) (the revised Model Law)<sup>3</sup> is the result of the work of UNCITRAL to reform the 1994 Model Law. This Guide accompanies the revised Model Law. References to the “Model Law” in this Guide, save where otherwise noted, are to the revised Model Law.

## **2. Purpose**

4. The decision by UNCITRAL to formulate model legislation on procurement was promoted by a wish to address inadequate or outdated legislation that had been observed in many countries, resulting in inefficiency and ineffectiveness in the procurement process, abuse, and the consequent failure of the public purchaser to obtain adequate value in return for the expenditure of public funds.

5. Inadequate procurement legislation at the national level creates obstacles to international trade (the promotion of which is a major aspect of the mandate of UNCITRAL), a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may be a partial limitation on the extent to which Governments can access the competitive price and quality benefits available through international procurement. 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.

6. The purpose of the Model Law is therefore three-fold: first, to serve as a model for States for the evaluation and modernization of their procurement laws and practices, and the establishment of procurement legislation where none currently exists. The second purpose is to support the harmonization of procurement regulation internationally, and so to promote international trade. The third purpose is to allow users of the 1994 Model Law to amend their national legislation to reflect modern procurement practices.

## **3. Universal application of the Model Law**

7. In accordance with its general approach of intergovernmental consensus-building, UNCITRAL has drawn on the experiences of countries from around the world in regulating public procurement when drafting the Model Law. This approach also serves to ensure that the text reflects best practice, and its provisions are universally applicable.

8. In the period following the issue of the 1994 Model Law, the text was used most frequently as a basis for introducing procurement legislation in countries whose economies were in transition and in developing countries. In countries at those levels of development, a substantial portion of all procurement is engaged in by the public sector, and a substantial proportion of gross domestic product is represented by public procurement. A significant part of total procurement may arise in connection with projects that are part of the essential process of economic and social development, and procurement may be targeted at enhancing such

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<sup>3</sup> The text of the revised Model Law is found in annex I to the report of UNCITRAL on the work of its forty-fourth session (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*), and is also available at [www.uncitral.org](http://www.uncitral.org).

development and capacity-building. In economies in transition, the introduction of procurement legislation is also part of a process of increasing the market orientation of the economy and a tool to regulate the relationship between its public and private sectors.

9. For developed countries, many of which enacted procurement legislation before the Model Law was issued, the Model Law's flexible and non-prescriptive provisions can be utilized as a tool for evaluation and modernization of existing systems and earlier legislation, so as to improve the outcomes in public procurement.

10. The potential of the Model Law as an instrument to harmonize international trade will be fully realized to the extent that it is used by all types of States. The text has therefore not been designed with any particular groups of countries or particular state of development in mind, and does not promote the experience in and approach of any one region. Sound laws and practices for public sector procurement are necessary in all countries: resources are scarce in all regions, even if relative scarcity varies, and so the Model Law is designed to facilitate the objective of ensuring that procurement is carried out in the most advantageous way possible.

#### **4. Interaction with other international texts addressing public procurement**

11. Since the issue of the 1994 Model Law, other international texts and agreements addressing public procurement have been promulgated, and they confer obligations that affect national procurement legislation in States that are parties to the texts concerned. The Model Law is expressly subject to any international agreements entered into by the enacting State (pursuant to article [3]), and UNCITRAL has sought to ensure, to the extent possible, consistency with these international texts and with common provisions in regional texts, so that it can be used by parties to them without major amendment.

12. The United Nations Convention against Corruption (New York, 31 October 2003)<sup>4</sup> (the Convention against Corruption) addresses the prevention of corruption by setting mandatory minimum standards for procurement in its article 9, which requires each State party to take the "necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption". Although the Model Law is not an anti-corruption instrument per se, its procedures are aimed, among other things, at the avoidance of abuse, so allowing the many enacting States that will be subject to the Convention against Corruption to comply with its obligations.

13. The Agreement on Government Procurement of the World Trade Organization (the WTO) contained in the Final Act of the 1986 —1994 Uruguay Round of trade negotiations (the 1994 GPA)<sup>5</sup> is a plurilateral agreement between [28] members,

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<sup>4</sup> United Nations, *Treaty Series*, vol. 2349. The Convention was adopted by the United Nations General Assembly by its resolution 58/4. In accordance with article 68 (1) of the Convention, the Convention entered into force on 14 December 2005. The text of the Convention is also available at [www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf) (accessed January 2011).

<sup>5</sup> Available at [www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm) (accessed January 2011).

whose purpose is described by the WTO as to open up as much of public procurement as possible to international competition, through making laws, regulations, procedures and practices regarding government procurement more transparent and ensuring that Governments do not protect domestic products or suppliers, or discriminate against foreign products or suppliers. [A new Agreement on Government Procurement is expected to be formally issued in 2011<sup>6</sup> [to be updated and a generic reference to both versions of the GPA (the “GPA”) is to be included].] There are also regional trade agreements and procurement directives applicable in other economic or political groupings of States. The Model Law is designed with sufficient flexibility to allow enacting States to adapt it to meet their international trade obligations as regards procurement without compromising the efficacy of the text itself.

14. In developing countries and countries whose economies are in transition, many procurement projects may be funded by multilateral donors or by foreign direct investment and, indeed, donors may finance procurement reform. The Model Law includes provisions that are suitable for all types of procurement, including large-scale and complex projects, and so can be used for the procurement aspects of privately or donor-funded projects. The multilateral development banks have agreed to harmonize their regimes as regards donor-financed procurement. The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action<sup>7</sup> provide, inter alia, for partner country ownership and the use of country systems for aid delivery (in circumstances in which the procurement system in the country concerned is assessed to be of the requisite standard). As the Model Law is drafted to reflect best practice in procurement, enacting States can be assured that it provides a sound basis for an approach based on the use of a country’s procurement system.

## **B. Purpose of the Guide**

15. In preparing and adopting the Model Law, UNCITRAL is mindful that the Model Law will be a more effective tool for States modernizing their procurement legislation if background and explanatory information is provided to policymakers and legislators to assist them in using the Model Law, particularly if there is limited familiarity with the type of procurement procedures it contains. This Guide also addresses the expanded scope of the revised Model Law as compared with its 1994 counterpart, and also explains, as necessary, the main recent developments in procurement that underlie the revisions made to the 1994 Model Law.

16. The information presented in this Guide is intended to explain both the objectives of the Model Law (as set out in its Preamble) and how the provisions in the Model Law are designed to achieve those objectives. The information in this Guide may also assist States 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 local circumstances. For example,

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<sup>6</sup> The provisionally agreed revised GPA text (of 11 December 2006) is available at [www.wto.org/english/tratop\\_e/gproc\\_e/negotiations\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm) (accessed January 2011) [to be updated].

<sup>7</sup> Available at [www.oecd.org/dataoecd/30/63/43911948.pdf](http://www.oecd.org/dataoecd/30/63/43911948.pdf) (accessed January 2011).

options have been included on issues that are 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, and issues related to challenge and appeals procedures.

17. Taking into account that the Model Law is a “framework” law and provides only essential principles and procedures (see further section [II.D] below), this Guide discusses the need for regulations to support legislation based on the Model Law, identifies the main issues that should be addressed in them, and discusses legal and other infrastructure that will be needed to support the effective implementation of the text.

## II. MAIN FEATURES OF THE MODEL LAW<sup>8</sup>

### A. Objectives

18. The Model Law has six main objectives, set out in its Preamble, which can be summarized as follows:

- (a) Achieving economy and efficiency (value for money);
- (b) Wide participation by suppliers and contractors, with procurement open to international participation as a general rule;
- (c) Maximising competition;
- (d) Ensuring fair and equitable treatment;
- (e) Assuring integrity, fairness and public confidence; and
- (f) Promoting transparency.

19. The above objectives are mutually supporting and reinforcing. The procedures and safeguards in the Model Law are designed to promote objectivity in the procurement proceedings which, in turn, facilitate participation, competition, fair treatment and transparency. These notions are the key principles that facilitate achieving the overarching aims of the Model Law: value for money and avoidance of abuse. Both the Convention against Corruption and the GPA are also based on statements of highly similar principles: expressed in the Convention as transparency, competition and objectivity in decision-making, and in the GPA as non-discrimination and transparency.

20. The statement of objectives may not confer substantive rights on any participants or potential participants in the procurement process. The effective implementation of the objectives can only take effect through cohesive and coherent procedures based on these underlying principles, and where compliance with them is evaluated and, where necessary, enforced. With the procedures prescribed in the Model Law incorporated in its national legislation, an enacting State will therefore create an environment in which the public is assured that the government purchaser will spend public funds with responsibility and accountability, and thus will obtain

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<sup>8</sup> Some provisions in this section may need to be amended after the article-by-article commentary has been completed, to avoid unnecessary repetitions.



value for money. This will also be the environment in which parties offering to sell to the Government are confident of receiving fair treatment and that abuse is absent.

## **1. Value for money**

21. Value for money in procurement includes both economy (meaning that the transaction costs or administrative costs of procurement and procurement systems are reasonable) and efficiency (meaning an optimal relationship between cost and other factors, which include the quality of the subject matter of the procurement). Price may be the sole or main determinant of the winning offer, or quality or other considerations may prevail, depending on the nature of the procurement concerned. When assessing what will represent value for money in a particular procurement, the procuring entity may wish to include a broad range of elements, such as life-cycle costs (which may themselves include disposal (sale or decommissioning) costs), and the impact of variations agreed during the administration of a procurement contract. The notion of sustainability — the costs and benefits to society as a whole rather than to the procuring entity alone, and which themselves may include the social and environmental impact of the procurement — may also be considered relevant. [Add a cross-reference to discussion in the Guide on sustainable procurement.]

22. The Model Law allows flexibility in designing the minimum standards that tenders or other offers must meet in order to be considered responsive (article [10]), and in the design of evaluation criteria (article [11]), so that procuring entities can determine the most advantageous tender in accordance with local practices regarding the components of value for money. (See, further, paragraphs 33-35 below regarding the transparency measures designed, *inter alia*, to facilitate the accountability of procurement officials for the decisions they take.)

## **2. Participation and competition**

23. The Model Law mandates as the main procurement method open tendering — widely recognized as the most effective in promoting the objectives of the Model Law. A main reason is that the procurement is “open” to all potential suppliers, and its terms are pre-determined and pre-publicised, so that suppliers are encouraged to participate and to compete to sell to the Government.

24. Participation on both a domestic and international level is a pre-requisite for competition, and accordingly, such international participation is the default rule for procurement under the Model Law. The limited circumstances in which international participation can be limited (directly or indirectly) are set out in articles [8]-[11] of the Model Law, as further explained in section [II.F] below. Enacting States will need to take into account any relevant international trade obligations regarding international participation in their procurement, when implementing these provisions into their domestic legislation.

25. The commentary to chapter II, section II, of the Model Law explains the default rule of open solicitation for procurement methods, other than those that necessarily involve or permit the use of direct solicitation (procurement that is not “open” in the sense set out above).

26. Finally, there are rules that require a minimum number of participants in procurement in which there might otherwise be too few participants to compete, to

ensure, among other considerations, that competition remains a relevant consideration regardless of whether or not the procurement is “open” (see, for example, the provisions on Request for proposals with dialogue, article [48]).

27. Enacting States may wish to take steps to increase the participation of small, medium and micro enterprises (SMMEs) in their domestic procurement. [To be completed when the article-by-article remarks sections have been drafted — to avoid repetition.]

28. Although some procurement markets will comprise many potential suppliers, procurement of larger and more complex items and services will normally take place in a more concentrated market. Enacting States may wish to monitor the extent of real competition in public procurement and take steps to avoid collusion and/or the creation of oligopolies where there are repeated procurements or long-term procurements in markets without many potential suppliers. The risks involved may increase where the effect of the Government’s purchases may be to consolidate still further the market.

### **3. Fair and equitable treatment**

29. The concept of fair and equitable treatment of suppliers under the Model Law involves non-discrimination and objectivity in taking procurement decisions that affect suppliers. The Model Law includes several provisions implementing these principles. First, except when authorized or required to do so by the procurement regulations or other provisions of law of this State, the procuring entity may not establish any “requirement limiting participation of suppliers or contractors in procurement proceedings that discriminates against or among suppliers or contractors or against categories thereof” (article [8 (2)]). Secondly, subject to provisions of article [8], the procuring entity may not establish any 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, or that is not objectively justifiable (article [9 (6)]). Thirdly, article [10 (2)] as regards descriptions of the procurement provides that the procuring entity, again subject to provisions of article [8], may not establish any description of the subject matter of a procurement that may restrict the participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction based on nationality. A further aspect of fair and equitable treatment is reflected in the requirement of article [10] that descriptions of what is to be procured must be objective, clear and complete. Along with the safeguards contained in article [11] on the evaluation criteria, this requirement of article [10] is aimed at ensuring that suppliers compete on an equal footing. (See, further, the commentary to article [7] on the rules of communication, designed not to exclude suppliers in a discriminatory fashion; article [9] setting rules on qualifications and providing in particular that suppliers can be disqualified only on the basis of pre-determined grounds; articles [10 and 11] regulating examination and evaluation criteria and providing in particular that submissions have to be examined and evaluated against pre-publicised criteria; and article [39] as regards presentation of tenders, in particular that late tenders cannot be accepted.)

30. The principle of equal treatment underlying free trade agreements normally implies that suppliers in all participating States are treated equally; the Model Law’s principle of fair and equitable treatment is a more nuanced one, which recognizes

that strictly equal treatment can lead to a discriminatory outcome (such as if the same time limits are applied to suppliers communicating in paper form and those communicating in electronic form). Nonetheless, the Model Law and free trade regimes proceed on the basis that opening domestic procurement markets to international competition is of benefit, and that the obligations between States under those agreements should therefore be reciprocal.

#### **4. Integrity**

31. Integrity in procurement involves both the avoidance of corruption and abuse and the notion of personnel involved in procurement acting ethically and fairly, avoiding conflicts of interest in particular.

32. General standards of conduct for civil servants may be addressed by enacting States in other national laws and regulations. Since the Convention against Corruption requires procurement systems to address conflicts of interest of personnel in procurement, article [25] of the Model Law highlights the need to enact a code of conduct for such personnel that will address conflicts of interest and other relevant issues. Enacting States, in accordance with their national legislation, may wish to add further provisions addressing integrity and prevention of corruption, or to include references to other laws regulating these issues.

#### **5. Transparency**

33. Transparency in procurement involves five main elements: the disclosure of the rules that apply in the procurement process; the publication of procurement opportunities; the prior determination and publication of what is to be procured and how offers are to be considered; the visible conduct of procurement according to the prescribed rules and procedures; and the existence of a system to monitor that these rules are being followed (and to enforce officials to follow them if necessary). Transparency is considered a key element of a procurement system that is designed, in part, to limit the discretion of officials, and thereby to avoid abuse and corruption. It is thus a critical support for integrity in procurement and for public confidence in its operation, and a tool to facilitate the accountability of those engaged in the procurement process.

34. Transparency measures feature throughout the Model Law. They include requirements that all legal texts regulating procurement should be made promptly and publicly available (article [5]), the determination of evaluation criteria at the outset of the procurement and their publication in the solicitation documents (article [11]), the publication of the deadline for presentation of submissions (article [14]), the disclosure to all participants of significant further information provided during the procurement to any one participant (article [15]), the publication of contract award notices (article [22]), the wide publication of invitations to participate and conditions of participation (articles [32 and 34]), including in an appropriate language (article [13]), and, in tendering proceedings, an opening of tenders in the presence of suppliers or contractors submitting them (article [41]). Further, certain information regarding the conduct of a particular procurement must be made publicly available *ex post facto*, and participants are entitled to further information, all of which must be included in a record of the procurement (article [24]). The Model Law also sets out requirements for non-discriminatory methods of communication (article [7]), stipulates the manner of

entry into force of the procurement contract (article [21]), and allows alleged non-compliance with these requirements to be challenged under its chapter VIII.

35. Nonetheless, the provisions in the text have also been formulated to allow for discretion where appropriate and necessary. Taking account of the differing stages of development and maturity of procurement systems in enacting States, this Guide comments on features of certain procurement methods that are intended to permit more or less discretion, and the capacity and infrastructure needed to operate them effectively, so as to enable enacting States to decide whether or not each method is appropriate for its local circumstances. Significant steps in the procurement process that are intended to constitute legal obligations towards suppliers are governed by rules so as to limit the use of discretion (such as the choice of procurement methods, which is discussed in detail in section [...] below). Other steps involve much broader discretion, such as designing evaluation criteria, which can be crafted to favour price above quality, or vice versa, in a highly flexible manner. The use of discretion under the Model Law involves a balance that allows the procuring entity to identify what to procure and how best to conduct the procurement, but discretion is then circumscribed in that the procuring entity must subsequently follow the prescribed rules and procedures in implementing the decisions involved (so the evaluation criteria and their constituent elements must be published in advance and then adhered to). Transparency is therefore a tool that allows the exercise of discretion to be monitored and evaluated (and, where necessary, challenged).

## **B. Scope of the Model Law**

### **1. Application to all public procurement**

36. The Model Law is designed to be applicable to all public procurement within an enacting State: the objectives of the Model Law are best served by the widest possible application of its provisions. Consequently, article [1] of the text provides that the Model Law applies to all public procurement in the enacting State. There are various options provided in the text to define the concept of the “procuring entity”, reflecting different extent of the public sector in States (see, further, the commentary to the relevant provisions of article [2]).

37. For the same reason, there is no general threshold below which the Model Law’s provisions do not apply. The Commission is aware that the costs of full compliance with all the provisions of the Model Law may exceed their benefits in some low-value procurement, and presents several options for procuring entities in such cases. First, the request-for-quotations procedure in article [45], a simple and speedy method particularly where conducted electronically, is available below a threshold set by the enacting State; auctions and framework agreements under chapters VI and VII, respectively, can also be used to amortise transaction costs and are thus useful for low-value procurement. Secondly, for procurements below [the same threshold], the standstill period envisaged under article [21 (2)] and individual contract award notices under article [22 (2)] can be dispensed with, provided that a notice of all below-threshold procurement is published at least once a year. Certain detailed publicity requirements relating to languages and currencies are optional for such procurement (see, for example, articles [13 (1) and 32 (4)]).

## 2. Defence and sensitive procurement

38. Defence procurement is a significant sector of the domestic procurement market in many enacting States. Traditionally (including in the 1994 Model Law), such procurement was exempted as a whole from legislation and supporting rules governing procurement. The present text brings national defence and national security sectors, where appropriate, into the general ambit of the Model Law, so as to promote a harmonized legal procurement regime across all sectors in enacting States, and to enable all procurement to benefit from the Model Law's provisions. However, it is acknowledged that the Model Law's extensive transparency obligations might not be compatible with all defence procurement: some procurement in the defence and national security arena will require appropriate modifications to accommodate sensitive or confidential information.

39. The Model Law permits such modifications, however, not because the procurement involves defence per se, but because it involves classified information and can thus be referred to as sensitive procurement. Enacting States will observe that modifications are permitted on a case-by-case basis, in order to avoid a blanket exemption arising whether by design or accident. "Classified information" refers to information designated as classified by an enacting State in accordance with the relevant national law, understood in many jurisdictions as information to which access is restricted by law or regulation to particular classes of persons. The term, and therefore the flexibility conferred as regards classified information, refer not only to procurement in the sectors where "classified information" is most commonly encountered, such as national security and defence, but also to procurement in any other sector where protection of certain information from public disclosure may be permitted by law, such as in the health sector. Importantly, the provisions do not confer any discretion on the procuring entity to expand the definition of "classified information": to do so would invite abuse. Generally, issues pertaining to the treatment of "classified information" are regulated at the level of statute, and are therefore subject to scrutiny by the legislature.

40. The authorization granted to procuring entities to take special measures and impose special requirements for the protection of classified information, including granting an exemption for the procurement from provisions requiring public disclosure of information, applies only to the extent permitted by the procurement regulations or by other provisions of law in the enacting State. Under article [7] of the Model Law, the procuring entity is required to specify, when first soliciting participation in a procurement procedure involving classified information, if any measures and requirements are needed to protect that information at the requisite level, and what those measures are. If it does so, the procuring entity must provide reasons in the record: these safeguards are designed to ensure that the potential significance of the exemptions is appropriately considered, and that the procuring entity (which determines whether sufficient grounds exist to lift normal transparency requirements) can explain and justify its actions.

41. As an application of the general principle described in paragraphs 11-14 above, the provisions in the Model Law allowing for exceptions to transparency mechanisms for the protection of essential security interests, such as relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes, are flexible and allow for States to comply with relevant international obligations.

42. Other issues that are of particular concern in defence procurement include the complexity of some procurement, and the need to ensure security of both information and supply. The Model Law's provisions, in chapters V and VII in particular, allow for these needs to be accommodated (including the appropriate protection of classified information as necessary).

### **[3. International obligations]**

43. 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.]

### **4. Procurement planning and contract administration**

44. The Model Law includes the essential procedures for the selection of suppliers and contractors for a given procurement contract, consistent with the objectives described in paragraphs 18-35 above, and provides for an effective challenge mechanism if the rules or procedures are broken or not respected. The Model Law does not purport to address the procurement planning, or contract performance or implementation phase. Accordingly, issues such as budgeting, needs assessment, market research and consultations, contract administration, resolution of performance disputes or contract termination are not addressed in its provisions.

45. Nonetheless, the Commission recognizes the importance of these phases of the procurement process for the overall effective functioning of the procurement system. The enacting State will need to ensure that adequate laws and structures are available to deal with these phases of the procurement process: if they are not in place, the aims and objectives of the Model Law may be frustrated.

46. As regards procurement planning, international and regional procurement regimes have moved towards encouraging the publication of information on forthcoming procurement opportunities, and some enacting States may require the publication of such information as part of their administrative law. Some other systems reduce time limits for procurement advertisements and notices where there has been such advance publication. The benefits of this practice accrue generally through improved procurement management, governance and transparency. Specifically, it encourages procurement planning and better discipline in procurement and can reduce instances of, for example, unjustified recourse to methods designed for urgent procurement (if the urgency has arisen through lack of planning) and procurement being split to avoid the application of more stringent rules. The practice can also benefit suppliers and contractors by allowing them to identify needs, plan the allocation of necessary resources and take other preparatory actions for participation in forthcoming procurements.

47. [The Model Law does not require the publication of such information — its provisions in article [6] are permissive. Flexibility is needed because information and needs may change with circumstances; not only may the procuring entity's time and costs be wasted, but suppliers or contractors may also incur unnecessary costs. Making available abundant, irrelevant or misleading information, rather than

carefully planned, useful and relevant information, may compromise the purpose of issuing this type of information. Similarly, the publication of procurement plans for the forthcoming months is also encouraged, subject to these caveats. The commentary to article [6] provides further detail of the approach of the Model Law.]

48. The contract administration stage, if poorly conducted, can undermine the integrity of the procurement process and compromise the objectives of the Model Law of equitable treatment, competition and avoidance of corruption, for example if variations to the contract significantly increase the final price, if sub-standard quality is accepted, if late payments are routine, and if disputes interrupt the performance of the contract. Detailed suggestions for contract administration in complex procurement with a private finance component are set out in the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000):<sup>9</sup> many of the points made in that instrument equally apply to all contract administration, particularly where the contract relates to a complex project. The UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987),<sup>10</sup> addresses provisions specific to an industrial works contract.<sup>11</sup>

### C. General approach of the Model Law

49. The Model Law provisions set out general requirements for a sound procurement system, and procedures for each procurement. Consistent with its intended application for all regions, the approach of the text is flexible and non-prescriptive. States can adapt the text to local circumstances, such as defining the extent of public sector procurement, without compromising the Model Law's essential principles and procedures.

50. The Model Law offers procedures that provide a balance between allowing some commercial discretion on the part of the procurement official (with the aim of empowering him or her to maximize value for money) and regulating or restricting the use of such discretion (by means of transparency and rules for the conduct of procurement) to avoid poor and corrupt decisions.

51. The Model Law's general prescriptions for the procurement system can be summarized as follows:

(a) That the applicable law, procurement regulations and other relevant information are to be made publicly available (article [5]);

(b) The prior publication of announcements for each procurement procedure (with relevant details) (articles [32-34]) and ex post facto notice of the award of procurement contracts (article [22]);

(c) Items to be procured are to be described in accordance with article [10] (that is, objectively, and without reference to specific brand-names as a general rule,

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<sup>9</sup> Available at [www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html) (accessed January 2011).

<sup>10</sup> Id.

<sup>11</sup> The Working Group may consider that further discussion is warranted on procurement planning and contract administration and, if so, to provide guidance to the Secretariat on the parameters for such discussion.

so as to allow submissions to be prepared and compared on a common and objective basis);

(d) That qualification procedures and permissible criteria to determine which suppliers will be able to participate are set out in the law, and the particular criteria that will determine whether or not suppliers are qualified in a particular procurement procedure are to be advised to all potential suppliers (articles [9 and 17]);

(e) That open tendering is the recommended procurement method and that the rules require the objective justification for the use of any other procurement method (article [27]). The law must set out the particular conditions for use of each such method (articles [28-30]);

(f) Standard procedures for the conduct of each procurement procedure are prescribed in the law (chapters III-VII);

(g) Communications with suppliers are to be in a form and manner that does not impede access to the procurement (article [7]);

(h) There is a legal requirement for a standstill period between the identification of the winning supplier and the award of the contract, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any procurement contract entering into force (article [21 (2)]); and

(i) There is a legal requirement for challenge and appeal procedures if rules or procedures are breached (chapter VIII).

52. As regards the obligations on the procuring entity for each procurement proceeding, the procuring entity is to:

(a) Determine and advise potential suppliers of all relevant information for the procurement at the beginning of the procedure in accordance with the rules set out in the Model Law (articles [36, 38, 46, 48, 52 and 57-60], for example). This information includes the procedures for each procurement method and the criteria and procedures for awarding the procurement contract;

(b) Use open and fully competitive procedures unless there is justification to do otherwise (chapter II, sections I and II);

(c) Follow the prescribed procedures for each procurement procedure (chapters III-VII); and

(d) Advertise the award of the procurement contract (article [22]).



**(A/CN.9/WG.I/WP.77/Add.2) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twentieth session****ADDENDUM**

This addendum sets out a proposal for the following section and subsections of Part I (General remarks) of a draft revised Guide to Enactment to the UNCITRAL Model Law on Public Procurement: II. Main features of the Model Law (“A ‘framework’ law to be supplemented by procurement regulations and supported by appropriate infrastructure”, “E-procurement,” and “Provisions on international participation in procurement proceedings, and the use of procurement systems to achieve other government policy goals”).

**GUIDE TO ENACTMENT OF  
THE UNCITRAL MODEL LAW  
ON PUBLIC PROCUREMENT****Part I. General remarks**

...

**II. MAIN FEATURES OF THE MODEL LAW**

*(continued)*

**D. A “framework” law to be supplemented by procurement regulations and supported by appropriate infrastructure****1. Legislative framework**

53. 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 out all the rules and regulations that may be necessary to implement those procedures in an enacting State.

54. Accordingly, the Model Law envisages, as a first step, that enacting States will issue procurement regulations to complete the legislative framework for the procurement system, both to fill in the details of procedures authorized by the Model Law and to take account of the specific, possibly changing circumstances at play in the enacting State (such as the real value of thresholds for request for quotations, for example, and accommodating technical developments). Naturally, caution is needed to ensure that regulations, which are derived from the Model Law, do not compromise its objectives and procedures. As regards other legal

infrastructure, not only will procurement procedures under the Model Law raise matters of procedure that will be addressed in the procurement regulations, but answers to other legal questions arising will probably be found in other bodies of law (such as administrative, contract, criminal and judicial-procedure law). Procuring entities may need to take account of and apply employment and equality legislation, environmental requirements, and perhaps others. Enacting States will enhance their procurement efficacy to the extent that the many applicable provisions are clearly disseminated and they and their interaction with procurement law understood.

## **2. Implementation of legislative provisions**

55. The legislative framework for procurement should form part of a coherent and cohesive procurement system. A second step to support legal reform is the use of measures to provide for effective implementation and operational efficacy. The use of guidance notes, manuals and developing standard forms and sample documents have proved an effective tool in practice. International and regional organizations and other bodies are active in procurement reform, and resources discussing best practice and other guidance can be found at their Internet addresses.

56. The following section describes the institutional, administrative and legal infrastructure and adequate capacity are needed to support the legislative framework if the procurement system's overall objectives are to be achieved, and for it to fulfil the requirements of the Convention against Corruption, some of which are not generally, or ideally, addressed through legislation.

## **3. Institutional and administrative structures and adequate resources**

57. Thirdly, the Model Law is based on an assumption that the enacting State has in place, or will put into place, the proper institutional and administrative structures and human resources necessary to operate and administer the type of procurement procedures provided for in the Model Law. At the administrative level, the interaction between good management of public finances and procurement (which is also a feature of the Convention against Corruption) is an issue of significance. Budgeting requirements or procedures may be found in a variety of sources, and enacting States will wish to ensure that procuring entities are aware of all relevant obligations, such as whether budgetary appropriation is required before a procurement procedure may commence, and whether or not those obligations are part of the procurement system per se.

58. At the institutional level, an enacting State may also find it desirable to set up a public procurement agency or other authority to assist in the implementation of rules, policies and practices for procurement to which the Model Law applies. The functions of such authority might include, for example:

(a) *Ensuring effective implementation of procurement law and regulations.* This may include the issue of procurement regulations, the code of conduct required under article [25] of the Model Law, monitoring implementation of the procurement law and regulations, making recommendations for their improvement, and issuing interpretations of those laws.

(b) *Rationalization and standardization of procurement and of procurement practices.* This may include coordinating procurement by procuring entities, and

preparing standardized procurement documents where appropriate, specifications and conditions of contract. This function may be particularly productive where the enacting State seeks to enhance the participation of SMMEs in the procurement process, in that the disincentive to participate where procedures are unknown, uncertain or long and complex will be significant.

(c) *Monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader government policies.* This may include examining the impact of procurement on the national economy (such as monitoring concentration in particular markets and potential risks to competition), analysing the costs and benefits of pursuing socio-economic goals through procurement, 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].

(d) *Assisting and advising procuring entities and procurement officers.* Procurement officers may seek guidance on drafting internal documents for use within a procuring entity, and interpretations of specific aspects of law and regulations. Legal advice may already be provided by the legal advisors to the Government, or within a particular procuring entity, but, otherwise, procurement officials may seek guidance as to whether their intended actions (for example using an alternative procurement method or recourse to direct solicitation) are in compliance with the legislative framework.

(e) *Training of procurement officers.* The agency or other authority could also be made responsible for training the procurement officers and other civil servants involved in operating the procurement system. This function will be particularly important (i) where the enacting State has included in its domestic legislation procurement methods that pre-suppose a high degree of professionalism in the procurement function, especially at the upper levels within procuring entities, where critical decisions are taken. There are various bodies at the international level that specialize in certification and training of procurement officers, information regarding which can be found through links on the UNCITRAL website, [www.uncitral.org](http://www.uncitral.org); and (ii) where the enacting State seeks to enhance SMME participation in procurement.

(f) *Approval requirement.* The agency or other authority may be charged with issuing approvals for particular procurements prior to the commencement of the procurement proceedings or prior to the award of the procurement contract, where the enacting State provides for such an approval function (see, further, paragraphs 66-68 below). Where this facility exists, the enacting State may wish to consider the use of flexibility in referral thresholds (so as to ensure that cases are not referred unnecessarily and that appropriate cases can be referred); the use of a guidance function as an alternative to an approval function (so as to ensure accountability in decision-making and to avoid impeding the development of capacity); and the appropriate structure of the agency and resources required.

(g) *Certification.* In some cases, such as high value or complex procurement contracts, the agency might alternatively be empowered to review the procurement proceedings to ensure that they have conformed to the Model Law and to the procurement regulations, before the award is made or the contract enters into force.

59. Where procuring entities are autonomous of the governmental or administrative structure of the State, such as some State owned commercial enterprises, States may find it preferable for any approval, certification or guidance function to be exercised by an agency 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. Most importantly, where approval functions are concerned, the agency or authority must 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 these functions to be exercised by a committee of persons, rather than by one single person, to avoid the risk of abuse of the power conferred.

#### **4. Oversight and enforcement**

60. A related issue is the question of oversight and enforcement of individual procurement decisions. An oversight function will be effective only to the extent that it is exercised by an entity that is independent of the decision-taker — that is, the procuring entity (see paragraphs 66-68 below for considerations relating to an approving body). An alternative structure for those systems in which the public procurement authority or agency exercises decision-making powers may be for oversight to be undertaken by a national audit body.

61. As regards enforcement of compliance with the provisions of legislation based on the Model Law, enacting States will be aware that chapter VIII of the Model Law requires an independent review function (administrative or judicial). Administrative review bodies will not be considered to be independent, and will face potential and actual conflicts of interest, if they are part of an agency or authority that can assist or advise procurement officials or procuring entities, and/or exercise decision-making powers. Although in some systems this review function has been exercised by a subsidiary body within the public procurement authority or agency with the general powers described above, it is generally considered undesirable to subject the review function to what will be perceived as effective political control on the part of the agency or authority itself. Finally, an advisory function will be compromised if procurement officers are reluctant to use it for fear of subsequent enforcement action on the basis of information they provide when seeking advice.

#### **5. Structure of public procurement authorities or agencies**

62. The nature of the agencies or other authorities that exercise administrative, oversight and review functions in a particular enacting State, and the precise functions that they will exercise, will depend, among other things, 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 effectiveness, economy and efficiency in mind. 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. Enacting States may consider that investment in systems to ensure that procuring entities have sufficient capacity, and that they and procurement officers are adequately trained and resourced, will assist

in the effective functioning of the system and in keeping the costs of administrative control proportionate.

63. The public procurement agency or authority may also be linked with existing regulatory authorities with expertise in related areas, such as those addressing competition. The latter may monitor collusion and bid-rigging, and concentration in public procurement markets. Enacting States may also wish to consider whether enforcement authority in competition-related and procurement-related matters is more effectively provided through one or more bodies.

64. Empirical evidence also indicates that there may be a risk of abuse of the powers of a public procurement agency or authority if there are insufficient controls to ensure its members are sufficiently independent from decision makers in the Government and in procuring entities.

65. It should be noted that by enacting the Model Law, a State does not commit itself to any particular administrative structure; neither does the adoption of such legislation necessarily commit the enacting State to increased government expenditures.

#### **6. Specific considerations relating to the optional prior-approval requirement for use of exceptional procedures**

66. The Model Law provides an option to allow certain important actions and decisions by the procuring entity, in particular those involving the use of certain procurement methods and the entry into force of the procurement contract, be subject to prior approval from outside the procuring entity. The advantage of such 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.

67. The prior-approval requirement is presented in the Model Law as an option because a prior-approval system is not applied in all countries, and its use is decreasing. An alternative approach is to exercise oversight over procurement practices primarily through audit after the event. In this regard, a requirement for external approval may be particularly inappropriate in certain circumstances, such as in the use of two-stage tendering, given that there are precise conditions for use of that procurement method (see [cross refer to relevant article-by-article remark]), and in some instances of single-source procurement, such as for urgent situations.

68. Where it decides to enact an approval requirement, the enacting State will designate the agency or other body or bodies responsible for issuing the various approvals, and to delineate the extent of authority conferred in this regard. An approval function may be vested in an agency or authority that is wholly autonomous of the procuring entity (e.g., ministry of finance or of commerce, or public procurement authority) or, alternatively, it may be vested in a separate supervisory organ of the procuring entity itself. (See further considerations raised in paragraph 59 above, which are also relevant in this context.)

## **E. E-procurement**

### **1. Background**

69. E-procurement includes (inter alia) the presentation of submissions electronically and the use of new procurement methods facilitated by the Internet (electronic reverse auctions, electronic catalogues, and electronic framework agreements), the publication of procurement-related information on the Internet and the use of electronic systems throughout the procurement process (for the communication and exchange of information).

70. Terms such as “documents”, “written communication” and “documentary evidence” are becoming more commonly used to refer to all documents (whether electronic or paper-based) in those countries in which e-government and e-commerce are widespread, but, in others, the assumption may be that they infer a paper-based environment. Accordingly, the Model Law now contains provisions to ensure that all means of communication, transmission of information and retention of information can be used in procurement under legislation based on that text.

71. At the time the revised Model Law was issued by the Commission, non-paper information transfers were most commonly conducted using the Internet and related systems. However, the Commission noted the rapid pace of technological advance and assumed that new technologies would emerge. For convenience, the term e-procurement will be used in this Guide to refer to the use of e-communications and the electronic presentation of submissions, which involve the transfer of information using electronic or similar media. The policy issues are of general application for all emerging information technologies that can be used to transfer information and documents and to conduct procurement procedures.

### **2. Benefits of e-procurement**

72. The potential benefits of e-procurement in terms of promoting the achievement of the objectives of the Model Law have been widely noted: they include increased administrative efficiency in terms of both time and costs (paper-related administrative costs and the time needed to send information in paper form are reduced); and repeated purchases can be standardized. The use of information technologies for the publication of procurement opportunities and of procurement rules and procedures enhances transparency and market access, facilitating both participation in the procurement process and competition. Similarly, the use of these technologies to enable suppliers to apply and participate in the procedure, to give and receive information, and to submit tenders and other offers online is not only administratively efficient, but can also open up the market to entrants located far away that might not otherwise participate. Automated processes are not only administratively efficient through introducing uniformity and standardization, but the electronic systems also provide new measures to support integrity, by reducing human interaction in the procurement cycle and the personal contacts between procurement officials and suppliers that can give rise to bribery opportunities.

73. While these benefits may be considerable, enacting States may wish to ensure that e-procurement is implemented in a way that does not impede market access — either generally, or to certain suppliers, such as SMMEs. The safeguards provided in the Model Law are discussed in particular in paragraphs [85-90] below. (Issues

relating to the participation of SMMEs generally are discussed in [add appropriate reference].)

### **3. Approach of the Model Law to e-procurement**

74. The general approach to the introduction of e-procurement in the Model Law is based on three key principles. First, given the potential benefits of e-procurement, the Model Law should, where appropriate and to the extent possible, encourage its use; secondly, as a consequence of rapid technological advance and of the divergent level of technical sophistication in States, the text should be technologically neutral (in that it does not recommend any particular technology, but describes the functions of available technologies); and, thirdly, further and more detailed guidance should be provided to assist enacting States in introducing and operating e-procurement.

75. The policy considerations arising from specific aspects of e-procurement are discussed in the article-by-article remarks (see [cross-reference to relevant article-by-article remarks]). The guidance in this section discusses possible legal and other obstacles to the use of e-procurement. The safeguards that are necessary to ensure that it is not used to compromise the objectives of the Model Law are addressed in sections below.

76. As regards possible legal obstacles to the use of e-procurement, the extent to which individual States can use this resource depends on the availability of necessary electronic commerce infrastructure and other resources, including measures respecting electronic security, and the adequacy of the applicable law permitting and regulating electronic commerce. The general legal environment in a State (rather than its procurement legislation) may or may not provide adequate support for e-procurement. For example, laws regulating the use of written communications, signatures, what is to be considered an original document and the admissibility of evidence in court might be inadequate to allow e-procurement with sufficient certainty. While these issues may not diminish the desire to use e-procurement, the outcome may be unpredictable and commercial results will not be optimized.

77. An initial consideration in addressing this issue is whether the general regulation of, or permission to use, e-procurement is to be addressed in procurement law or in the general administrative law of an enacting State. As noted in Section [II.D] above, the Model Law is not a complete protocol for procurement: procurement planning, contract administration and the general supporting infrastructure for procurement are addressed elsewhere. Even if the Model Law were to provide for a general recognition of electronic documents and communications, it would not cover all documents, information exchange and communications in the procurement cycle, and there may be conflicts with other legal texts on electronic commerce. The solution adopted in the Model Law therefore, is to rely on laws of the enacting States, including general electronic commerce legislation to enable e-procurement, adapting them as necessary for procurement-specific needs. Enacting States will therefore first need to assess whether their general electronic commerce legislation enables e-procurement in their jurisdictions.

78. For this purpose, enacting States may wish to adapt the series of electronic commerce texts that UNCITRAL has issued: the Model Law on Electronic Commerce (1996), the Model Law on Electronic Signatures (2001), and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).<sup>1</sup> These texts provide a general recognition of electronic commerce and electronic signatures, and which, if enacted in a State, provide the general legal requirements for the use of e-procurement. They rely on what has been called a “functional equivalent approach” to electronic commerce, which analyses the functions and purposes of traditional requirements for paper-based documents and procedures, and fulfils those requirements using information technologies. This approach has also been followed for procurement-specific applications of e-commerce in the Model Law.

79. Because the approach is functional, it encompasses the notion of technological neutrality and avoids the imposition of more stringent standards on e-procurement than have traditionally applied to paper-based procurement. It is important to note that more stringent standards will operate as a disincentive to the use of e-procurement, and/or may elevate the costs of its use, and its potential benefits may be lost or diluted accordingly. Further, there will be risks of paralysis of a system should any technology that it mandates become temporarily unavailable. An additional reason for applying technological neutrality is to avoid the consequences of a natural tendency to over-regulate new techniques or tools in procurement or to follow a prescriptive approach, reflecting a lack of experience and confidence in the use of new technologies, which would also make their adoption more difficult than it needs to be.

80. Another implication of this approach is that no definitions of the terms “electronic”, “signature”, “writing”, “means of communication” and “electronic data messages” are included in the Model Law. Definitions of the main terms needed for effective electronic commerce transactions do appear in the UNCITRAL electronic commerce texts described above. [For example, article 2 of the UNCITRAL Model Law on Electronic Commerce describes “data message” as “information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.”] On the other hand, the Model Law no longer includes references or form requirements that pre-suppose a paper-based environment.

81. The Model Law itself addresses issues specific to procurement that are not addressed in general e-commerce legislation, such as the need for precise times of receipt for e-tenders, and the importance of preventing access to their contents until the scheduled opening time [add cross reference to relevant article-by-article remarks].

#### **4. Practical considerations**

82. Obstacles to the use of e-procurement may be logistical and/or technological. Although many Governments have moved to conducting some of their business online, reliable access to the Internet cannot always be assumed: there may be

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<sup>1</sup> Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce.html) (accessed January 2011).



infrastructure deficiencies, and the relevant technologies may not be universally available, particularly if it involves or uses new technologies and their supporting infrastructures that are not yet used sufficiently widely, or that is beyond the reach of SMMEs.

83. A related issue is the use of proprietary information technology systems and specialist software for procurement. Market access is enhanced if procuring entities make these systems available to all potential suppliers without charge, but practical and commercial considerations may indicate otherwise. Procuring entities may be under significant pressure to amortize and or recoup the costs of investment in proprietary systems, and may contract out the management of e-procurement systems to third parties, which may then own any intellectual property in their systems or create the potential for conflicts of interest.

84. Consequently, the Model Law does not require procuring entities to provide all software or other technical requirements without charge, but it is strongly recommended that no charge is made. If it is necessary to apply charges, procuring entities should not levy disproportionate amounts or use proprietary systems or charges to restrict access to the procurement. For these reasons, too, enacting States may wish to consider the use of off-the-shelf or open software information systems. An important consideration is that the systems should be easily harmonized with systems used by potential trading partners, should not involve multiple-user licence fees, and should be easily adaptable to local languages or to accommodate multilingual solutions. Interoperability considerations may be especially important in the broader context of public governance reforms involving integration of internal information systems of different government agencies, and in preventing the use of e-procurement systems to restrict international participation of suppliers in the procurement. Some e-procurement systems require potential users, i.e. suppliers, to provide domestic information as a prerequisite for authorization to use the system. While security and authenticity considerations must be accommodated, enacting States are encouraged to ensure that their systems do not impose unnecessary restrictions that will impede market access. (See further Section [II.F] below.) The [refer to the appropriate version] GPA requires that e-procurement systems be generally available and interoperable with other systems that are widely used in the relevant State. Enacting States may wish to ensure that they comply with those and any applicable regional trade agreements in this regard, many of which have similar requirements.

## **5. Safeguards to enhance the use of e-procurement**

85. The take-up of e-procurement systems requires public confidence in the security of the information system to be used. Such public confidence itself requires adequate authentication of suppliers, sufficiently reliable technology, systems that do not compromise tenders or other offers, and adequate security to ensure that confidential information from suppliers remains confidential, is not accessible to competitors and is not used in any inappropriate manner. That these attributes are visible is particularly important where third parties operate the system concerned. At a minimum, the system must verify what information has been transmitted or made available, by whom, to whom, and when (including the duration of the communication), and must be able to reconstitute the sequence of events. It should provide adequate protection against unauthorized actions aimed at disrupting the

normal operation of the public procurement process. Transparency to support confidence-building will be enhanced where any protective measures that might affect the rights and obligations of procuring entities and potential suppliers are made generally known to public or at least set out in the solicitation documents.

86. Applying the principles of functional equivalence and technological neutrality to safeguards is necessary to manage the requisite measures for e-procurement, as noted above. For example, specific safeguards for e-communications or confidentiality in tenders or other offers would inevitably set higher standards of security and for preserving integrity of data than those applicable to paper-based communications (because there are very few, if any, such standards set in the paper-based world), and they may fail to allow for the risks that paper-based communications have always involved.

87. The first safeguard is to ensure the authentication of communications, i.e. ensuring that they are traceable to the supplier or contractor submitting them, which is commonly effected by electronic signature technology and systems that address responsibilities and liabilities in matters of authentication. Relevant rules may either be specific to a procurement system or may be found in the State's general law on electronic systems. The concept of technological neutrality means in practice that procurement systems should not be automatically restricted to any one electronic signature technology [(such as advanced electronic signatures based on cryptography and public key infrastructure, even if they are the pre-eminent technology at the relevant time)].<sup>2</sup> Some electronic signature systems are based on a local certification requirement. Accordingly, and in order to avoid the use of e-procurement systems as instruments to restrict access to the procurement, the system should ensure the recognition of foreign certificates and associated security requirements related to electronic signatures, by disregarding the place of origin of signatures. In this regard, enacting States will need to consider which communications, such as tenders or other offers, require full authentication, and that other mechanisms for establishing trust between the procuring entity and suppliers may be sufficient for other communications. This approach is not novel: the 1994 Model Law applied different requirements to lesser and more important communications in the procurement process, as does the revised Model Law (see article [7]).

88. Another requirement is for integrity, so as to protect the information from alteration, addition or manipulation or, at least, that any alteration, addition or manipulation that takes place can be identified and traced. A related issue is "security", meaning that time-sensitive documents, such as tenders, cannot be accessed until the scheduled opening time.

89. These issues are discussed in more detail in [cross-reference to the guidance on article [39]] below, in which they assume the greatest importance.

90. The rise in e-procurement has been accompanied by the introduction of new procurement methods and the overhaul of existing methods to take advantage of the new technologies. New methods include electronic reverse auctions and electronic catalogues, and the more traditional techniques such as framework agreements can

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<sup>2</sup> The Working Group may wish to consider whether this reference is helpful given the pre-eminence of this technology.

be modernized to allow for e-submissions notably at the second stage of the procedure: these techniques can permit purchases to be completed in hours rather than weeks or months. The approach of the Model Law is, again, to facilitate these techniques where appropriate and subject to appropriate safeguards (see [cross-reference to commentary to chapters VI and VII] below).

## **6. E-procurement as a process issue**

91. Some of the most significant economic benefits of e-procurement arise from its application to the procurement system as a whole: introducing uniformity into the procurement system through information technologies can enhance oversight, monitoring and evaluation capacities, particularly where procurement systems are integrated with planning, budgetary and contract administration and payment systems (which themselves may include electronic invoicing and payment). The introduction of e-procurement is an opportunity to reform the entire procurement system to this end: if paper communications are simply replaced with e-mails and Internet-based communications, and advertising procurement opportunities on a website, the benefits of e-procurement will not be as great. Without systemic reform, the risk is that whatever weaknesses may exist in a traditional procurement system are transported to its new, digital system and the risks associated with e-procurement will not be adequately addressed.

92. Such an overhaul of an entire procurement system is a significant investment and the electronic systems shall also entail new governance processes. Empirical evidence suggests that most e-procurement systems that are introduced have taken many years to provide the benefits promised, and the most effective implementation has been often undertaken in a staged manner, which can also assist in amortizing the investment costs. Systems set up to be self-financing through charges to suppliers and outsourcing may be administratively efficient, but can involve risks: commentators have observed both decreasing participation and competition where charges are levied, and the potential for institutional conflicts of interest. These risks will be enhanced if the system is outsourced merely to introduce it swiftly and relatively cheaply. In other words, the costs and benefits of self-financing systems and outsourcing need to be carefully considered.

## **F. Provisions on international participation in procurement proceedings, and the use of procurement systems to achieve other government policy goals**

### **1. Background**

93. In line with the mandate of UNCITRAL to promote international trade, and with the Model Law's objectives of maximizing participation and competition so as to enhance value for money, the Model Law provides that suppliers and contractors are to be permitted to participate in procurement proceedings without regard to nationality, save to the extent the procurement regulations or other provisions of law in the enacting State exceptionally permit otherwise (article [(8) (1)]). This general rule is meant to promote transparency and to prevent arbitrary and excessive resort to restriction of foreign participation, and is given effect by a number of procedures designed, for example, to ensure that invitations to participate in a procurement

proceeding and invitations to pre-qualify are issued in such a manner that they will reach and be understood by an international audience of suppliers and contractors. They are further supported by article [(9) (6)], which states that, subject to article [8], “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, or that is not objectively justifiable,” and by the rules on description of the subject matter of the procurement, which provide that, subject to article [8], no description of the subject matter of a procurement may be used that may restrict participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction on the basis of nationality (article [10 (2)]).

## **2. Direct limitation of international participation**

94. The Model Law permits enacting States to provide legally for procurement limited to domestic suppliers, as an exceptional measure, by permitting the procuring entity under article [8 (1)] to declare that a procurement proceeding will exclude suppliers or contractors on the basis of nationality. However, the procuring entity can limit international participation only to the extent that other laws (including treaty obligations) or the procurement regulations so permit. The aim of this restriction is to ensure that the procuring entity is not able to discriminate against particular suppliers or categories of suppliers at its own instance.

95. This latter point is reinforced by provisions that expressly prohibit discrimination through requirements regarding qualification, examination or evaluation criteria in articles [9], [10] and [11] of the Model Law, respectively.

96. This approach, together with the provisions in article [3] on the primacy of international obligations of the enacting State, permits the Model Law to take account of cases in which the funds being used for procurement are derived from a bilateral tied-aid arrangement. Such an arrangement may require that procurement should be from the donor country’s suppliers or contractors. Similarly, recognition can be 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 sanctions imposed by the United Nations Security Council.

## **3. Indirect limitation of international participation**

97. The above discussion refers to exceptional measures that are explicitly designed to limit foreign participation. Certain measures may indirectly give the same result, such as through the setting of minimum standards for qualification, in the description of the subject matter of the procurement and in the design of the evaluation criteria (in articles [9, 10 and 11]).

98. As is further explained in the commentary to articles [9, 10 and 11], the procuring entity can set minimum standards for qualification and responsiveness, and can include evaluation criteria, that do not relate to the subject matter of the procurement in order to promote government policies (such as environmental policies, industrial policies or social policies). Minimum standards might either restate legal requirements within the enacting State (such as the minimum wage for

employees), or such standards or evaluation criteria might set higher standards than, or prefer submissions that exceed, the legal norms for the purpose of promoting a policy through procurement (such as higher environmental standards). These policies will have the effect of disfavours international participation if the standards are higher than those applying in other States. Other policies may aim at promoting local capacity development through providing support for SMMEs, targeting particular sectors of the commercial sector that have historically been disadvantaged, and the promotion of community participation in procurement. Governments may also seek to place certain types of procurement contracts for strategic reasons. All such measures may be part of an explicit approach to sustainable or environmentally sensitive procurement. These terms are flexible notions, but in general seek to ensure that the environmental, social and developmental impact of procurement is taken into account [cross-reference to the section on sustainable procurement].

99. Article [11] permits the procuring entity to use 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 local capacities, without resorting to purely domestic procurement. The margin of preference permits the procuring entity to select a submission from a local supplier as the successful supplier when the difference in price (or price when combined with quality scores) between that submission and the overall lowest-priced or most advantageous submission 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.

#### **4. The use of procurement to promote government policies and objectives**

100. A system based on the Model Law allows exceptions to procedures that would be considered to be those that guarantee optimum allocation of resources and value for money in order to allow other government objectives to be pursued, particularly to develop and enhance local capacities.<sup>3</sup>

101. The Model Law does not restrict the types of policies or objectives that enacting States may promote through procurement, but it applies rigorous transparency requirements to ensure that how the policies will be applied is clear to all participants in the process. Provisions of law or regulations in enacting States must set out the policies concerned. Examples of policies that have been encountered in practice include protecting the balance of payments position and foreign exchange reserves of a State, allowing for countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, 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

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<sup>3</sup> The Working Group may wish to consider whether the Guide should discuss whether these policies should be used only to the extent that they are engaged in for local capacity development or whether they may also appropriately include political considerations (which are equally valid in the view of some States).

suppliers, the transfer of technology and the development of managerial, scientific and operational skills, targeting specific industrial sector development, the development of SMMEs, minority enterprises, small social organizations, disadvantaged groups, persons with disabilities, regional and local development, environmental improvements, and the improvement of the rights of women, the young and the elderly, and people who belong to indigenous and traditional groups.

102. The approach of the Model Law is designed to ensure that the costs of the policies concerned can be calculated through comparison with established benchmarks, and so balanced against the benefits derived. Common considerations as regards the impact of such policies on the objectives of the Model Law set out in the Preamble include that, to the extent they impose a restriction on competition, they are likely to have an inflationary effect on the ultimate price paid and thus on the value for money; and the cost of monitoring compliance with government policies may add to administrative or transaction costs, which may have a negative effect on efficiency. On the other hand, some such policies may open the procurement market to sectors that have traditionally been excluded from procurement contracts (such as SMMEs) and may increase participation and competition, though in the longer term such benefits may not persist if suppliers choose not to expand beyond the level of an SMME.

103. Enacting States may wish to consider empirical evidence from States that have pursued such policies. For example, within relatively short periods, suppliers or contractors from supported areas of the economy may develop to such an extent, following or as a result of the implementation of such policies, that they become able to compete freely in the market. However, total insulation from foreign competition for an extended period of time or beyond the point that suppliers can compete freely can frustrate the capacity development that such policies are designed to achieve. For similar reasons, the results from the use of preference policies (such as the use of evaluation criteria to prefer a defined group) tends to be more positive than for set-aside policies (such as requiring subcontracting to a defined group). Enacting States will wish to ensure that pursuing government policies through procurement is both effective in achieving the policy objectives and efficient in operation. At the same time, enacting States should consider viable alternatives, such as targeted technical assistance, simplifying procedures and red tape, ensuring that adequate financial resources are available to all sectors of the economy, requiring procuring entities to pay suppliers regularly and on time, and providing other targeted support.

## **5. Sustainable procurement**

104. [Further research/contributions are required if a section on this topic is to be included.]

## **6. International obligations**

105. The Model Law is not an international text in the sense of being a negotiated international agreement, a situation that facilitates its flexible approach. Enacting States may be signatories to international agreements covering procurement (including the Convention against Corruption and the [appropriate references to the versions to be added] GPA, and regional trade agreements), which may have the

effect of limiting the opportunity of pursuing government policies of the type described above through the procurement system.

106. The pursuit of certain government policies under the Model Law may run contrary to international agreements (such as the GPA and regional trade agreements), which generally require “national treatment”, i.e. that suppliers in all signatory countries will be treated no less favourably than domestic suppliers. [“Offsets”, i.e. measures to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements, are explicitly prohibited in the GPA. However, developing countries may negotiate (at the time of their accession) the use of offsets as qualification criteria, but offsets may not be used as evaluation or award criteria.] Enacting States will therefore wish to consider the extent of their international obligations when implementing the provisions allowing any direct or indirect restriction of international participation into their national procurement law[, and where they have based or will base their procurement legislation on the Model Law, to consider their domestic provisions when negotiating international obligations]. The provisions of many trade agreements mean that some, but not all, of the options available under the Model Law that may have the effect of restricting international participation will be available to enacting States.

#### **7. Exemptions from international publication of invitations to participate and procurement notices**

107. The procurement regulations can exempt procuring entities from having to publish an initial invitation to participate in a low-value procurement in a newspaper of wide international circulation in a language customarily used in international trade, where the procuring entity considers that the low value is unlikely to attract cross-border interest [article 32 (4)]. It is important to note that low value alone is not a justification to exclude international participation of suppliers per se (by contrast with other reasons permitting domestic procurement set out in article [8]), so that international suppliers can participate if they so choose; for example, if they respond to a domestic advertisement.

108. The concept of low-value procurement in this regard should not be interpreted as conferring upon enacting States complete flexibility to set the appropriate threshold sufficiently high to exclude the bulk of its procurement from requirement of international publication. It is not possible for the Model Law to set out a single threshold that will be appropriate for all enacting States. Nonetheless, the enacting State may wish to take the following matters into account when setting the appropriate threshold or thresholds: whether one threshold should be applied for “low-value procurement”, to address permissible exemptions from international publication and from the requirement to provide information about currency and languages in the solicitation documents, and whether this threshold should also serve as the upper limit for the use of request-for-quotations procedures.

109. Enacting States may also wish to encourage procuring entities to assess whether international participation is a likelihood in the circumstances of each given procurement (whether or not it is low-value), assuming that there is international publication, and what additional steps international participation might indicate. In this regard, the Model Law recognizes that in such cases of low-value procurement

the procuring entity may or may not have an economic interest in precluding the participation of foreign suppliers and contractors: a blanket exclusion of foreign suppliers and contractors might unnecessarily deprive it of the possibility of obtaining a better price. On the other hand, international participation may involve translation costs, additional time periods to accommodate translation of the advertisement or responses from foreign suppliers, and might require the procuring entity to consider tenders or other offers in more than one language. The procuring entity will wish to assess the costs and benefits of international participation, where its restriction is permitted, on a case-by-case basis.



**(A/CN.9/WG.I/WP.77/Add.3) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twentieth session****ADDENDUM**

This addendum sets out a proposal for the following section and sub-section of Part I (General remarks) of a draft revised Guide to Enactment to the UNCITRAL Model Law on Public Procurement: II. Main features of the Model Law (“Challenges and appeals”).

**GUIDE TO ENACTMENT  
OF  
THE UNCITRAL MODEL LAW ON  
PUBLIC PROCUREMENT****Part I. General remarks****II. MAIN FEATURES OF THE MODEL LAW**

*(continued)*

**G. Challenges and appeals**

110. A key feature of a transparent procurement system is the existence of mechanisms to monitor that the system’s rules are followed and to enforce them if necessary. Such mechanisms include audits and investigations, and prosecutions for criminal offences (which are matters not generally addressed in a procurement law and consequently are not provided for in the Model Law), and challenge procedures, in which suppliers and contractors are given the right to challenge decisions and actions of the procuring entity that they allege are not in compliance with the rules contained in the applicable procurement legislation.

111. An effective challenge mechanism is therefore an essential element towards ensuring the proper functioning of the procurement system and can promote confidence in that system. Such a mechanism 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 that have a natural interest in monitoring compliance by procuring entities with the provisions of the Model Law in each procurement procedure. An additional function of the challenge mechanism is to act as a deterrent: its existence is designed to discourage actions or decisions knowingly in breach of the law.

112. Challenges can address breaches of rules and procedures only at the instigation of suppliers, and so the other oversight mechanisms outlined above should be in place to deal with (a) non-compliance where a supplier chooses not to take action

and (b) systemic issues. Suppliers may not wish to take action for many reasons: where the contract is of low value, larger suppliers may consider that losses may not justify the costs concerned; smaller suppliers may consider that the time and costs of any challenge are unaffordable; and all suppliers may be unwilling to challenge discretionary decisions because of the higher risk of failure, and may be concerned that a challenge will risk future relationships with the procuring entity. Systemic non-compliance may be overlooked if attention in challenge mechanisms is directed to individual cases, especially those involving relatively insignificant non-compliance.

113. A key feature of an effective challenge mechanism is to allow timely submissions of challenges: accordingly, the requirement for a standstill provision under article 21 (2) is designed to ensure that challenges can be brought before a procurement contract (or framework agreement) enters into force; the interaction between the provisions governing a standstill period and provisions of chapter VIII form part of the overall supervisory and enforcement mechanism under the Model Law.

114. Chapter VIII contains a minimum set of provisions aimed at ensuring an effective challenge process, and enacting States are encouraged to incorporate all the provisions of the chapter to the extent that their legal system so permits.

#### **1. International agreements addressing challenge mechanisms**

115. Article 9 (1) (d) of the Convention against Corruption requires procurement systems to include an effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to article 9 (1) of the Convention are not followed. The Commission, in seeking to ensure that the Model Law addresses the Convention's requirements, decided that the Model Law should require enacting States to provide all rights and procedures necessary (both at first instance and in appeals) for an effective challenge mechanism. Similarly, the Commission has sought to ensure consistency with the approach to challenge mechanisms under the GPA.

#### **2. Ensuring challenge mechanisms operate in the context of an enacting State's legal traditions**

116. The requirements of the Convention against Corruption and the Model Law are founded on the recognition that the procedures need to be implemented in a manner consistent with the legal tradition in the enacting State concerned. It is recognized that there exist in most States mechanisms and procedures for the challenge of acts of administrative organs and other public entities (often called a review function). In some States, such 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. States do, however, differ significantly in their approach to enforcement: in some countries, there is a long-standing system of review before specialist authorities and courts; in others there is no general legislative provision for such review (except to the extent required by international obligations and subject to judicial review procedures). In some systems there are administrative sanctions for breaches of procurement law by

organs of the State, and proceedings are brought before an administrative tribunal, while in others there is a combination of administrative review, or quasi-judicial review, and/or judicial review of procurement decisions through the ordinary courts (accompanied by special criminal proceedings for violations of procurement laws by procuring entities).

117. The rules and procedures set out in chapter VIII of the Model Law are intended to be sufficiently flexible that they can be adapted to any of these approaches, without compromising their efficacy. Certain important aspects of challenge proceedings, such as the forum where an application or appeal is to be filed 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.

118. Some legal systems provide for challenge or review of acts of administrative organs and other public entities before an independent administrative body that exercises hierarchical authority or control over the organ or entity. In legal systems that provide for this type of 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 other States, the challenge or review function is performed by specialized bodies whose competence is sometimes referred to as “quasi-judicial”. Such a body is not, however, considered in those States to be a court within the judicial system. The procedures before an administrative or quasi-judicial body are set out in article [66] of the Model Law.

119. Whether the mechanism is administrative or quasi-judicial, a key feature is that it is independent. In this context, the notion of “independence” means independence from the procuring entity rather than independence from the Government as a whole. Nonetheless, enacting States are encouraged, within the scope of their national systems, to provide for as much autonomy and independence of action from the executive and legislative branches as possible, in order to avoid political influence and to ensure rigour in decisions emanating from the independent body. The need for an independent mechanism is particularly critical in those systems in which it is unrealistic to expect that reconsideration by the procurement entity of its own acts and decisions will always be impartial and efficient, but, on the other hand, there may be difficulties in ensuring that effective remedies can be provided through other mechanisms in some vulnerable States.<sup>1</sup>

120. Many national legal systems provide for a judicial review of acts of administrative organs and public entities, either in addition to the quasi-judicial function outlined above, or instead of this function. In some legal systems where both quasi-judicial and judicial review is provided, judicial review may be sought only after opportunities for other challenges have been exhausted; in other systems

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<sup>1</sup> The Working Group may wish to consider whether further detail, such as on the ideal degree separation of powers between a procurement agency, regulatory bodies (e.g. existing anti-trust authorities) and independent bodies should be included in the Guide, whether here or in the general section on administrative infrastructure to support the Model Law. The Secretariat’s understanding is that a supervisory body or central procurement board cannot be independent because it takes decisions for the procuring entity. A regulatory or oversight body, such as a public procurement authority, could discharge the function or, if scale and resources indicate, such functions could be delegated to a separate body.

the two means of challenge or review are available as options. The provisions in the Model Law do not address this question, so that enacting States can provide for the desired approach through regulations.

121. Enacting States may wish to use the provisions of the Model Law to assess the effectiveness of challenge mechanisms already in operation in their country. As a general rule, the nature of procurement disputes indicates that specialized fora are beneficial. Where a system of effective and efficient court review is already present, there may be little benefit in introducing a new quasi-judicial body, and, on the other hand, there may be equally little benefit in promoting procurement specialization in the courts if there is a well-functioning quasi-judicial function.

122. In view of the above, and in order to enable the provisions to be accommodated within the widely differing conceptual and structural frameworks of legal systems and systems of State administration throughout the world, the provisions in chapter VIII set out the principles and main procedures to be followed in order to constitute an effective challenge mechanism. Continuing the general approach of the Model Law as a framework text, they are intended to be supplemented by regulations and detailed rules of procedure to ensure that the challenge mechanisms operate effectively, expeditiously and in a cost-effective manner. Particular importance should be given to the question of evidence and hearings, so as to ensure that all parties to the proceedings are fully aware of their rights and obligations in this regard.<sup>2</sup>

123. Chapter VIII does not deal with the possibility of dispute resolution through arbitration or alternative fora, since the use of arbitration in the context of procurement proceedings is relatively infrequent, and given the nature of challenge proceedings, which often involves the characterization of acts or decisions of the procuring entity as compliant or not compliant with the requirements of the Model Law. 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.

124. Other branches of law and other bodies in the enacting State may have an impact on the challenge mechanism envisaged under chapter VIII, if, for example a challenge is triggered by allegations of fraud or corruption, or breaches of competition law. In such cases, enacting States may wish to ensure that appropriate guidance is provided to procuring entities and to suppliers, and that this information is publicly available, to ensure that relevant authorities are alerted and so that appropriate action is taken.

### **3. Importance of the balance between effective challenge mechanisms and avoiding excessive disruption of the procurement process**

125. A key characteristic of an effective challenge mechanism is that it strikes the appropriate balance between, on the one hand, the need to preserve the rights of

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<sup>2</sup> The Working Group may wish to consider whether further detail is required, particularly to guide independent bodies that are being set up, on how to gather evidence (investigatory or adversarial approach) and the conduct of the proceedings. For example, the procuring entity is obliged to provide the procurement record, but an enforcement mechanism might be appropriate. Also, provisions on evidence to ensure that there is consistency in terms of the type of evidence required and the weight it will be given may be needed.

suppliers and contractors and the integrity of the procurement process and, on the other hand, the need to limit disruption of the procurement process. The provisions therefore limit the right to challenge to suppliers and contractors (including potential suppliers and contractors that have, for example, been disqualified); provide time limits for filing of applications and appeals, and for disposition of cases; and provide discretion in deciding in some circumstances whether a suspension of the procurement proceedings may apply. Nonetheless, article [64] contains a general prohibition preventing the entry into force of the procurement contract or framework agreement while a challenge remains involved (with limited exceptions). These matters are discussed in the commentary to that article.

#### **4. Need for timely resolution of disputes**

126. An important factor contributing to the efficient resolution of disputes and limiting the disruption of the procurement process is to encourage early resolution of issues and disputes, and to enable challenges to be addressed before stages of the procurement proceedings would need to be undone, of which the most significant is the entry into force of the procurement contract (or, where applicable, the conclusion of a framework agreement). There are several provisions in the Model Law to this end, notably the use of a standstill period (provided for in article [21 (2)]). The aim of imposing a standstill period is to require a short delay between the identification of the successful submission and the award of the procurement contract (or framework agreement), so that any challenges to the proposed award can be dealt with before the additional complications and costs of addressing an executed contract arise. As regards challenges to the terms of solicitation and other issues that arise prior to the submission of tenders or other offers, article [15] provides a mechanism for clarifying and modifying the solicitation documents, so as to reduce the likelihood of challenges to the terms and conditions set out in those documents. These provisions therefore support the challenge mechanism in chapter VIII.

#### **5. Summary of the challenge provisions**

127. The provisions in chapter VIII establish in the first place that suppliers and contractors have a right to challenge an act or decision of a procuring entity: there are no acts or decisions in a procurement procedure that are exempt from the mechanism. As to forum, the Model Law provides for three options. In the first instance, a challenge may be presented to the procuring entity itself under article [65], provided that the procurement contract is yet to be awarded. Significantly, this peer-based system is an option for suppliers, and not a mandatory first step in the challenge process. This option has been included so as to facilitate a swift, simple and relatively low-cost procedure. Speedy remedies that can be granted without significant time and cost are features that are highly desirable in a procurement challenge mechanism, and the fact that the procuring entity will be in possession of the facts relating to and in control of the procurement proceedings concerned, and may be willing and able to correct procedural errors of which it may perhaps not have been aware, contribute to achieving them. These features are important not only to the challenging supplier, but also in order to minimize disruption to the procurement process as a whole. A peer-based system may also lessen the perceived risk of jeopardizing future business through a legal procedure, which has been observed to operate as a disincentive to challenges. Enacting States

are therefore encouraged to take steps to ensure that this mechanism, its operation (which includes formal procedures and is not a debriefing) and its benefits are widely disseminated, so that effective use can be made of it.

128. The second option is for an independent, third-party review of the decision or action of the procuring entity that the supplier alleges is not in compliance with the law. This independent review may operate as an administrative or quasi-judicial procedure. It is broader in scope than the peer system outlined above, because challenges can be submitted after the entry into force of the procurement contract (or framework agreement). The independent body receiving the challenge may grant a wide range of remedies, and footnotes to the provisions concerned highlight those remedies that may not traditionally be available in certain legal systems, so that enacting States can ensure consistency between the independent review system and equivalent mechanisms before their courts.

129. The third option for suppliers is to commence proceedings in a competent court. The Model Law does not provide procedures for such proceedings, which will be governed by applicable national law. The footnotes to the various provisions identify issues and procedures that will need to be implemented in some manner so as to ensure the effective overall mechanism outlined above.

130. In this regard, enacting States are encouraged to review the scope of all forums available, to ensure that the system put in place indeed confers effective legal recourse and remedies (including appeals) as required by the Convention against Corruption and as is acknowledged to constitute best practice. In general terms, an effective mechanism involves the possibility of intervention without delay; the power to suspend or cancel the procurement proceedings and to prevent in normal circumstances the entry into force of a procurement contract while the dispute remains outstanding; the power to implement other interim measures, such as giving restraint orders and imposing financial sanctions for non-compliance; the power to award damages if intervention is no longer possible (e.g. after the contract is awarded); and the ability to proceed swiftly within a reasonably short period of time, which should be measured in terms of days and weeks in the normal course.

[This completes the current draft of Part I. General remarks of the Guide. The Working Group is to consider which additional sections/sub-sections/issues for Part I. General remarks of the Guide are to be included. This may affect the sequence of sections/sub-sections/issues in the current draft of Part I.]

**(A/CN.9/WG.I/WP.77/Add.4) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twentieth session****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany chapter VIII (Challenges and appeals) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE  
UNCITRAL MODEL LAW ON  
PUBLIC PROCUREMENT****Part II. Article-by-article commentary**

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**CHAPTER VIII. CHALLENGES AND APPEALS****Article [63]. Right to challenge and appeal**

1. The purpose of article [63] is to establish the basic right to challenge an act or a decision of the procuring entity in the procurement proceedings concerned, and the right to appeal a first-instance finding on a challenge where necessary.
2. Under paragraph (1), the right to challenge is given only to suppliers and contractors (including potential suppliers or contractors, such as those excluded through pre-qualification), and not to members of the general public. Sub-contractors are also omitted from the ambit of the right to challenge provided for in the Model Law. These limitations are designed to ensure that challenges relate to the decisions or actions of the procuring entity in a particular procurement procedure, and to avoid an excessive degree of disruption to the procurement process through challenges that are based on policy or speculative issues. In addition, 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, such as whether State bodies may have the right to pursue challenge applications, are left to be resolved in accordance with the relevant legal rules in the enacting State.
3. Paragraph (1) refers to applications under articles [65 and 66] to the procuring entity and independent body, respectively, and to courts. A challenge that takes the form of a judicial review may be made under the relevant court procedures or authority, or under article [69] of the Model Law.
4. Paragraph (2) is limited to appeals from decisions made in proceedings under articles [65 and 66]. Appeals to courts and in court proceedings will be made under

relevant court procedures and authority. The paragraph is silent on this matter, and enacting States may wish to make specific reference to the appropriate authority when transposing this provision into their domestic legislation.

**Article [64]. Effect of an application for reconsideration or review or an appeal**

1. The purpose of the article is to provide for prohibition to enter into a procurement contract or framework agreement while a challenge or an appeal remains pending. This ensures that the challenge or appeal cannot be nullified by making an award a *fait accompli*.

2. The procuring entity is prohibited from entering into a procurement contract (or framework agreement) where it receives within prescribed time limits an application for reconsideration or is notified of a challenge or an appeal before an independent body or from the courts. The prohibition provided for in this article continues for a short period after a challenge or appeal has been decided and participants have been notified, as provided for in paragraph (2), in order to allow any disaffected party to appeal to the next level forum. Enacting States will wish to ensure that this period is as short as their systems will permit, so as to avoid excessive disruption to the procurement process.

3. The prohibition provided for is not absolute: there may be urgent public interest considerations that indicate that the better course of action would be to allow the procurement proceedings to continue and the procurement contract or framework agreement to enter into force, even while the challenge or appeal is still outstanding. An independent body may therefore order that the proceedings and contract or framework agreement may proceed. An option is provided in paragraph (3) (b) for enacting States to specify that an independent body may take a decision on this question without a request from a procuring entity. This option may be appropriate in systems that operate on an inquisitorial basis, but in other States, it may be less so. When drafting rules of procedure and guidance for the operations of the independent body, States will also wish to ensure that there are clear rules and procedures as regards the evidence that a procuring entity would need to adduce as regards urgent public interest considerations where it makes such an application, and how applications to permit the procurement to continue should be filed (including whether the application is to be made by the procuring entity *ex parte*, or *inter partes*).

4. The need for timely resolution of procurement disputes and effective challenge and appeal mechanism should be balanced with the protection of urgent public interest considerations. This is particularly important in jurisdictions where court systems in the enacting State do not allow for injunctive and interim relief and summary proceedings. Paragraph (3) (b) is drafted to ensure that any decision to permit the procurement contract or framework agreement to proceed in such circumstances can itself be challenged (by application of the general rights conferred under article 63). The procuring entity, on the other hand, should also be given opportunity to request the competent court to allow it to proceed with the procurement contract or framework agreement on the ground of urgent public interest considerations where the independent body ruled against granting an exemption to the prohibition to enter into a procurement contract or framework agreement.



5. An important requirement in this regard contained in paragraph (3) (b) is to ensure that prompt notice of the decision taken by the independent body is provided to all participants concerned, including the procuring entity. The provisions require disclosure of the decision and its reasons, which is essential to allow any further action (such as an appeal from the decision concerned). By the nature of an application under paragraph (3), there may be need for the protection of confidential information, the public disclosure of which will be restricted under article [68]. This however does not exempt the independent body from the obligation to notify all concerned (as listed in the provisions) of its decision and provide reasons therefor; any confidential information will have to be excluded to the extent and in the manner required by law.

#### **Article [65]. Application for reconsideration before the procuring entity**

1. Article [65] provides that a supplier or contractor that wishes to challenge a decision or act of the procuring entity may, in the first instance, request the procuring entity to reconsider the decision or action concerned. This application is optional, because its effectiveness will vary both according to the nature of the challenge at issue and the willingness of the procuring entity to revisit its steps in the procurement process. The procedure under this article is to be contrasted with a debriefing procedure [cross-refer to any discussion of debriefing in the Guide]. Enacting States may consider that it is desirable to promote the early resolution of disputes by promoting the use of the optional challenge mechanism envisaged by this article, in that so doing might also enhance efficiency and the long-term relationship between the procuring entity and suppliers or contractors.

2. The purpose of providing for this procedure is to allow the procuring entity to correct defective acts, decisions or procedures. Such an approach can avoid unnecessarily burdening other forums with applications and appeals that might have been resolved by the parties at an earlier, less disruptive stage, and with lower costs.

3. Nonetheless, the application for reconsideration is a formal procedure, and in this regard it is important for the scope of the application and the issues it raises to be clearly delineated at the outset (both to ensure their effective consideration and to avoid other issues being raised during the proceedings). The application must therefore be in writing. There are no rules presented in the Model Law as regards supporting evidence: the applicant will wish to present its best case to demonstrate why a reconsideration or corrective action is the appropriate course, but how that may be done will vary from case to case. Regulations and procedural rules, as noted above, should address evidentiary gathering where it is necessary. A general approach that permits the submission of a statement of application with any supporting evidence being filed later may defeat the aim of requiring prompt action on the application by the procuring entity (provided for under paragraph (3)), and accordingly these supporting rules and regulations should encourage the early submission of all available evidence.

4. The purpose of the two time limits in paragraph (2) is, in general terms, to ensure that grievances are promptly filed so as to avoid unnecessary delay and disruption in the procurement proceedings, and to avoid actions or decisions being unwound at a later stage. There are, broadly speaking, two types of challenge contemplated by the article: first, challenges to the terms of solicitation and to pre-qualification or pre-selection, which must be filed prior to the deadline for

submissions for the reasons set out immediately above. In this context, the “terms of solicitation” encompass all issues arising from the procurement proceedings before the deadline for presenting submissions (including those arising in pre-qualification or pre-selection, separately mentioned in the subparagraph), such as the selection of a method of procurement or a method of solicitation where the choice between open and direct solicitation exists, and the limitation of participation in the procurement proceedings in accordance with article 8. It thus excludes issues arising from examination and evaluation of submissions. The terms of the solicitation, pre-qualification or pre-selection include the contents of any addenda issued pursuant to article [15]. The use of the term “prior to” the submission deadline is crafted in broad terms, so as to allow enacting States to provide in applicable regulations for a filing deadline that is a defined, short, period before the submission deadline (and there may be the need for different periods for different procurement methods: the appropriate period for electronic reverse auctions would normally be shorter than for procurement methods with dialogue or negotiations). The reason for this approach is that there may be a need to prevent highly disruptive (and perhaps vexatious) challenges being filed immediately before the submission deadline.

5. The second type of challenge is likely to relate in some manner to the award, or proposed award, of the procurement contract (or framework agreement) and here the main aim is to ensure that the challenge is addressed before the additional complications of an executed contract (or an operating framework agreement) arise. The issues will commonly arise from the examination and evaluation of submissions, a step in the procurement process that may also include the assessment of qualifications of suppliers (but not pre-qualification). The deadline for submission of these challenges is the expiry of the standstill period where one applies, or the entry into force of the procurement contract (or framework agreement) as applicable. Reference in the text is made to the entry into force of the procurement contract, rather than to the despatch of the notice of acceptance, in order to allow for situations in which signing a written procurement contract or receiving approval of another body for entry into force of the procurement contract is required (possibilities envisaged under article [21] and the articles throughout the Model Law describing the content of the solicitation documents).

6. The provisions do not refer to the procuring entity’s competence to consider challenges to decisions to cancel the procurement. Although a decision to cancel the procurement is, in principle, no different from any other decision in the procurement process, the Commission considered that the issues involved are such that they should more appropriately be considered by the courts.

7. The policy rationale behind requiring the request for reconsideration before the procuring entity only if the procurement contract has not yet entered into force is that, thereafter, there are limited corrective measures that the procuring entity could usefully require. The latter cases would better fall within the purview of quasi-judicial or judicial review.<sup>1</sup>

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<sup>1</sup> The Working Group may wish to consider whether additional matters should be discussed. The restriction of the procuring entity’s competence to pre-contract disputes is intended to avoid granting excessive powers to the procuring entity, and is also consistent with the approach of the Model Law that it does not address the contract administration stage, so that the natural

8. Should an application be filed out of time, the procuring entity has no competence and should dismiss the application under paragraph (3) (a) of the article. Where a standstill period has been applied and approval of another authority is required for the entry into force of the procurement contract, the provisions mean that a challenge initiated after the expiry of the standstill period but before approval is granted is out of time.

9. The interaction of articles [65 and 64] means that upon the filing of an application for reconsideration, no procurement contract may be awarded (or framework agreement concluded) unless the procuring entity's request for an exemption from the prohibition on the grounds of urgent public interest is granted by the independent body under article 64 (3) or by courts.

10. Paragraph (3) requires the procuring entity to take several steps. First, promptly after receipt of the application, it must publish a notice of the application. There is no fixed time limit given for this step; the appropriate time will depend on the manner of publication and availability of the relevant forum. In the electronic environment, for example, the most effective place for publication to take place is the website where the initial notice of the procurement was published. The aim is to ensure that all participants in the procurement process (whose contact details may or may not be known to the procuring entity) are informed that the application has been filed.

11. In addition to this publication requirement, within three working days of receipt of the application, the procuring entity must notify all participants in the procurement proceedings known to it (i.e. whose contact details are made known to the procuring entity) about the submission of the application and its substance. Providing notice of the substance of the application permits the procuring entity to avoid the disclosure of potentially confidential information without the need for reviewing the entire application to redact confidential information.

12. The purpose of the publication and notification provisions is to make the suppliers or contractors aware that an application 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 article [67], which might include a request to lift a suspension that has been applied, and other steps that may be provided for under applicable regulations or procedural rules. The possibility of broader participation in the review proceedings is provided for since it is in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible.

13. Within the same period (three working days of receipt of the application), the procuring entity, must take further steps, which amount to an initial review of the

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consequence is that the procuring entity's powers cease when the contract comes into force. An alternative approach could be described in the Guide, such as that, if there is no independent body, enacting States might wish to expand the time limits by using the equivalent provisions in article 66 (because otherwise there might only be recourse to the courts). This may be considered to be a point of some significance as the procuring entity has the most detailed knowledge and might be in the best position to judge the challenge. On the other hand, safeguarding the integrity of the process is addressed through the standstill period and availability of other remedies.

application for reconsideration and notification of the applicant and other concerned of the result of such review. It must first decide whether it will entertain the application. Paragraph (3) (a) identifies the types of situation in which the procuring entity may decide not to entertain the application. The procuring entity will consider such issues as whether the application has been filed within the prescribed time limits; whether or not the applicant has standing to file its application (as noted in paragraph [2] of the commentary to article 63 above, sub-contractors and members of the general public, as opposed to potential suppliers, do not have standing); whether the application is based on an obviously erroneous understanding of the facts or applicable law and regulations; or whether the application is frivolous or vexatious. These issues may be particularly pertinent in those systems in which challenge mechanisms are in their infancy and where suppliers may be unsure about the extent of their rights to file a challenge. Permitting early dismissal is important to minimize disruption to the procurement process and to minimize the costs of all concerned.

14. The decision on dismissal can be challenged under the competence granted by article [63], because, as paragraph (3) (a) of the article notes, the dismissal constitutes a decision on the application. It also allows the prohibition against entry into force of the procurement contract or framework agreement to lapse after the time period specified in article [64], unless a further challenge or an appeal against the dismissal is made. To allow further challenge or appeal in a timely fashion, the provisions require the procuring entity to notify the applicant about its decision on dismissal and reasons therefor not later than three days upon receipt of the application.

15. If the procuring entity decides to entertain the application, it must consider whether to suspend the procurement proceedings and, if so, the period that is required. The purpose of suspension is to enable the interests of the applicant to be preserved pending the disposition of the proceedings. The approach taken with regard to suspension — that is, to allow the procuring entity to decide on the matter — is designed to strike a balance between the right of the supplier or contractor to have a challenge 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.

16. The Commission, in framing the suspension powers given to the procuring entity, was mindful that an automatic suspension would involve a cumbersome and rigid approach, and might allow suppliers to submit vexatious requests that would needlessly delay the procurement proceedings, and might cause serious damage to the procurement proceedings. This possibility would allow suppliers to pressurize the procuring entity to take action that might, albeit unwittingly, inappropriately favour the supplier concerned. Another possible disadvantage of an automatic suspension approach might be an increase in challenge mechanisms generally, resulting in disruption and delay in the procurement process.

17. Nonetheless, without a suspension, a supplier or contractor submitting a complaint might not have sufficient time to seek and obtain interim relief. The availability of suspension enhances the possibility of settlement of applications at a lower level, short of judicial intervention, thus fostering more economical and efficient dispute settlement.

18. For this reason, the procuring entity has discretion as to whether or not to suspend the procurement proceedings. The procuring entity's decision on suspension will be taken in the light of both the nature of the challenge and its timing, as well as the facts and circumstances of the procurement at issue. For example, a challenge to certain terms of the solicitation made early in the proceedings may not have the type of impact that requires suspension even if some minor corrective action is ultimately required; a challenge to some other terms might warrant a suspension, where there is a possibility that corrective action might mean undoing steps taken and wasting costs; at the other extreme, a challenge to such terms a few days before the submission deadline would require quite different action and a suspension would be likely to be appropriate. The supplier concerned will have the burden of establishing why a suspension should be granted, though in this regard it is important to note that the supplier may not be necessarily in possession of the full record of the procurement proceedings, and may be able only to outline the issues involved.

19. Although article [64] prohibits the entry into force of the procurement contract until the application has been disposed of, a suspension of the procurement proceedings may also be necessary in the situations described in the preceding paragraph, among others. In other words, suspension of the procurement proceedings is a broader notion than the prohibition under article [64]: it stops all actions in those proceedings.

20. An alternative approach, particularly where the procuring entity might lack experience in challenge proceedings, where decisions in the procurement proceedings concerned have been taken by another body, or where it is desired to promote the early resolution of disputes by strongly encouraging any challenge to be presented to the procuring entity in the first instance, would be to regulate the exercise of the procuring entity's discretion in deciding whether or not to suspend the procurement proceedings. If such an approach is desired, enacting States may wish to redraft the provisions of paragraph (3) along the lines of the provisions of paragraphs (3) to (7) of article [66].

21. Given the overall aim of efficient dispute resolution, a further goal of the provisions on suspension is to ensure swift decisions on whether or not to apply a suspension, and accordingly the procuring entity is given a short period of three working days to decide whether or not to suspend the procurement and on the length of any suspension applied, and to notify the applicant and all participants in the procurement process of its decision. Where the procuring entity decides to suspend the proceedings, it need not give reasons for that decision, because it is not one that the applicant will wish to challenge. The key safeguard against abusive failures to suspend are transparency measures; first, under paragraph (3) (c) (ii), the procuring entity must advise the applicant of the reasons for its decision not to suspend the procurement and, secondly, it must put on the record all decisions in relation to suspension and the reasons for them. These safeguards ensure that the procuring entity's decision can itself be challenged and scrutinized (for example, by the independent body provided for in article [66], or by the courts).

22. Where a procuring entity decides not to grant a suspension, the applicant may consider that this decision is a likely predictor of the eventual decision on the application, and accordingly that its best course would be to terminate its application before the procuring entity and commence proceedings before an

independent body or court (rather than appealing the decision not to suspend to that body). Paragraph (4) confers this right. While a procuring entity may consider that this option operates as a disincentive to treat applications with the seriousness the system is intended to confer, a subsequent challenge before another forum or action by another oversight body, which should be considered a probable consequence, should demonstrate that any such approach is unwise. Paragraph (4) also provides that a failure to abide by the three-day notification requirement permits the applicant to recommence proceedings with an independent body or court, a measure also intended to discourage dilatory conduct on the part of the procuring entity. Where proceedings before an independent body or court are commenced, the competence of the procuring entity to entertain further the application ceases.

23. Paragraphs (5) to (7) regulate the procuring entity's steps as regards the application that it entertains. Paragraph (5) confers a wide discretion on the procuring entity when deciding on the application. Possible corrective measures might include the following: rectifying the procurement proceedings so as to be in conformity with the procurement law, the procurement regulations or other applicable rules; if a decision has been made to accept a particular submission and it is shown that another should be accepted, refraining from issuing the notice of acceptance to the initially chosen supplier or contractor, but instead to accept that other submission; or cancelling the procurement proceedings and commencing new proceedings.

24. The decision of the procuring entity on the application that it entertains is to be issued and communicated to the applicant, and to all participants in the challenge and procurement proceedings, as required by paragraph (6). The enacting State is invited to specify the appropriate number of working days within which the decision must be issued. The period of time so specified should balance the need for a thorough review of the issues concerned and the need for an expeditious resolution of the application for reconsideration, in order to allow the procurement proceedings to continue.

25. If the application cannot be disposed of expeditiously, quasi-judicial review or judicial review may be the more appropriate course. To that end, in the absence of a timely decision, or if the decision is unsatisfactory to the applicant, paragraph (7) entitles the supplier or contractor that submitted the application to commence review or appeal proceedings under article [66] or proceedings before the court, as appropriate.

26. Paragraph (8) provides additional transparency mechanisms. All decisions of the procuring entity must be recorded in writing, state action(s) taken and include reasons, both to enhance understanding and thereby assist in the prevention of further disputes, and to facilitate any further challenge or appeal. Although in some systems silence by the procuring entity to an application can be deemed to be a rejection of such an application, the provisions require a written decision as an example of good practice. The application and all decisions must also be included in the record. The implication of this provision is that these documents (subject to confidentiality restrictions of article [24]), will be made available to the public in accordance with the provisions of article [24].

27. Where the enacting State provides that certain actions of the procuring entity are to be subject to the decision of an approving authority [cross reference to

relevant discussion], the enacting State will need to ensure that appropriate provision is included in this article to allow that authority to receive an application for reconsideration and all information pertinent to the relevant challenge proceedings.

**Article [66]. Application for review or an appeal before an independent body**

1. Article 66 regulates review and appeal proceedings before an independent body. The Model Law intends that the enacting State should grant all the powers set out in this article, subject to permissible deviations described in the footnotes. These powers are required as a package in order to ensure the effectiveness of the system.
2. A footnote to this article records that States in which administrative or quasi-judicial review of 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 [69]) in addition to the peer system under article [65]. This flexibility is granted on the condition that the enacting State provides an effective system of judicial review, including an effective system of appeal, to ensure that a challenge can be made in compliance with the requirements of the Convention against Corruption. In those States in which effective independent review is already achieved through the court system, there may also be little advantage in introducing another layer of review; the peer system before the procuring entity may nonetheless provide a useful mechanism to assist in the early resolution of disputes.
3. In some legal systems that provide for both administrative or quasi-judicial review and judicial review, proceedings for judicial review may be instituted while quasi-judicial review proceedings are still pending, or vice versa, or judicial review may be sought only after opportunities for other challenges have been exhausted. Some States concerned may already provide rules that will guide those involved in challenge procedures on these matters. If not, the State may wish to establish them by law or by regulation; the Model Law, which does not regulate court procedures, does not address the issue. In this regard, the Model Law does not seek to encourage the filing of multiple applications. The aim of the provisions is to allow enacting States to address the issue consistent with its legal tradition.
4. An enacting State that wishes to set up a mechanism for administrative or quasi-judicial review will need to identify the appropriate body in which to vest the review function, whether in an 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, 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.
5. As its name indicates, it is an important safeguard that the body exercising the review function be independent of the procuring entity and protected from political pressure. In this regard, an administrative body that, under the Model Law as enacted in the State, has the competence to approve certain actions or decisions of, or procedures followed by, the procuring entity, or to advise the procuring entity on procedures, will not fulfil the requirement for independence. In addition, States will

wish to consider in particular whether the body should include or be composed of outside experts, independent from the Government. Independence is also important as a practical matter: if decision-taking in review proceedings lacks independence, a further challenge to the court may result, causing lengthy disruption to the procurement process.

6. Paragraph (1) is drafted to ensure broad competence on the part of the independent body. In addition to bringing an application for review as an original application to the independent body, a supplier that is dissatisfied with a decision of the procuring entity under article [65] can appeal that decision, or commence new proceedings before the independent body; the supplier can take either step if the procuring entity does not issue its decision as required by article [65 (3), (6) or (8)]. The paragraph is therefore one of the key provisions intended to give effect to the requirements of the Convention against Corruption for an effective system of review including an appeal mechanism.

7. Paragraph (2) establishes time limits for the commencement of review applications and appeals. Paragraph (2) (a) addresses challenges to the terms of solicitation and pre-submission matters, and provides the same time limits as apply in challenge proceedings before the procuring entity, guidance as to which is set out in paragraph [4] of the commentary to article [65]] above.

8. Under paragraph (2) (b) (i), applications regarding other decisions or steps in the procurement proceedings should be submitted within the standstill period prescribed in article [21(2)], where a standstill period has been applied. Under paragraph (2) (b) (ii), where a standstill period was not applied (either because the procuring entity was permitted not to apply a standstill period by article [21(3)], or failed to respect the requirements of a standstill period), a challenge must be filed within a specified number of working days from the point of time when the supplier became aware or should have become aware of the circumstances in question. To avoid an indefinite period during which applications for review can be filed under such circumstances, the provisions also refer to the absolute maximum — the application cannot be filed upon expiry of a certain number of days after the entry into force of the procurement contract. Such a final deadline is required in order to provide a balance between the rights of suppliers to enforce the integrity of the process and the need for the procurement contract to continue undisrupted. It is also acknowledged that in most States, there is a determined limitation period for any civil claim. The absolute maximum period may be expressed in weeks or months rather than working days, where it would be more appropriate to do so. Enacting States are invited to specify these two time limits in the light of their local needs.

9. As regards the first time limit in paragraph (2) (b) (ii), the 1994 text of the Model Law specifies a period of 20 days for equivalent time limits; the [revised GPA] specifies a minimum 10 day period; and enacting States may wish to be guided by those provisions in considering the appropriate time period for their domestic legislation. As regards the second time limit in paragraph (2) (b) (ii), although in many cases the notice of the procurement contract award to be published under article [22] will probably alert the supplier or contractor submitting the application of the circumstances concerned, it will not necessarily be always the case. For example, the reasons for not applying a standstill period may also justify an exemption from the obligation to advertise the procurement contract award — such as where confidentiality is invoked for the protection of essential national



interests of the State. Accordingly, it was decided not to refer to the publication of the notice of the award as the starting point for calculating the absolute maximum, since the publication will not take place in all cases, but to refer instead to the entry into force of the procurement contract.

10. As in article [65], the provisions do not refer to the independent body's competence to consider challenges to decisions to cancel the procurement. This reflects the Commission's decision, mentioned in paragraph [6] of the commentary to article [65], that challenges related to such decisions should be in the exclusive competence of the courts.

11. Paragraph (2) (c) envisages that a supplier may request the independent body to entertain an application after the expiry of the standstill period applied pursuant to article [21 (2)], on the grounds that the application raises significant public interest considerations. The absolute deadline for submission of such late applications is to be established by enacting States, which should be aligned with the final deadline to be established in paragraph (2) (b) (ii). It is up to the independent body to decide whether significant public interest considerations are indeed present and justify entertaining such late applications. As regards the type of issues that should permit entertaining applications after the standstill period, enacting States may consider that the most common will be the discovery of fraudulent irregularities or instances of corruption. The enacting State will wish to provide rules or guidance on these matters. The discretionary element of this provision does not bar entirely the independent body to consider this type of applications. Within the normal limitation period in the jurisdiction concerned, such applications can also be submitted directly to the courts. This provision is in particular important in situations in which the normal transparency safeguards of the Model Law do not apply.

12. Paragraph (2) (d) provides the time limit for the submission of appeals against a decision of the procuring entity and the absence of decisions under article [65]. When setting this time limit, enacting States are, again, left to determine the relevant number of working days from the point of time when the supplier became aware or should have become aware of the circumstances in question. States will wish to ensure that all relevant time limits left to their determination are effectively aligned, both within chapter VIII and as regards the standstill period in article [21(2)].

13. Paragraphs (3) and (4) address issues of suspension. The main policy issues surrounding suspensions are discussed in [paragraphs [15 to 21] of the commentary to article [65]] and are also relevant here.

14. Paragraph (3) delineates the general discretion that is to be granted to the independent body to order the suspension of the procurement proceedings. This discretion is subject to the requirement to suspend the procurement proceedings under certain circumstances referred to in paragraph (4). In all other cases not covered by paragraph (4) where suspension is mandatory, the independent body may order a suspension for so long as it considers it necessary to protect the interests of the supplier presenting the application for review or appeal; it may also lift or extend any suspension so granted, and these powers may be exercised at any time during the challenge proceedings before the independent body. Recognizing that in some jurisdictions, the independent body may have limited powers as regards the

procurement contracts or framework agreements that entered into force, the provisions of subparagraph (b) (like all other provisions throughout the article referring to procurement contracts or framework agreements that entered into force) are accompanied by a footnote indicating the optional nature of the provisions.

15. Paragraph (4) sets out two situations in which the procurement proceedings must be, as a general rule, suspended. Those are the situations considered to pose particularly serious risks to the integrity of the procurement process.

16. Under paragraph (4) (a), the suspension for a period of ten working days must be applied where the application or appeal is received prior to the deadline for presenting submissions. The reason for this approach is to ensure to a large extent that such challenges are addressed before the submissions are received, when corrective action is easier to achieve. In such circumstances, the independent body may wish to take such steps as to extend the deadline for submission of tenders, and correct other actions as regards the terms of solicitation, pre-qualification or pre-selection.

17. Paragraph (4) (b) covers situations where no standstill was applied and a challenge is received after the submission deadline. No fixed period is provided for in the text, because circumstances may indicate different periods are appropriate. As the challenge may be received after the entry into force of the procurement contract, the optional power is given to suspend performance of a procurement contract or operation of a framework agreement, as the case may be.

18. In each case covered by paragraphs (3) and (4), the suspension is presumptive and not automatic, in that the independent body may decide that urgent public interest considerations may justify that the procurement contract or framework agreement should proceed. This is the same test as applies in article [64 (3)] (under which a procuring entity may seek to lift the prohibition to enter into the procurement contract or framework agreement), and enacting States should ensure that appropriate guidance is given on the circumstances that may so justify. Examples when this might be the case include natural disasters, emergencies, and situations where disproportionate harm might otherwise be caused to the procuring entity or other interested parties. The rules of procedure for the independent body may provide permission for the body to make enquiry of the procuring entity if its decision on suspension must be taken before the full record of the procurement proceedings is provided to it (as required by paragraph (8) of this article).

19. In any event, the independent body should bear in mind that a suspension might ultimately prove less disruptive of the procurement process because it may avoid the need to undo steps taken in the procurement process if a decision is taken to overturn or to correct a decision of the procuring entity. In addition, the appropriate degree of incentive for suppliers to submit challenges should be ensured, in which the availability of suspension is an important consideration.

20. In order to mitigate the potentially disruptive effect of an application for review or appeal, paragraphs (5) and (6) together operate to require the independent body to undertake an initial consideration of the application or appeal filed, akin to that set out in paragraph (3) of article [65], guidance as to which is set out in the commentary to that paragraph (paragraphs [13-22] of the guidance to article [65]). This initial review of the application is intended to permit the independent body to

assess the application swiftly and on a *prima facie* basis, so as to determine whether it should be entertained.

21. Paragraph (5) requires the independent body promptly to notify the procuring entity and all participants in the procurement proceedings whose identities are known to the independent body of the application for review or appeal, and of its substance. It is not required to notify other entities whose interests might be affected by the application or appeal (such as other government entities), but is required to publish a notice of the application or appeal so that such entities can take steps to protect their interests, as appropriate. As was discussed in the context of the challenge proceedings before the procuring entity, such steps may include intervention in the challenge proceedings under article [67], might include a request to lift a suspension that has been applied, and such other steps that may be provided for under applicable regulations or procedural rules.

22. It must also take a decision on suspension, and notify all concerned about such decision (including, where relevant, the period of suspension). The independent body must also provide reasons for a decision not to suspend to the applicant or appellant (so as to facilitate any appeal against that decision) and to the procuring entity.

23. The powers to dismiss the application for review or appeal under paragraph (6) track those given to the procuring entity under article [65], as discussed in paragraph [13] of the commentary to that article. The same transparency safeguards as regards the notification of the decision and reasons therefor as in article [65] are also applicable.

24. Under paragraph (7), notices of the actions taken under paragraphs (5) and (6) must be given within three working days after the application or appeal was received, as is the case with applications for reconsideration to the procuring entity. The effect of the notices will vary with the decisions they notify, but notably the independent body may require the procuring entity to suspend the procurement proceedings.

25. Paragraph (8) requires the procuring entity to provide all documents relating to the procurement proceedings to the independent body; this obligation is subject to the confidentiality provisions in articles [23 and 24], in particular restrictions on disclosure of certain information, which however may be lifted by competent authorities identified by enacting States in those provisions. Enacting States may wish to provide rules or guidance to avoid excessive disruption of both procurement and review or appeal proceedings by providing secure and efficient means of transfer of such documents.

26. Paragraph (9) lists remedies that the independent body can grant under the Model Law with respect to the application for review or appeal that it decides to entertain. Paragraph (9) acknowledges that differences exist among national legal systems with respect to the nature of the remedies that bodies exercising quasi-judicial review are competent to grant. In enacting the Model Law, States are encouraged to enact all remedies that, under its legal system, can be granted to an independent body undertaking review, so as to ensure an effective system of review as required by the Convention against Corruption. The thrust of the provisions is to ensure that an appropriate decision on the application or appeal is taken (including, where circumstances so dictate, that the application is dismissed or rejected); as part

of that exercise, any suspension existing when the application or appeal is disposed of must also be lifted or extended where the independent body considers it necessary.

27. Some provisions in this paragraph appear in parenthesis indicating their optional nature and possibility of their variation in accordance with the local circumstances of the enacting State. For example, sub-paragraphs (c) and (e) permit the independent body to overturn acts and decisions of the procuring entity, including award of a procurement contract. The term “overturn” does not carry any particular consequences (it need not be treated as declaring the decision of no effect), so that the enacting State may provide for the consequences appropriate in the light of the legal tradition in the jurisdiction concerned. Nonetheless, footnotes to these sub-paragraphs as well as to sub-paragraph (d) note that, where an independent body cannot be granted the power to overturn a procurement contract or to substitute its own decision for that of a procuring entity, an alternative formulation would be to permit the independent body to quash the decision of the procuring entity, so that the procuring entity is then required to take another decision in the light of the decision of the independent body.

28. Corrective action should be regarded as the primary and most desirable remedy. This approach is reflected in the GPA. The early resolution of disputes through corrective action will reduce the need for financial compensation. Financial compensation may, however, be part of the appropriate remedy in a given case, for example where a contract has entered into force but it is not considered appropriate to interfere in the contract. A system without provision for any financial compensation (beyond the costs of filing a complaint) may therefore fail to provide adequate remedies in all situations, and the question of financial compensation should therefore be a part of the broader perspective of putting in place an effective remedies system.

29. Paragraph (9) (h) therefore makes provision for financial compensation, and sets out two alternatives for the consideration of the enacting State. Where the text in parenthesis is retained, 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, proposal, offer or quotation of the supplier or contractor submitting the complaint. The types of losses compensable under the second alternative (i.e. where provisions are enacted without the text in parenthesis) are broader, and might include future losses, including lost profit, in appropriate cases. Enacting States will wish to consider how purely economic loss is addressed in their domestic legal systems, so as to ensure consistency in the measure of financial compensation throughout the jurisdiction concerned (such as whether the compensation should reflect the loss of a chance, and the extent to which financial compensation is contingent on the complainant proving that it would have won the procurement contract concerned). Since the possibility of receiving financial compensation can raise the risk of encouraging speculative applications and disrupting the procurement process, it may be useful when a quasi-judicial system is in its infancy, to ensure that there is adequate incentive for suppliers to bring applications, but the mechanism should be reviewed as systems mature. In addition,

the enacting State may wish to monitor the risk of abuse if the power to award financial compensation lies in a small entity or the hands of a few individuals.<sup>2</sup>

30. Paragraph (10) provides for a maximum period within which the decision on the application or appeal that the independent body decided to entertain must be taken. It also provides for the requirement of prompt notification of that decision to all concerned. Together with paragraph (11) that requires all decisions taken by the independent body during the review or appeal proceedings to be in writing, complete, reasoned and put on the record, paragraph (10) sets out important transparency safeguards that also aim at ensuring efficient and effective review and appeal proceedings and possible further action by aggrieved suppliers in courts if need be. Paragraphs (10) and (11) are similar to paragraphs (6) and (8) of article [65]; the matters discussed in paragraphs [24] and [26] of the guidance to article [65] are therefore relevant here.

31. The examination of evidence, and the manner in which it is conducted (such as whether hearings are to take place), will be a significant determining factor as regards the necessary length of administrative or quasi-judicial proceedings, and will reflect the legal tradition in the enacting State concerned. If detailed rules governing procedures in administrative or quasi-judicial review do not already exist in the enacting State, the State may provide such rules by law or in the procurement regulations, to cover such matters as the conduct of review proceedings, the manner in which applications are to be filed, and questions of evidence.

#### **Article [67]. Rights of participants in challenge or appeal proceedings**

1. The references in paragraph (1) to any supplier or contractor participating in the procurement proceedings and to any governmental authority whose interests may be affected by challenge proceedings or appeals establish a broad right of participation in challenge or appeal proceedings beyond the applicant or appellant. These rights of participation are intended to provide an appropriate balance between effective challenge proceedings and avoiding excessive disruption, as noted regarding general rights to commence challenge proceedings described in the commentary to article [64] above, and are predicated on the notion that participation is granted to the extent that the supplier or contractor, or other potential participant, can demonstrate that its interests may be affected by the challenge or appeal proceedings.

2. In this context, the “participants in challenge or appeal proceedings” can include a varying pool of participants, depending on the timing of the challenge or appeal proceedings and subject of the challenge or appeal, and can include other governmental bodies. A governmental body may include public sector bodies that would intend to use a framework agreement, or any approving authority that has participated in the procurement concerned. The reference to suppliers or contractors “participating in the procurement proceedings” is intended to permit all those that remain in the proceedings concerned, but to exclude those that have been eliminated through pre-qualification or a similar step earlier in the proceedings, unless that step is the action or decision of the procuring entity to which the challenge or appeal relates.

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<sup>2</sup> The Working Group has expressed the wish that the Guide should address the quantification of costs, and may wish to provide parameters for this discussion to the Secretariat.

3. Paragraph (2) enshrines the right of the procuring entity to participate in challenge or appeal proceedings before an independent body.

4. Paragraph (3) sets out the fundamental rights of participants in the proceedings, of which the most significant are the right to be heard, to have access to all the proceedings and to present evidence. These rights accrue to those described in paragraphs (1) and (2) of the article, and not to anyone that may be present during hearings that take place in public (such as members of the press). The independent body may grant access to the record of the challenge or appeal proceedings (which will, under the provisions of article [66 (8)], include the record of the procurement proceedings). Participants in the proceedings will need to demonstrate their interest in the documents to which access is sought: this measure is intended to allow the independent body to keep effective control of the proceedings and to avoid fishing expeditions. Access to records is also subject to the provisions on confidentiality in article [68]. There will be a need for robust procedural rules in order to ensure that the proceedings examine the issues in each case in the appropriate level of detail and in a timely fashion.

#### **Article [68]. Confidentiality in challenge and appeal proceedings**

The article has been included in chapter VIII to apply the principles of confidentiality found in article 23 to the challenge and appeal proceedings, in particular the review and appeal proceedings taking place in the independent body (to which article [23] does not apply).

#### **Article [69]. Judicial review**

[1. This section remains to be completed. The relevant part of the Guide to Enactment of the 1994 Model Law on the equivalent article is included here, together with comments made by the Working Group on the scope of judicial review and a footnote accompanying article 69 of the draft revised Model Law.

2. The commentary to article 57. Judicial review of the Guide to Enactment of the 1994 Model Law reads as follows:

“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 52. This includes appeals against decisions of review bodies pursuant to articles 53 and 54, 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 53 or 54, 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 57 has been adopted so as to avoid impinging on national laws and procedures relating to judicial proceedings.”

3. Comments by the Working Group as regards the provisions of the revised Model Law on judicial review are contained in footnote 43 in document A/CN.9/WG.I/WP.75/Add.8. They can be summarized as follows:

“The Model Law does not intend to interfere into the prerogatives of courts, which are regulated or should be regulated in a separate body of law in enacting States. The Model Law intends neither inadvertently to restrict broader powers may exist for courts under legislation of enacting States, such as powers to award compensation for anticipatory losses or to grant interim measures, including under a contract that has been executed and where performance has commenced, if the legal system of the enacting State so permits.

Since the Model Law does not deal with judicial review beyond outlining the framework and encouraging all remedies available in quasi-judicial proceedings to be available before the Court, article 66 does not purport to address the question of court ordered suspension, which may be available under the applicable law.”

4. A footnote accompanying article [69] of the revised Model Law reads as follows:

“States may provide for the system of appeal judicially, or administratively, or both, to reflect the legal system in the jurisdiction concerned. States that provide only for judicial review of the decisions of the procuring entity are required to put in place an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption. Such an effective system of judicial review shall in particular ensure: (i) that deadlines for submission of applications for judicial review or appeal of decisions of the procuring entity or the independent body, as the case may be, shall be appropriate in the procurement context, in particular the provisions of this Law on the standstill period shall be taken into account; (ii) that the court or courts with jurisdiction pursuant to article 63 may take any or any combination of the actions contemplated in article 66 (9) of this Law and to grant interim measures that it considers necessary to ensure effective review, including suspension of the procurement proceedings or performance of the procurement contract or the operation of the framework agreement, as applicable; and (iii) that minimum safeguards as regards the participation in the challenge or appeal proceedings, submission of evidence and protection of confidential information in the procurement context, contemplated in articles 67 and 68 of this Law, are in place.”]

## (A/CN.9/WG.I/WP.77/Add.5) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twentieth session****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany related provisions of chapters II and IV of the UNCITRAL Model Law on Public Procurement on restricted tendering and request for quotations.

## **GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT**

### **Part II. Article-by-article commentary**

[for ease of reference, this addendum consolidates the proposed article-by-article commentary to various provisions of the Model Law regulating restricted tendering and request for quotations]

...

#### **A. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of restricted tendering**

##### **1. Conditions for use**

*The relevant provision of the revised Model Law on conditions for use:*

**“Article 28. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering ...)**

(1) The procuring entity may engage in procurement by means of restricted tendering in accordance with article 44 of this Law when:

(a) The subject matter of the procurement, by reason of its highly complex or specialized nature, is 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 subject matter of the procurement.”

*Proposed text for the Guide:*

1. Paragraph (1) of the article sets out the conditions for use of restricted tendering. It 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. Those exceptional cases are: the procurement of technically complex or specialized subject matter that is available from only a limited number of suppliers (for



example, equipment for nuclear power plants); and where the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement (for example, standard cleaning services). A requirement for open solicitation in such cases would be inappropriate.

2. Although the use of restricted tendering is subject to transparency safeguards, in that an advance notice of the procurement is required under the provisions of [article 33 (5)], and certain procedures applicable to open tendering apply also to restricted tendering procedures under article 44, strict and narrow conditions for use have been included for restricted tendering. These conditions are based on the notion that inappropriate use of the method would fundamentally impair the objectives of the Model Law. They therefore seek to avoid encouraging its use. Under the conditions of paragraph (1) (a) in particular, the use of open tendering with pre-qualification can achieve the same purposes as restricted tendering in a more transparent manner. The use of restricted tendering on the grounds specified in paragraph (1) (b) should diminish with the use of electronic procurement: many steps in the process can be automated to a large degree, saving both time and costs.

3. Both conditions for use of this method listed in paragraph (1) confer significant discretion on the procuring entity as regards solicitation: in the first instance as regards the existence of only a limited number of suppliers or contractors capable of delivering a subject matter of the procurement, though this judgement is subject to further suppliers seeking to participate following the publication of a notice as discussed further below. In the second case, the procuring entity has the discretion to assess the appropriate maximum number of tenders to be evaluated to achieve proportionality between the costs or time spent in evaluation and the value of the procurement. Thus the method necessarily involves subjectivity and may therefore be at risk of abuse.

4. In applying the grounds specified in paragraph (1) (a), the procuring entity should be aware of the implications of article 33 (5) that requires giving an advance notice of the procurement specifying inter alia the main terms and conditions of the procurement and the method of procurement selected. The justification for the use of restricted tendering should be set out in the record, as required under the Model Law (see paragraph [9] below), and the justification should be provided in such detail as would allow the decision to be overseen or challenged where appropriate. However, the justification need not be included in the notice (to avoid inaccurate summaries or excessively long notices). (See, also, the guidance to article 24 that explains how suppliers that may wish to challenge the choice of procurement method can have access to the justification in the record.)

5. If, under the conditions of paragraph (1) (a), the procuring entity receives requests from suppliers or contractors to allow them to tender in response to that notice, such suppliers will have to be allowed to tender unless they are disqualified (if pre-qualification took place) or do not comply with the terms of the notice of the procurement (for example, the declaration made pursuant to article 8 of the Law). This is in compliance with article 33 (1) (a) requiring solicitation of tenders from all suppliers and contractors, within the market concerned, from which the subject matter of the procurement is available.

6. The procuring entity has more discretion if recourse to restricted tendering has been justified on the ground referred to in paragraph (1) (b), that is the time and cost

required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement. As long as it has already selected a sufficient number of suppliers or contractors in an objective manner to ensure effective competition, the procuring entity in such cases may decline to consider requests to tender coming from additional suppliers or contractors responding to the notice published in accordance with article 33 (5). In practice, objectivity in selection may be achieved by various methods, such as a lottery or random selection, as discussed in the guidance to article [33 (1)], but oversight measures to ensure that the manner of selection is indeed undertaken objectively should be put in place, particularly where repeated procedures are envisaged.

7. The manner in which the suppliers will be selected to participate, the choice of the procurement method and terms of solicitation, among other things, may be challenged under chapter VIII of the Model Law. In applying the grounds specified in paragraph (1) (b), the procuring entity should therefore carefully consider whether the desired goal of saving time and cost would indeed be achieved in the procurement concerned. It is important to note that a challenge cannot be mounted unless the manner of selection is alleged to be discriminatory: suppliers cannot challenge their exclusion per se. Where repeated procedures are concerned, and a limited group is repeatedly selected, it may be easier to show a lack of objectivity in the selection. Where there are repeated purchases, the procuring entity should take particular care to be demonstrably objective in its selection of the suppliers to be invited to participate (or may wish to consider the use of a tool such as a framework agreement).

8. The provisions of paragraph (1) (b) should also be read together with article 12 of the Model Law containing rules on estimation of the value of the procurement. That article contains essential safeguards against the artificial division of the subject matter of the procurement for the purpose, for example, of justifying resort to restricted tendering on the ground set out in paragraph (1) (b), i.e. that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

9. The procuring entity, under article 27 (3) read together with the provisions of article 24 (1) (e), is required to put on the record a statement of the reasons and circumstances relied upon by the procuring entity to justify the use of restricted tendering instead of open tendering.

*For a discussion of the changes in conditions for use from the 1994 text, see section A.5 below.*

## 2. Solicitation

*The relevant provision of the revised Model Law on solicitation:*

### **“Article 33. Solicitation in restricted tendering ...**

(1) (a) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified in article 28 (1) (a) of this Law, it shall solicit tenders from all suppliers and contractors from which the subject matter of the procurement is available;

(b) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified in article 28 (1) (b) of this Law, it shall select suppliers or contractors from which to solicit tenders in a non-discriminatory manner, and it shall select a sufficient number of suppliers or contractors to ensure effective competition.”

*Proposed text for the Guide:*

10. Paragraph (1) sets out minimum solicitation requirements in restricted tendering. They have been drafted in order to give effect to the purpose of article 28 (1) of limiting the use of restricted tendering to truly exceptional cases while maintaining the appropriate degree of competition. They are tailored specifically to each of the two exceptional cases reflected in the conditions for use in article 28 (1). When resort is made to restricted tendering on the ground referred to in article 28 (1) (a), that is the procurement of technically complex or specialized subject matter that is available from only a limited number of suppliers, all the suppliers or contractors that could provide the subject matter of the procurement in the market envisaged to be covered by the procurement are required to be invited to participate. When the ground is that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement, the case referred to in article 28 (1) (b), suppliers or contractors should be invited in a non-discriminatory manner and in a sufficient number to ensure effective competition. The requirement of selection in a non-discriminatory manner would presuppose notification to the public in accordance with paragraph (5) of this article of not only the procuring entity’s decision that restricted tendering would be used but also of the maximum number of participants to be selected, and the manner of selection (for example, on a random or lottery basis, or on the basis of the “first come first served” principle, up to the maximum number notified — see, also, paragraphs [5-7] above).

### **3. Advance notice of the procurement**

*The relevant provision of the revised Model Law:*

#### **“Article 33. ... Requirement for an advance notice of the procurement**

...

(5) Prior to direct solicitation in accordance with the provisions of paragraphs (1), (3) and (4) of this article, the procuring entity shall cause a notice of the procurement to be published in ... (the enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall contain at a minimum the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into in the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

- (c) A declaration pursuant to article 8 of this Law; and
  - (d) The method of procurement to be used.
- (6) The requirements of paragraph (5) shall not apply in the case of urgency as referred to in articles 29 (4) (b) and 29 (5) (b)."

*Proposed text for the Guide as regards restricted tendering:*<sup>1</sup>

11. Paragraph (5) promotes transparency and accountability as regards the decision to use [restricted tendering] by requiring publication of a notice of the procurement in the media to be specified by the enacting State in its procurement law. Also relevant in this regard is the rule in article 27 (3) (which is of general application), read together with the provisions of article 24 (1) (e), which require the procuring entity to include in the record of procurement proceedings a statement of the grounds and circumstances relied upon to justify the selection of the procurement method concerned.

12. The paragraph mandates the publication of the notice prior to the direct solicitation. It is therefore distinct from a public notice of the award of a procurement contract or framework agreement required under article 22 of the Model Law. Including the procedures described in this article in the procurement law enables interested suppliers and contractors to identify, simply by reading the procurement law, publications that they may need to monitor in order to stay abreast of procurement opportunities in the enacting State and of the way those procurement opportunities are allocated in the market. (The procuring entity should also be aware of the implications of this notice provision in restricted tendering as discussed in paragraphs [4-7] above.) The Model Law does not regulate the means and media of publication, which are left to determination by enacting States. There may be paper or electronic media or combination of both. In this context, considerations raised in the guidance to article 5 in paragraphs ... above are relevant.

13. The information to be published is a minimum needed to ensure effective public oversight and possible challenge by aggrieved suppliers or contractors under chapter VIII of the Model Law. In particular, the selected method of procurement may be challenged by any affected supplier or contractor if, for example, single-source procurement or restricted tendering were selected on the ground that a particular supplier or limited group of suppliers existed in the market and was or were capable of supplying the subject matter of the procurement. Any other suppliers or contractors capable of delivering the same subject matter of the procurement in the market intended to be covered by the procurement might challenge the use of the procurement method relying on the information in the notice of the procurement. Under chapter VIII, they would be able to do so before the deadline for submission of tenders and could benefit from provisions on the mandatory suspension of the procurement proceedings if the application for review

<sup>1</sup> The Working Group may wish to consider whether a general discussion of solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement to accompany article 33 or article 33 (5), with a cross-reference in the guidance to each procurement method concerned, would be preferable to a discussion of solicitation in each such procurement method. While the discussion in some provisions in the paragraphs below are tailored to restricted tendering, some other provisions in those paragraphs are of general application to the procurement methods addressed in article 33.

is filed with the independent review body. As is discussed in the commentary to chapter VIII, and in order to avoid vexatious challenges that can be highly disruptive when filed at the last minute, a supplier has to show that its interests may or have been affected at the point in time concerned: thus, for example, it may have to show a real intention to participate in the circumstances described above (for example, by submitting a draft tender or other offer).

14. The requirement for an advance notice of the procurement in restricted tendering, competitive negotiations and single-source procurement is essential in the fight against corruption and as a means to achieve transparency. Together with the provisions of chapter VIII, they enable and encourage aggrieved suppliers or contractors to seek redress earlier in the procurement process rather than at a later stage where redress may not be possible or will be costly to the public and available remedies will thus be limited.

15. The requirement to publish an advance notice of the procurement is not applicable in request for quotations proceedings in the light of the very restrictive conditions for use of that method, which will constrain any excessive or abusive use of that method. Nor does it apply in the case of competitive negotiations and single-source procurement when those methods are used in urgent or extremely urgent situations due to catastrophic events (for example, under the conditions for use of these procurement methods under articles 29 (4) (b) and 29 (5) (b)). In the normal case, when an advance notice is in principle required, an exemption may nevertheless apply under article 23 (confidentiality), in particular in procurement involving classified information. (For the guidance on the relevant provisions of the Model Law on confidentiality and procurement involving classified information, see paragraphs ... above).

*For a discussion of the changes in solicitation and notice requirements from the 1994 text, see section A.5 below.*

#### **4. Procedures**

*The relevant provision of the revised Model Law on procedures:*

##### **“Article 44. Restricted tendering**

(1) The procuring entity shall solicit tenders in accordance with the provisions of article 33 (1) and (5) of this Law.

(2) The provisions of chapter III of this Law, except for articles 35 to 37, shall apply to restricted tendering proceedings.”

*Proposed text for the Guide:*

16. The article regulates the procedures for restricted tendering. The provisions are very short since the relevant provisions of other chapters of the Model Law regulate the procedural steps required in this procurement method, cross-reference to which is made in this article.

17. As noted in the comments to article 33 (1), the solicitation requirements for this procurement method are designed to ensure that, in the case of resort to restricted tendering on the grounds referred to in article 28 (1) (a), tenders are solicited from all suppliers or contractors from whom the subject matter of the

procurement is available in the market intended to be covered by the procurement, and, in the case of resort to restricted tendering on the grounds referred to in article 28 (1) (b), from a sufficient number of suppliers or contractors to ensure effective competition. Incorporation of those solicitation requirements, together with the requirement to publish an advance notice of the procurement in accordance with article 33 (5), is an important safeguard to ensure that the use of restricted tendering does not subvert the objective of the Model Law of promoting competition, is justifiable in each case with reference to the transparent criteria and may be challenged in accordance with chapter VIII.

18. Paragraph (2) of the article makes it clear that the procedures to be applied in restricted tendering are those normally applied to tendering proceedings, with the exception of open solicitation and requirements applicable in the case of open solicitation. Paragraph (2) therefore excludes articles 35 to 37 from application to restricted tendering. Article 35 regulates procedures for soliciting tenders in open tendering and is therefore not applicable to restricted tendering. Article 36 regulates contents of an invitation to tender to be published in open tendering. In restricted tendering, it is not necessarily that an invitation to tender is issued and if it is issued, it does not necessarily include all information listed in article 36. As regards article 37, in restricted tendering, solicitation documents will be provided to all suppliers that were directly invited and that expressed interest in tendering. Some provisions of article 37 will therefore not be applicable to restricted tendering. If the procuring entity decides to charge a price for the solicitation documents in restricted tendering, it will, despite the exclusion of article 37 from application to restricted tendering, be bound by the provision in the last sentence of article 37 (“the price that the procuring entity may charge for the solicitation documents shall reflect only the cost of providing them to suppliers or contractors”). This provision appears in other articles of the Model Law in the similar context and may be considered as referring to good practice that is aimed at preventing the procuring entity from charging excessively high unjustifiable amounts for solicitation documents. The negative effect of such charges on participation in procurement of suppliers or contractors, in particular SMEs, and prices that suppliers or contractors participating in the procurement would eventually offer in their tenders, proposals, offers, quotations or bids, should be carefully considered.<sup>2</sup>

*For a discussion of the changes in procedures from the 1994 text, see section A.5 below.*

## **5. Points regarding restricted tendering proceedings proposed to be discussed in the Section of the Guide to Enactment addressing changes from the 1994 text of the Model Law**

### *Conditions for use*

19. The provisions in the revised Model Law addressing restricted tendering are based on article 20 of the 1994 Model Law, with two main changes. The first of which was to delete from the revised text references to an approval by a designated organ. This change implements the decision of UNCITRAL not to require, as a

<sup>2</sup> As regards the final sentence, the Working Group may consider that a cross-reference to the guidance to article 37, for example will be sufficient, as that guidance will discuss this point in more detail.

general rule, in the revised Model Law the procuring entity to seek an approval of another body for steps to be taken by the procuring entity (for the guidance on this point, see paragraphs ... above).

20. The second change was to delete the 1994 reference to “reasons of economy and efficiency” from the revised text. This deletion reflects the UNCITRAL decision not to refer to any objective of the Model Law listed in its Preamble in the articles of the text itself (for further discussion of this point, see paragraphs ... above). The procuring entity should, in any event, consider the objective of “maximizing economy and efficiency in procurement” and all other objectives of the Model Law when selecting any procurement method — a consideration that should also be applied at all other stages of the procurement proceedings, as appropriate. In addition, it was also considered that the reference to “economy and efficiency” was relevant in the context of the second condition for use of this procurement method (to avoid disproportionate costs and time), not to its use where there was a limited supply base.

#### *Solicitation*

21. The provisions set out in article 33 (1) and (5) are based on article 47 (1) and (5) of the 1994 Model Law, respectively, with drafting changes to ensure consistency of style and specification of the minimum information to be included in the advance notice of procurement. The provisions of the revised Model Law also make it clear that the notice is to be published before the direct solicitation is made.

#### *Procedures*

22. Provisions of article 44 are based on article 47 (3) of the 1994 Model Law, with the exclusion of specific articles of chapter III regulating open tendering that are not applicable to restricted tendering, as explained in paragraph [18] above.

## **B. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for quotations**

### **1. Conditions for use**

*The relevant provision of the revised Model Law on conditions for use:*

#### **“Article 28. Conditions for use of methods of procurement under chapter IV of this Law (... request for quotations ...)**

(2) A procuring entity may engage in procurement by means of a request for quotations in accordance with article 45 of this Law for the procurement of readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the threshold amount set out in the procurement regulations.”

#### *Proposed text for the Guide:*

1. Paragraph (2) of this article sets out conditions for use of request for quotations. This method of procurement provides a procedure appropriate for low-value purchases of a standardized nature (commonly referred to as “off-the-

shelf items”). In such cases, engaging in tendering proceedings, which can be costly and time-consuming, may not be justified. Article 28 (2) limits the use of this method strictly to procurement of a value below the threshold set in the procurement regulations. That threshold may or may not be the same as the one required to be set in the provisions of the Model Law exempting low-value procurement from the mandatory application of a standstill period (article 21 (3) (b)) or from the requirement of public notice of the procurement contract award (article 22 (2)). It is recommended however that the threshold to be set in the procurement regulations for the purposes of paragraph (2) of this article should be harmonized with the thresholds set for the purposes of enacting articles 21 (3) (b) and 22 (2) of the Model Law, to ease the implementation of these related provisions of the Model Law.

2. [Unlike those other provisions that require setting a threshold in the Law itself, the threshold referred to in paragraph (2) of this article is to be set in the procurement regulations.]<sup>3</sup> Enacting States will wish to provide guidance to procuring entities on the concept of low-value procurement, by reference to the thresholds, among other things, to ensure consistency of approach. (See, also, the guidance to article 32 (4) addressing the exemption of low-value procurement from international solicitation in paragraphs ... below).

3. In enacting article 28, it should be made clear that use of request for quotations is not mandatory for procurement below the threshold value. Article 27 containing the requirement to maximize competition and to have regard for the circumstances surrounding the procurement when choosing a procurement method, and the conditions for use of other procurement methods that might be appropriate, will guide the procuring entity in considering alternatives to request for quotations (for the relevant guidance to article 27, see paragraphs ... above).

4. In particular, the method is not intended to be used for repeated purchases, because of the risk of restricting the market and of abuse in so doing (such as through an abusive selection of participating suppliers or in justifying the need for repeated purchases by, for example, splitting procurement to avoid exceeding the threshold under article 12 (see, further, below)). For repeated purchases, establishing an open framework agreement or, if more complex items are involved, concluding a closed framework agreement as a result of tendering proceedings, is a preferred alternative. The use of electronic catalogues may assist in promoting transparency where the procedure is used on a periodic, rather than repeated, basis.

5. Where procurement of more complex items is involved and thus evaluation of prices alone is not sufficient, tendering with its greater transparency safeguards should be used, even though the value of the procurement may fall below the

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<sup>3</sup> At its nineteenth session, the Working Group was requested to consider whether the Model Law, instead of fixing any threshold in its provisions, should refer the matter to the procurement regulations consistently throughout the Model Law, in particular in the light of the fluctuating value of currencies (inflation, etc.) (A/CN.9/WG.I/WP.75/Add.2, footnotes 31 and 38). The Working Group did not consider that suggestion. However, the suggestion was made, during expert consultations on the guidance to be provided for this procurement method, that the Working Group and Commission may wish to reconsider the point so as to ensure consistent approach to the location of thresholds. Given the need for periodic adjustment as economic circumstances change, the thresholds themselves may best be set out in regulations (by comparison with article 22 (2)).



threshold established for the use of request for quotations.<sup>4</sup> Restricted tendering on the ground set out in article 28 (1) (b) may in particular be appropriate in such cases. Where initial low-value procurement would have the long-term consequence of committing the procuring entity to a particular type of technological system, the use of other methods of procurement, leading in particular to conclusion of a framework agreement, is recommended. For procurement of commodities, simple services and similar items, an alternative approach may be to use an electronic reverse auction. (For the relevant guidance to article 28 (1) (b) as applicable to restricted tendering, see paragraphs ... above; for the relevant guidance to provisions on electronic reverse auctions, see paragraphs ... below; and for the relevant guidance to provisions on framework agreements, see paragraphs ... below.)

6. The provisions of paragraph (2) should be read together with article 12 of the Model Law containing rules on estimating the value of the procurement. That article 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 the subject matter of the procurement for the purpose of circumventing the value limit on the use of request for quotations with a view to avoiding use of the more competitive methods of procurement, a prohibition that is essential to the objectives of the Model Law.

*For a discussion of the changes in conditions for use from the 1994 text, see Section B.4 below.*

## 2. Solicitation

*The relevant provision of the revised Model Law on solicitation:*

### **“Article 33. Solicitation in ... request for quotations ...**

(2) Where the procuring entity engages in procurement by means of request for quotations in accordance with article 28 (2) of this Law, it shall request quotations from as many suppliers or contractors as practicable, but from at least three.”

*Proposed text for the Guide:*

7. Paragraph (2) sets out rules of solicitation in the case of request for quotations. The objectives of the Model Law of fostering and encouraging participation and competition are applicable to procurement regardless of its value. Thus, the procuring entity is bound to request quotations from as many suppliers or contractors as practicable, but from at least three, without exception. This minimum requirement is present in the light of the type of the subject matter supposed to be procured by means of request for quotations — readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market (article 28 (2)). For this type of procurement, it should always be possible to request quotations from at least three suppliers or contractors that are capable of providing the subject matter

<sup>4</sup> The Working Group may wish to consider including a discussion of the use of tendering even where the subject matter of the procurement is not produced to the particular design of the procuring entity, and the use of performance or output-based specifications that refer to industry standards.

of the procurement. The use of electronic procurement also allows the procuring entity to reach a broader audience and ensure that a sufficient number of quotations is sought.

8. Enacting States may wish to provide guidance to ensure that the selection of participants in request-for-quotations procedures is not carried out in a way so as to restrict market access or to allow abuse of the procedures (examples might include the selection of two suppliers whose prices are known to be high, or two suppliers that are geographically remote, so as to direct the procurement towards a third, chosen supplier). The considerations raised as regards the manner of selection of participating suppliers in the context of the use of restricted tendering on the ground of article 28 (1) (b) are relevant here (see paragraphs ... above). In addition, procedures that require the comparison of historical offers and to ensure rotation among suppliers, where the same items may be procured occasionally, are useful. Oversight procedures should identify the winning suppliers under this method, so that repeat awards can be evaluated.

9. Electronic methods of requesting quotations may be particularly cost-effective for low-value procurement and ensuring also more transparent selection. The use of electronic catalogues as a source of quotations may in particular be considered to offer better opportunity for transparency in the selection of suppliers from which to request quotations, in that such selection can be evaluated against those suppliers offering relevant items in catalogues (see, also, the guidance on framework agreements under chapter VII for the repeated procurement of low-cost items).<sup>5</sup> Ensuring adequate transparency is a key issue, given that procurement under this method is not required to be preceded by a notice of the procurement (see, further, paragraph ... above).

10. The requirement to request quotations from at least three suppliers or contractors should not however be interpreted as invalidating the procurement where in response to request for quotations addressed to three or more suppliers only one or two quotations were received.

*For a discussion of the changes in solicitation from the 1994 text, see section B.4 below.*

### 3. Procedures

*The relevant provision of the revised Model Law on procedures:*

#### **“Article 45. Request for quotations**

(1) The procuring entity shall request quotations in accordance with the provisions of article 33 (2) of this Law. Each supplier or contractor from which a quotation is requested shall be informed whether any elements other than the charges for the subject matters of the procurement themselves, such as any applicable 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

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<sup>5</sup> A/CN.9/668, para. 208.

between the procuring entity and a supplier or contractor with respect to a quotation presented by the supplier or contractor.

(3) The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity as set out in the request for quotations.”

*Proposed text for the Guide:*

11. The article sets out procedures for request for quotations. In the light of the nature and low value of the subject matter to be procured by means of request for quotations, only minimum procedural requirements are included, which are designed to provide for the fair and equitable treatment of suppliers or contractors participating in the procurement. Overseeing the use of the method, using electronic tools where possible to amortise the costs of so doing in low-value procurement, can introduce transparency and safeguards against abuse in practice.

12. 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.

*For a discussion of the changes in procedures from the 1994 text, see section B.4 immediately below.*

**4. Points regarding request for quotations proceedings proposed to be discussed in the Section of the Guide to Enactment addressing changes from the 1994 text of the Model Law**

*Conditions for use*

13. The request-for-quotations method in the revised text is based on article 21 of the 1994 Model Law. The wording of the latter article has been amended so as to allow the use of request for quotations for all types of standardized or common procurement that is not tailored by means of specifications or technical requirements. Use of the method under the revised text does not contain a requirement for external approval, in conformity with the decision of UNCITRAL not to require, as a general rule, in the revised Model Law the procuring entity to seek an approval of another body for steps to be taken by the procuring entity (for the guidance on this point, see paragraphs ... above). Paragraph (2) of the 1994 text has been deleted in the light of new article 12 setting rules concerning estimation of the value of procurement applicable to all procurement methods, not only request for quotations.

*Solicitation*

14. The provisions in the revised Model Law (article 33 (2)) are based on the first sentence of article 50 of the 1994 Model Law. The words “if possible” in the reference to the minimum three suppliers or contractors from which quotations should be requested have been deleted in the revised text since they were considered to raise the risk of abuse and subjectivity in selecting suppliers from which to solicit quotations. As explained in paragraph [7] above, in the light of the type of the subject matter supposed to be procured by means of request for quotations — off-the-shelf items — it should always be possible to request quotations from at least

three suppliers of contractors that are capable of providing the subject matter of the procurement.

*Procedures*

15. Article 45 is based on the remaining provisions of article 50 of the 1914 Model Law, with the addition of the phrase “as set out in the request for quotations” in the end of paragraph (3). The phrase has been added to ensure equal treatment of suppliers by requiring that information about the needs of the procuring entity that has been provided to participating suppliers at the outset of the procurement remains valid throughout the procurement proceedings and is the basis for the selection of the successful quotation.

**(A/CN.9/WG.I/WP.77/Add.6) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twentieth session****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany related provisions of chapters II, IV and V of the UNCITRAL Model Law on Public Procurement on request for proposals without negotiation and request for proposals with consecutive negotiations.

**GUIDE TO ENACTMENT  
OF  
THE UNCITRAL MODEL LAW  
ON PUBLIC PROCUREMENT****Part II. Article-by-article commentary**

[for ease of reference, this addendum consolidates the proposed article-by-article commentary to various provisions of the Model Law regulating request for proposals without negotiation and request for proposals with consecutive negotiations]

...

**A. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals without negotiation****1. Conditions for use**

*The relevant provision of the revised Model Law on conditions for use:*

**“Article 28. Conditions for use of methods of procurement under chapter IV of this Law (... request for proposals without negotiation)**

(3) The procuring entity may engage in procurement by means of request for proposals without negotiation in accordance with article 46 of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposals.”

*Proposed text for the Guide:*

1. Paragraph (3) provides for the conditions for use of request for proposals without negotiation, a procurement method that may be used where the procuring

entity (a) wishes to express its needs in a functional or output-based manner<sup>1</sup> and (b) needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of their quality and technical aspects. This approach is appropriate where the procuring entity does not wish to be influenced by the financial aspects of proposals when it examines and evaluates their quality and technical aspects, and the words “needs to” in the provisions are intended to convey that there is an objective and demonstrable need for the procuring entity to follow this sequential examination and evaluation procedure. These circumstances may arise, for example, where the procuring entity wishes to consider whether a particular technical solution will work, or to assess the quality of key personnel. Only if the technical proposal fully responds to the terms of reference in the request for proposals will the procuring entity continue to consider the price of the proposal concerned. The method is therefore suitable for procurement of items or services of a relatively standard nature, where all aspects of the proposals can be evaluated without resort to discussions, dialogue or negotiations with suppliers.

2. The procurement method covered by the paragraph is therefore not appropriate in procurement where price is the only award criterion or one of the main award criteria, or where a complete evaluation would not be possible without evaluating price and non-price criteria together.<sup>2</sup> In such circumstances, a tendering procurement method that focuses on the price, and which does not provide for a sequential examination and evaluation of quality and technical aspects and of financial aspects, would be appropriate. The procuring entity may find that a tendering-based procurement method is also more appropriate where it has many technical requirements. The method is also not appropriate where there is a need to negotiate on any aspects of proposals (be they quality, technical or financial) since the method, like tendering, does not allow for dialogue or negotiations (for the types of procurement in which dialogue or negotiations may be appropriate and necessary, see the guidance to request for proposals with dialogue and with consecutive negotiations, at [...] below).

3. In practical terms, the technical and quality proposals will be submitted in one envelope (or its electronic equivalent), and they will require manual evaluation by suitably qualified individuals. For those proposals that respond to the terms of reference, a second envelope (or electronic equivalent) containing the financial aspects of the proposal concerned is opened. The term “financial aspects” in this context means that the envelope will contain all the commercial aspects of the proposals that cannot be set out in the terms of reference (which might include

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<sup>1</sup> The guidance to articles 26 and 27 (on choice of procurement methods) will explain that procurement through request for proposals methods can be distinguished from tendering proceedings in that the needs of the procuring entity in request for proposals methods are set out in terms of reference that, as a general rule, focus on the functional aspects of what is to be procured. This type of presentation of the procuring entity’s needs can also be described as an output-based description. In tendering proceedings, on the other hand, the description of the needs of the procuring entity includes technical specifications and is based on a single, defined technical solution (also termed an input-based description).

<sup>2</sup> The Working Group may wish to give examples of procurement of this type.

warranties, guarantees, insurance and so forth) as well as the final price.<sup>3</sup> These aspects may be susceptible to automated evaluation.

4. [In tendering proceedings, the procuring entity may seek clarification of tenders in order to assist in the examination and evaluation procedure and envisages that minor deviations that do not affect the substance of the tender can be accepted (see article 42(1) and (2)). It may be considered that the need for such a facility may be lesser in the context of request for proposals proceedings as proposals respond to terms of reference rather than to technical specifications. Nonetheless, enacting States may wish to include provisions equivalent to those in article 42, with the accompanying safeguards.]<sup>4</sup>

5. Under the Model Law, request for proposals without negotiation is available, subject to its conditions for use, for all types of procurement, in conformity with the UNCITRAL decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 27 (2) of the Model Law; for the relevant guidance, see paragraphs ... above). Enacting States should be aware nevertheless that some multilateral development banks recommend, where procurement methods sharing the features of request for proposals without negotiation as provided for in the revised Model Law are to be used, that they be used for the procurement of well-defined services that are neither complex nor costly, such as the development of curricula, that are usually outsourced because procuring entities generally lack the internal capacity to undertake this type of work. Some multilateral development banks may not authorize the use of this method in other circumstances, at least as regards projects financed by them.

6. The procedures for the use of request for proposals without negotiation, including the submission of the envelopes as described above, are set out in article 46; they mirror the transparency and competition mechanisms of open tendering, save that (as further explained below), the procuring entity may engage in direct solicitation in defined circumstances. For further guidance on those procedural aspects, see paragraphs [...] below.

*For a discussion of the changes in conditions for use from the 1994 text, see section A.4 below.*

## 2. Solicitation

*The relevant provision of the revised Model Law on solicitation:*

### **“Article 34. Solicitation in request for proposals proceedings**

(1) An invitation to participate in the request for proposals proceedings shall be published in accordance with article 32 (1) and (2), except where:

<sup>3</sup> During expert consultations, it was suggested that the term “financial aspects” used in the text might be inaccurate in the light of the experts’ understanding of the scope of the items concerned; and that a suitable alternative term might be “price-related aspects”. The Working Group may wish to consider this suggestion.

<sup>4</sup> The Working Group may wish to consider whether such a provision could alternatively be included in article 46 itself and in other appropriate procurement methods (or as a general provision, in which case it may also be applied to pre-qualification and qualification).

(a) The procuring entity engages in pre-qualification proceedings in accordance with article 17 of this Law or in pre-selection proceedings in accordance with article 48 (3) of this Law; or

(b) The procuring entity engages in direct solicitation under the conditions set out in paragraph (2) of this article; or

(c) The procuring entity decides not to cause the invitation to be published in accordance with article 32 (2) of this Law in the circumstances referred to in article 32 (4) of this Law.

(2) The procuring entity may engage in direct solicitation in request for proposals proceedings if:

(a) The subject matter to be procured is available only from a limited number of suppliers or contractors, provided that the procuring entity solicits proposals from all those suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the subject matter to be procured, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) The procurement involves classified information, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.

(3) The procuring entity shall include in the record required under article 24 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request for proposals proceedings.

(4) The procuring entity shall cause a notice of the procurement to be published in accordance with the requirements set out in article 33 (5) where it engages in direct solicitation in request for proposals proceedings.”

*Proposed text for the Guide:*

1. The article regulates solicitation in request for proposals proceedings. The Model Law provides for three types of request for proposals proceedings: request for proposals without negotiation; request for proposals with dialogue; and request for proposals with consecutive negotiations. The article applies to all three types of request for proposals proceedings. It provides for various solicitation options that the procuring entity may choose, depending on the circumstances of the given procurement.

2. In line with the objectives of the Model Law of fostering and encouraging participation in procurement proceedings by suppliers and contractors and promoting competition among them, paragraph (1) of this article sets out a requirement for open international solicitation as the default rule. The provisions contained in that paragraph are aimed at ensuring that as many suppliers and contractors as possible are made aware of the procurement proceedings and are able to express their interest in participating. As is also the case in tendering proceedings, this objective is fulfilled by providing that an invitation to participate in the request for proposals proceedings should be publicized widely as prescribed in the paragraph.



3. Where request for proposals proceedings are preceded by pre-qualification proceedings, solicitation is subject to separate regulation under article 17, the provisions of which also require international solicitation in the same manner as is required in article 32. Further guidance is set out in the commentary to the guidance to those articles. After the pre-qualification proceedings have been completed, the request for proposals must be provided to all pre-qualified suppliers. Similarly, when pre-selection proceedings are used in request for proposals with dialogue proceedings under article 48 (3), special rules apply: the request for proposals is to be preceded by an open invitation to pre-selection, and following the pre-selection proceedings, the request for proposals is issued to all pre-selected suppliers or contractors. As is the case with pre-qualification, wide international outreach, except in the cases referred to in article 32 (4), is ensured in pre-selection proceedings through the application of article 17 (2).

4. As is also the case in tendering proceedings, there are exceptions to the default rule requiring international solicitation. They are contained in paragraphs (1) (b) and (c) of the article. The exceptions set out in paragraph (1) (c) mirror those contained in article 32: that is, for domestic and low-value procurement as described in article 32 (4). Given the similarity between these provisions, the considerations raised in this Guide as regards article 32 should be taken into account in enacting this paragraph (see paragraphs ... above). The exception set out in paragraph (1) (b) is not found in article 32 since it is relevant only in the request for proposals proceedings where there may be choice between open and direct solicitation.

5. Recognizing that in certain instances, the requirement of open solicitation might be unwarranted or might defeat the objectives of economy and efficiency, paragraph (2) of this article sets out those cases where the procuring entity may engage in direct solicitation in request for proposals proceedings (without pre-qualification or pre-selection). Subparagraphs (a) and (b) generally track the circumstances that may justify direct solicitation in restricted tendering (under article 28 (1)), and the considerations raised in this Guide as regards article 28 (1) are thus relevant in the context of paragraphs (2) (a) and (b). (For the guidance on article 28 (1), see paragraphs ... above.) Subparagraph (c) sets out a distinct ground that may justify recourse to direct solicitation in request for proposals proceedings — procurement involving classified information. In such cases, the procuring entity must solicit proposals from a sufficient number of suppliers or contractors to ensure effective competition.

6. In deciding whether or not to engage in direct solicitation, the procuring entity should give consideration as to whether it is authorized to reject any unsolicited proposals or as to the manner in which it would consider any such proposals. The discussions on this point in this Guide as regards article 33 are also relevant in this context (see paragraphs ... above).

7. Because direct solicitation impedes the objectives of the Model Law of fostering and encouraging open participation in procurement proceedings by suppliers and contractors and promoting competition among them, paragraphs (3) and (4) are included to provide for more transparency and accountability when direct solicitation is used. Paragraph (3) requires the procuring entity including in the record of procurement proceedings a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request for proposals proceedings. Paragraph (4) requires the procuring entity, where it engages in direct

solicitation in request for proposals proceedings, to cause a notice of the procurement to be published in accordance with the requirements set out in article 33 (5) (unless classified information would thereby be compromised) (for the guidance on article 33 (5), see paragraphs ... above). Both measures intend to facilitate a possible challenge by affected suppliers or contractors to the use and manner of use by the procuring entity of direct as opposed to open solicitation.

*For a discussion of the changes as regards solicitation from the 1994 text, see section A.4 below.*

### 3. Procedures

*The relevant provision of the revised Model Law on procedures:*

#### **“Article 46. Request for proposals without negotiation**

(1) The procuring entity shall solicit proposals by causing an invitation to participate in the request for proposals without negotiation proceedings to be published in accordance with article 34 (1) of this Law, unless an exception provided for in that article applies.

(2) The invitation shall include:

(a) The name and address of the procuring entity;

(b) A description of the subject matter of the procurement, and the desired or required time and location for the provision of such subject matter;

(c) 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;

(d) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law;

(e) The criteria and procedures for opening the proposals and for examining and evaluating the proposals in accordance with articles 10 and 11 of this Law, including the minimum requirements with respect to technical and quality characteristics that proposals must meet in order to be considered responsive in accordance with article 10 of this Law, and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;

(f) A declaration pursuant to article 8 of this Law;

(g) The means of obtaining the request for proposals and the place where it may be obtained;

(h) The price, if any, charged by the procuring entity for the request for proposals;

(i) If a price is charged for the request for proposals, the means and currency of payment for the request for proposals;

(j) The language or languages in which the requests for proposals are available;

(k) The manner, place and deadline for presenting proposals.

(3) The procuring entity shall issue the request for proposals:

(a) Where an invitation to participate in the request for proposals without negotiation proceedings has been published in accordance with the provisions of article 34 (1) of this Law, to each supplier or contractor that responds to the invitation in accordance with the procedures and requirements specified therein;

(b) In the case of pre-qualification, to each supplier or contractor pre-qualified in accordance with article 17 of this Law;

(c) In the case of direct solicitation under article 34 (2) of this Law, to each supplier or contractor selected by the procuring entity; and that pays the price, if any, charged for the request for proposals. The price that the procuring entity may charge for the request for proposals shall reflect only the cost of providing it to suppliers or contractors.

(4) The request for proposals shall include, in addition to the information referred to in paragraphs (2) (a) to (e) and (k) of this article, the following information:

(a) Instructions for preparing and presenting proposals, including instructions to suppliers or contractors to present simultaneously to the procuring entity proposals in two envelopes: one envelope containing the technical and quality characteristics of the proposal and the other envelope containing the financial aspects of the proposal;

(b) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;

(c) The currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(d) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(e) The means by which, pursuant to article 15 of this Law, suppliers or contractors may seek clarifications of the request for proposals, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(f) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including

those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(g) 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;

(h) Notice of the right provided under article 63 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(i) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by another authority and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;

(j) 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 presentation of proposals and to the procurement proceedings.

(5) Before opening the envelopes containing the financial aspects of the proposals, the procuring entity shall examine and evaluate the technical and quality characteristics of proposals in accordance with the criteria and procedures specified in the request for proposals.

(6) The results of the examination and evaluation of the technical and quality characteristics of the proposals shall be immediately included in the record of the procurement proceedings.

(7) The proposals whose technical and quality characteristics fail to meet the relevant minimum requirements shall be considered to be non-responsive and shall be rejected on that ground. A notice of rejection and the reasons for the rejection, together with the unopened envelope containing the financial aspects of the proposal, shall be promptly dispatched to each respective supplier or contractor whose proposal was rejected.

(8) The proposals whose technical and quality characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive. The procuring entity shall promptly communicate to each supplier or contractor presenting such a proposal the score of the technical and quality characteristics of its respective proposal. The procuring entity shall invite all such suppliers or contractors to the opening of the envelopes containing the financial aspects of their proposals.

(9) The score of the technical and quality characteristics of each responsive proposal and the corresponding financial aspect of that proposal shall be read out in the presence of the suppliers or contractors invited in accordance with

paragraph (8) of this article to the opening of the envelopes containing the financial aspects of the proposals.

(10) The procuring entity shall compare the financial aspects of the responsive proposals and on that basis identify the successful proposal in accordance with the criteria and the procedure set out in the request for proposals. The successful proposal shall be the proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price.”

*Proposed text for the Guide:*

1. The article regulates the procedures for procurement using request for proposals without negotiations. Paragraph (1), by cross-referring to article 34, reiterates the default rule contained in article 34 (1) of the Model Law that an invitation to participate in the proceedings must, as a general rule, be publicized as widely as possible, so as to ensure wide participation and competition. Solicitation may be preceded by pre-qualification. The exceptions to the open solicitation rule and the guidance on solicitation procedures following pre-qualification are provided for in article 34. (For the guidance to article 34, see paragraphs ... above.)
2. When open solicitation without pre-qualification is involved, an invitation to participate in the request for proposals without negotiation proceedings is issued, which must include the minimum information listed in paragraph (2). Providing that minimum information is designed to assist suppliers or contractors in determining whether they are interested and eligible to participate and, if so, how they can participate. The relevant requirements are similar to those applicable to an invitation to tender (article 36) and an invitation to participate in request for proposals with dialogue proceedings (article 48 (2)). They contain the required minimum and do not preclude the procuring entity from including additional information that it considers appropriate. The procuring entity should take into account that it is usual practice to keep the invitation brief and include therein the most essential information about procurement, which is most pertinent to the initial stage of the procurement proceedings. All other information about the procurement, including elaboration of the information contained in the invitation, is included in the request for proposals (see paragraph (4) of this article). This approach helps to avoid repetition, possible inconsistencies and confusion in the content of the documents issued by the procuring entity to suppliers or contractors. Nonetheless, where the procuring entity uses electronic means of advertisement and communication, it is possible to include in the invitation a web link to the terms of the request for proposals itself: this approach is proving beneficial in terms of both efficiency and transparency.
3. The procuring entity may omit information about the currency of payment and on applicable languages referred to in subparagraphs (i) and (j) in domestic procurement, if it would be unnecessary in the circumstances; however, an indication of the language or languages may still be important in some multilingual countries even in the context of domestic procurement. Subparagraph (e) refers to the minimum requirements with respect to technical and quality characteristics that proposals must meet in order to be considered responsive. This provision covers both the threshold that is to be established for rejecting proposals and assigning scores to proposals that meet or exceed the proposals.

4. Paragraph (3) specifies the group of suppliers or contractors to which the request for proposals is to be issued. Depending on the circumstances of the given procurement, such suppliers may comprise the entire group of suppliers or contractors that respond to the invitation in accordance with the procedures and requirements specified therein; or if pre-qualification has been undertaken, only to those that were pre-qualified; or in the case of direct solicitation, only to those that are directly invited. The provisions contain a standard clause, found also in other provisions of the Model Law in similar context, that the price that may be charged for the request for proposals may reflect only the cost of providing the request for proposals to suppliers or contractors. (See the guidance to article [...] for a further discussion of this limitation.)

5. Paragraph (4) contains a list of the minimum information that should be included in request for proposals in order to assist the suppliers or contractors in preparing their proposals and to enable the procuring entity to compare the proposals on an equal basis. The list is largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (article 38) and contents of request for proposals in request for proposals with dialogue proceedings (article 48 (5)). The differences reflect the procedural specifics of this procurement method, and are aimed at ensuring that the financial aspects of proposals are presented, although simultaneously, separately from quality and technical aspects of the proposals. As explained above, the procuring entity will not have access to the financial aspects of proposals until after it has evaluated their technical and quality aspects. The procuring entity may omit information about currency of payment referred to in subparagraph (c) in domestic procurement, if it would be unnecessary in the circumstances.

6. Paragraphs (5) to (10) of the article regulate the sequential examination and evaluation procedure in this procurement method. They ensure that the procuring entity will not be influenced by the financial aspects of proposals when it evaluates quality and technical aspects of proposals and assigns scores to suppliers or contractors as a result of that evaluation. A number of provisions in those paragraphs are aimed at ensuring transparency and integrity in the process. Paragraphs (6) to (8), for example, contain requirements that the results of the evaluation of technical and quality aspects of the proposals are to be promptly reflected in the record of procurement proceedings and communicated to all suppliers or contractors that presented proposals. Special rules are designed for suppliers and contractors whose quality and technical aspects of proposals were rejected: they are to receive promptly not only information about the fact of rejection but also the reasons therefor, and the unopened envelopes containing financial aspects of their proposals are returned to them. These provisions are essential for the timely debriefing of, and effective challenge, by aggrieved suppliers. (For a fuller discussion of the benefits and procedures for debriefing, see [...].)

7. Paragraphs (8) and (9) allow the presence at the opening of the second envelopes (those containing the financial aspects of proposals) of suppliers or contractors whose proposals as regards quality and technical aspects of proposals met or exceeded the minimum requirements. They can thus verify the accuracy of the information announced by the procuring entity at the opening of second envelopes that is relevant to them, such as on the scores assigned and the financial

aspects of their proposals, and can observe whether the successful proposal is identified in accordance with the criteria and the procedure set out in the request for proposals.

8. The Model Law regulates complex scenarios involving the separate evaluation of all aspects of proposals and combining the results of those evaluations in order to determine the successful proposal. Paragraph (10) therefore defines the successful proposal in this procurement method as the proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price.<sup>5</sup> Enacting States should be aware however that in the procurement of simpler subject matter, the procuring entity may select the successful proposal on the basis of price alone. This approach may be appropriate in situations where the procuring entity does not need to evaluate quality and technical aspects of proposals and assign any scores but rather establishes a threshold by which to measure quality and technical aspects of proposals at such a high level that all the suppliers or contractors whose proposals attain a rating at or above the threshold can in all probability perform the procurement contract at a more or less equivalent level of competence. There should also be no need in such cases to evaluate any financial aspects of proposals other than price. Such procedures are compatible with the Model Law on the condition that the procedures and all criteria involved are set out in the solicitation documents and are applied accordingly.

*For a discussion of the changes in the procedures from the 1994 text, see section A.4 immediately below.*

**4. Points regarding request for proposals without negotiation proposed to be discussed in the Section of the Guide to Enactment addressing changes from the 1994 text of the Model Law**

*Conditions for use*

9. Request for proposals without negotiation is a new procurement method that draws its features from the selection procedure without negotiation (article 42) of the 1994 Model Law. The 1994 Model Law provided for the selection procedure without negotiation in the context of procurement of services only. Under the revised Model Law, request for proposals without negotiation is not treated as a procurement method appropriate only for procurement of services, in conformity with the UNCITRAL decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 27 (2) of the Model Law; for the relevant guidance, see paragraphs ... above).

[Details as regards solicitation and procedures to be added at a later date]

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<sup>5</sup> During expert consultations on the guidance to this article, it was suggested that the Working Group may wish to use the term “most advantageous proposal” for consistency with the term used in tendering, as this term (unlike the previous term “lowest evaluated tender”) no longer has an implicit emphasis on price.

## **B. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals with consecutive negotiations**

### **1. Conditions for use**

*The relevant provision of the revised Model Law on conditions for use:*

**“Article 29. Conditions for use of methods of procurement under chapter V of this Law (... request for proposals with consecutive negotiations, ...)**

(3) A procuring entity may engage in procurement by means of request for proposals with consecutive negotiations in accordance with article 49 of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposals, and it assesses that consecutive negotiations with suppliers or contractors are needed in order to ensure that the financial terms and conditions of the procurement contract are acceptable to the procuring entity.”

*Proposed text for the Guide:*

1. Paragraph (3) sets out conditions for use of request for proposals with consecutive negotiations. The conditions for use and procedures of this method resemble those of the request for proposals without negotiation referred to in article 28 (3) of the Model Law. Like the request for proposals without negotiation procedure, it has proved to be beneficial where quality and technical characteristics may be the main priority and where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of the quality and technical aspects of the proposals (i.e. so that the procuring entity is not influenced by the financial aspects when it examines and evaluates quality and technical aspects of proposals). The words “needs to” in the provisions intend to convey that there is an objective and demonstrable need for the procuring entity to follow this sequential examination and evaluation procedure. Thus, like the request for proposals without negotiation, this procurement method is appropriate for use only where the examination and evaluation of quality and technical aspects of the proposals separately from consideration of financial aspects of proposals is possible and needed.

2. The difference of this procurement method from the request for proposals without negotiation is in the need to hold negotiations on the financial aspects of the proposals, reflecting that it is appropriate for the procurement of goods or services that are designed for the procuring entity, rather than for procurement of subject matter of a fairly standard nature. The request for proposals with consecutive negotiations procedure is thus appropriate for use in the procurement of more complex subject matter, such as intellectual services, where holding negotiations on commercial or financial aspects of proposals is indispensable — there may be so many variables in these aspects of proposals that they cannot be all foreseen and specified at the outset of the procurement and must be refined and agreed upon during negotiations.



3. All stages in this procurement method preceding the stage of negotiations are the same as in the request for proposals without negotiation: the procuring entity sets a threshold on the basis of the quality and technical aspects of the proposals, and then ranks those proposals that are rated at and above the threshold, ensuring that the suppliers or contractors with whom it will negotiate are capable of providing the required subject matter of the procurement. The procuring entity then holds negotiations on financial aspects of the proposals first with the supplier or contractor that was ranked highest; if negotiations with that supplier are terminated, the procuring entity holds negotiations with the next highest-ranked supplier and so on, to the extent necessary, until it concludes a procurement contract with one of them. These negotiations are aimed at ensuring that the procuring entity obtains fair and reasonable financial proposals. The format of consecutive, as opposed to concurrent or simultaneous, negotiations has proved to be the most appropriate in the context of this procurement method in the light of the scope of negotiations covering exclusively financial or commercial aspects of the proposals. When the need exists to negotiate on other aspects of proposals, this procurement method cannot be used. (For the guidance on article 49 regulating procedural aspects of this procurement method, see paragraphs ... below).

4. Request for proposals with consecutive negotiations is not reserved exclusively for the procurement of services. This approach is in conformity with the UNCITRAL decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 27 (2)) (for the relevant guidance, see paragraphs ... above). Enacting States should be aware, nevertheless, that some multilateral development banks recommend the use of the procurement method with features of the request for proposals with consecutive negotiations as provided for in the Model Law for the procurement of advisory services (i.e. those with an intellectual output). The method has traditionally been widely used in such type of procurement. Such banks may not authorize the use of this method in other circumstances, at least as regards projects financed by them.

*For a discussion of the changes in conditions for use from the 1994 text, see section B.4 below.*

## **2. Solicitation**

[Please see in the guidance on RfP without negotiation]

## **3. Procedures**

*The relevant provision of the revised Model Law on procedures:*

### **“Article 49. Request for proposals with consecutive negotiations**

(1) The provisions of article 46 (1)-(7) of this Law shall apply mutatis mutandis to procurement conducted by means of request for proposals with consecutive negotiations, except to the extent those provisions are derogated from in this article.

(2) The proposals whose technical and quality characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive.

The procuring entity shall rank each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals, and shall:

(a) Promptly communicate to each supplier or contractor presenting the responsive proposal the score of the technical and quality characteristics of its respective proposal and its ranking;

(b) Invite the supplier or contractor that has attained the best ranking in accordance with those criteria and procedure for negotiations on the financial aspects of its proposal; and

(c) Inform other suppliers or contractors that presented responsive proposals that they may be considered for negotiation if the negotiations with the suppliers or contractors with a better ranking do not result in a procurement contract.

(3) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (2) (b) 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.

(4) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second best ranking; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors still participating in the procurement proceedings for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

(5) During the course of the negotiations, the procuring entity shall not modify the subject matter of the procurement, nor any qualification, examination or evaluation criterion, including any established minimum requirements, nor any elements of the description of the subject matter of the procurement or term or condition of the procurement contract other than financial aspects of proposals that are subject to the negotiations as notified in the request for proposals.

(6) The procuring entity may not reopen negotiations with any supplier or contractor with which it has terminated negotiations.”

*Proposed text for the Guide:*

1. The article regulates request for proposals with consecutive negotiations procedures. All stages in this procurement method preceding the stage of negotiations are the same as in request for proposals without negotiation. Paragraph (1) therefore makes reference to the applicable provisions of article 46. The guidance to those provisions therefore applies also to this article (see paragraphs ... above).<sup>6</sup>

2. Paragraphs (2) to (6) regulate the distinct procedures of this procurement method. Paragraph (2) addresses issues of ranking and the invitation to consecutive

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<sup>6</sup> See, also, footnote 4 above as regards the use of a clarification procedure in this procurement method.

negotiations. The reference in paragraph (2) (b) to “financial aspects of proposals”<sup>7</sup> intends to exclude any quality, technical and other aspects of proposals that have been considered as part of the examination and evaluation of quality and technical characteristics of proposals.

3. Paragraphs (3) and (6) refer to the notion of “termination of negotiations”. This notion means the rejection of a supplier’s final financial proposal and the consequent exclusion of that supplier from further participation in the procurement proceedings. Thus, no procurement contract can be awarded to the supplier(s) with which the negotiations have been terminated as provided for in paragraphs (3) and (4). This feature may be considered rigid and it may be considered to defeat the efficacy of the procedure. Only at the end of a process of negotiation with all suppliers may the procuring entity know which proposal in fact constitutes the best offer; that offer however may have been rejected as a result of the termination of negotiation with the supplier or contractor submitting it. In addition, the procedure does not necessarily ensure a strong bargaining position on the part of the procuring entity since the highest-ranked supplier, knowing its preferred status, may have little incentives to negotiate, particularly as regards price. The benefit of leverage that may be present in concurrent negotiations is not present here.

4. UNCITRAL has nevertheless decided to include this feature of this procurement method in order to emphasize competition on quality and technical aspects of proposals. When the procurement method is used in appropriate circumstances, this distinct feature of the procurement method may impose discipline on both suppliers and procuring entities to negotiate in good faith. The first-ranking supplier faces a risk that negotiations with the procuring entity may be terminated at any time, leading to the permanent exclusion of the supplier from the procurement proceedings. That supplier may also consider that negotiations with the lower-ranked suppliers are more likely to succeed since such suppliers will have an incentive to improve their position to win, and it is in the interest of the procuring entity to have the procurement contract in the end of the process. Thus the highest-ranked supplier will be under some pressure to negotiate while the procuring entity, facing the risk of rejecting the best technical proposal, will exercise restraint in putting an excessive focus on the financial aspects of proposals at the expense of quality and technical considerations. Fixing a period for the negotiations in the solicitation documents may be considered another effective discipline measure on both sides in negotiations.

5. Whether the procuring entity is willing to compromise on quality and technical considerations by terminating negotiation with a better-ranked supplier and beginning negotiations with the next ranked supplier will very much depend on the circumstances of procurement, in particular the results of the examination and evaluation of the quality and technical aspects of proposals. The extent of the gap between the proposals of various suppliers may vary widely, and the procuring entity’s strategies in negotiations must be adjusted accordingly. The procuring entity can always cancel the procurement if it faces unacceptable proposals.

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<sup>7</sup> See footnote 3 above, as regards the use of this term.

**4. Points regarding request for proposals with consecutive negotiations proposed to be discussed in the Section of the Guide to Enactment addressing changes from the 1994 text of the Model Law**

*Conditions for use*

1. Request for proposals with consecutive negotiations is a procurement method that draws its features from the selection procedure with consecutive negotiations of the 1994 Model Law (article 44). Unlike its equivalent in the 1994 text, the procurement method in the revised text is not reserved exclusively for procurement of services. This approach is in conformity with the UNCITRAL decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 27 (2)) (for the relevant guidance, see paragraphs ... above).

[Details as regards solicitation and procedures to be added at a later date]

(A/CN.9/WG.I/WP.77/Add.7) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twentieth session**

**ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany the related provisions of chapters II and V of the UNCITRAL Model Law on Public Procurement on two-stage tendering.

**GUIDE TO ENACTMENT  
OF  
THE UNCITRAL MODEL LAW ON PUBLIC  
PROCUREMENT**

**Part II. Article-by-article commentary**

[for ease of reference, this addendum consolidates the proposed article-by-article commentary to various provisions of the Model Law regulating two-stage tendering]

...

**Proposed text for the Guide to Enactment of the revised Model Law addressing issues of two-stage tendering**

**1. Conditions for use**

*The relevant provision of the revised Model Law on conditions for use:*

**“Article 29. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)**

(1) A procuring entity may engage in procurement by means of two-stage tendering in accordance with article 47 of this Law where:

(a) The procuring entity assesses that discussions with suppliers or contractors are needed to refine aspects of the description of the subject matter of the procurement and to formulate them with the precision required under article 10 of this Law<sup>1</sup> and in order to allow the procuring entity to obtain the most satisfactory solution to its procurement needs; or

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<sup>1</sup> The Working Group may wish to correct an inaccuracy in this condition for use identified during expert consultations on the draft guidance to this procurement method. The procedures for the method in article 47 make it clear that discussions with suppliers or contractors are optional, and need not be held, contrary to what is stated in article 29 (1). The need is, in reality, to refine certain technical aspects of the description — a step that can be carried out without discussions

(b) Open tendering was engaged in but no tenders were presented or the procurement was cancelled by the procuring entity pursuant to article 18 (1) of this Law and where, in the judgement of the procuring entity, engaging in new open tendering proceedings or a procurement method under chapter IV of this Law would be unlikely to result in a procurement contract.”

*Proposed text for the Guide:*

1. Paragraph (1) of the article provides for conditions for use of two-stage tendering. The rationale behind the two-stage procedure used in this method of procurement is to combine two elements: first, to allow the procuring entity, through the examination of the technical aspects of tenders and optional discussions on them, to refine and finalize the terms and conditions of the procurement that the procuring entity may not have been able to formulate adequately at the outset of the procurement. The second is to ensure the high degree of objectivity and competition provided by the procedures for open tendering proceedings under chapter III that will apply to the selection of the successful tender under two-stage tendering proceedings.

2. UNCITRAL acknowledges that the method has stood the test of time and is successfully used for procurement, for example, of high-technology items, such as large passenger aircraft, information or communication technology systems, technical equipment and other infrastructure procurement (including turnkey contracts, large complex facilities or construction of a specialized nature). In such procurement, it may be undesirable or impractical to prepare a complete description of the procurement setting out all the technical or quality aspects (including technical specifications) at the outset. At that stage, the procuring entity may be able to formulate draft technical specifications at some level of detail, or may express its requirements in terms of output or performance. The aim of the procedure is that initial tenders responding to the description in the solicitation documents should allow the procuring entity to refine the description of the technical and quality aspects so that, at the second stage, the suppliers or contractors present their final tenders against a single technical solution. That single technical solution is then set out in the refined statement of technical and quality aspects forming part of the request to present final tenders. Thus the procuring entity remains responsible for the design of the technical solution throughout the procedure.<sup>2</sup>

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if the initial tenders address the aspects of which the procuring entity is unsure at the outset. An appropriate amendment to the text could read as follows: “(a) The procuring entity assesses that there is a need for a stage in the process to refine the technical and quality aspects of the subject matter of the procurement (which may include discussions with suppliers or contractors) in order for the procuring entity to formulate them in accordance with the precision required under article 10, and so as to allow the procuring entity to obtain the most satisfactory solution to its needs”. A consequential amendment to article 10 to refer to “technical and quality aspects” rather than “technical and quality characteristics” of the subject matter will be made, to ensure that there is sufficient clarity regarding the precision required to distinguish tendering procurement methods from those involving requests for proposals. The difference between these types of procurement is an issue that will be discussed in detail in the guidance to articles 26 and 27 on the choice of procurement method.

<sup>2</sup> The commentary to articles 26 and 27 will explain that in request-for-proposals proceedings, the suppliers make proposals as to how to meet the needs of the procuring entity, and so it is the suppliers that are responsible for the technical solution. It will also discuss the options available

3. As a consequence of the objectives of the procedure, the discussions that may be held in this procurement method with suppliers or contractors will not cover the proposed tender price. They may cover other financial aspects of the tenders only to the extent that such aspects form part of the description of the requirements of the procuring entity as set out in the solicitation documents. All price and price-related items that are not part of discussions are then submitted as part of the final tenders. This feature of this procurement method (as well as the absence of bargaining at any stage of the proceedings) is a further way in which this method differs from other methods available under chapter V.<sup>3</sup>

4. The flexibility and potential benefits described above are not risk-free. In particular, the procuring entity may tailor the final terms and conditions of the procurement to one particular supplier (regardless of whether discussions are held or not, though it should be acknowledged that this risk is also present in open tendering proceedings, particularly where informal market consultations precede the procurement). The transparency provisions applicable to all tendering proceedings should mitigate the risks of distorting the procurement to favour a particular supplier. The procurement system should also require the procurement planning stage to be documented and recorded.

5. This method is a structured one. The rules of open tendering regulate the solicitation procedure and the selection of the successful tender in two-stage tendering (see articles 32 and 47 of the Model Law and the guidance to them in paragraphs [...] below).

6. Subparagraph (a) deals with the procurement of technically sophisticated and complex items. The need for use of the procurement method in these circumstances may become clear at the procurement planning stage: that is, in situations in which it is evident that obtaining best value for money is unlikely if the procuring entity draws up terms and conditions of the procurement without examining initial tenders. Those initial tenders will propose technical solutions as to the exact capabilities and possible variations of what is available in the market. After its examination of the initial tenders, the procuring entity may decide that proposed solutions alone are not adequate and it is necessary to hold discussions with suppliers and contractors whose proposed technical solutions met the minimum requirements set out by the procuring entity.

7. Subparagraph (b) deals with a different situation — where open tendering was engaged in but it failed. This condition is the same as one of the conditions for resort to request for proposals with dialogue, contained in paragraph (2) (d) of this article. In such situations the procuring entity must analyse the reasons for the

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for procurement of complex subject-matter, such as a consultancy contract for design purposes, followed by open or two-stage tendering, and the use of request for proposals with dialogue proceedings. The Working Group may wish to add a cross-reference to that discussion here, rather than repeating those considerations. Hence the focus here is limited to highlighting distinct features of two-stage tendering as compared to other chapter V procurement methods.

<sup>3</sup> The Working Group decided that detailed commentary in the Guide addressing the issues in selecting among the methods of chapter V would be necessary, from the perspective both of legislators and of procuring entities, and that the guidance should address the elements of that selection that could not be addressed in a legislative text and should draw on real-life examples. If the Working Group considers that the above discussion is insufficient, it is requested to provide further guidance to assist the Secretariat in expanding it.

failure of open tendering. Where it concludes that its difficulties in formulating sufficiently precise terms and conditions of the procurement were the reasons for the failure, it may consider that a two-stage procedure in which suppliers are involved is the appropriate course. The reasons for the earlier failure should also guide the procuring entity in selecting between two-stage tendering under paragraph (1) (b) of this article and request for proposals with dialogue under paragraph (2) (d) of this article: if formulating a single set of terms and conditions (including a single technical solution) for the procurement will be possible and appropriate, two-stage tendering will be the appropriate procurement method. The procuring entity will be able to engage with suppliers or contractors in order to be able to formulate those terms and conditions as necessary. (By contrast, the procuring entity may conclude that it is not possible or not appropriate to formulate a single technical solution, in which case request for proposals with dialogue may be the better course — see the guidance to that procurement method at [...].)

8. The provisions refer to the need for holding “discussions”, not “negotiations” or “dialogue”. While reflecting the iterative nature of the process, the term distinguishes the nature of talks that may be held in this method — which may not include the tender price or other financial aspects of the procurement — from the bargaining that may take place in other procurement methods regulated by chapter V of the Model Law.

*For a discussion of the changes in conditions for use from the 1994 text, see section 4 below.*

## 2. Solicitation

*The relevant provision of the revised Model Law on solicitation:*

### **“Article 32. Solicitation in open tendering, two-stage tendering and in procurement by means of an electronic reverse auction**

(1) An invitation to tender in open tendering or two-stage tendering and an invitation to an electronic reverse auction under article 52 of this Law shall be published in [...] (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published).

(2) The invitation 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 or professional journal of wide international circulation.

(3) The provisions of this article shall not apply where the procuring entity engages in pre-qualification proceedings in accordance with article 17 of this Law.

(4) The procuring entity shall not be required to cause the invitation to be published in accordance with paragraph (2) of this article in domestic procurement and in procurement proceedings where the procuring entity decides, in view of the low value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in presenting submissions.”



*Proposed text for the Guide:*

9. The article reflects one of the key features of open tendering — unrestricted solicitation of participation by suppliers or contractors. The same feature is present in two-stage tendering and electronic reverse auctions and is the default rule in request-for-proposals procurement methods.

10. In order to promote transparency and competition, paragraph (1) sets out the minimum publicity procedures to be followed for soliciting tenders 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 that they may need to monitor in order to stay abreast of procurement opportunities in the enacting State. The Model Law does not regulate the means and media of publication, which are left to determination by enacting States. There may be paper or electronic media or combination of both. In this context, considerations raised in the guidance to article 5 in paragraphs [...] above are relevant.

11. In view of the objective of the Model Law of fostering and encouraging international participation in procurement proceedings, paragraph (2) requires publication of the invitations also in media with international circulation in a language customarily used in international trade. These procedures are designed to ensure that invitations to tender or to the electronic reverse auction are issued in such a manner that they will reach and be understood by an international audience of suppliers and contractors.

12. The exceptions to this rule are found in paragraph (4), and comprise cases of domestic procurement, and low-value procurement in which, in the judgement of the procuring entity, there is unlikely to be interest on the part of foreign suppliers or contractors. In such cases, the procuring entity may still solicit internationally but is not required to do so; however, where suppliers or contractors wish to participate (if they have seen an advertisement on the Internet, for example), they must be permitted to do so (see, further, paragraph [...] below).

13. The first exception — resort to domestic procurement — is possible under article 8 of the Law only on grounds specified in the procurement regulations or other provisions of law of the enacting State (for the guidance to that article, see paragraphs [...] above). The second exemption — low-value procurement — relies largely on the judgement of the procuring entity. The Model Law recognizes that in 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. The decision, it should be emphasized, must be recorded and is open to challenge under chapter VIII, and the procuring entity will wish to consider the potential costs and benefits of its approach.

14. To promote transparency and to prevent arbitrary and excessive resort to the second exception, the enacting State may wish to establish in the procurement regulations a value threshold below which procuring entities need not, in accordance with paragraph (4) of the article, resort to international solicitation. This threshold may be the same or different from those to be set out by enacting States in

enacting articles 21 (3) (b) and 22 (2) of the Model Law and may vary for different types of procurement. In the absence of any specific threshold set out by the enacting State in the procurement regulation for the purposes of implementing paragraph (4), the enacting State may wish to give guidance to procuring entities as to appropriate descriptions of low-value procurement in the State concerned, which may take into account the thresholds set out by the enacting State in enacting articles 21 (3) (b) and 22 (2) of the Model Law.<sup>4</sup> <sup>5</sup>

15. Regardless of which approach is followed, the goal of reaching a common understanding in an enacting State of what is meant by low-value procurement should be achieved, to prevent excluding the bulk of procurement from requirement of international publication. The low-value consideration should be taken into account alongside any anticipated lack of a cross-border interest in participating in the procurement concerned (i.e. even if the procuring entity publicized the procurement in a publication of international circulation in a language customarily used in international trade, no international participation would result: foreign suppliers or contractors would simply not be interested). Thus, such publication would involve additional cost without benefit (in particular, translation costs may be applicable). Consistent practices throughout the enacting State's procuring entities in this respect are important to avoid confusion, uncertainty and concerns over the accessibility of the enacting State's procurement system.

16. Where the procuring entity has used an exemption under paragraph (4), it may invoke the other exemptions applicable in the case of the domestic procurement, such as exemption from the requirement to indicate in the solicitation documents information about currency and languages, which may no longer be pertinent in the context of the international procurement (for the guidance on this point, see paragraphs [...] below).

17. The publicity requirements in the Model Law are only minimum requirements. The procurement regulations may require procuring entities to publicize the invitation to tender 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, a contracts bulletin and

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<sup>4</sup> For the purpose of finalizing the guide to these provisions of article 32 (4), the Working Group is requested to confirm the Secretariat's understanding that the procuring entity by invoking the exemption from international solicitation under article 32 (4) will be bound by the threshold established in the Law and procurement regulations for low-value procurement; if the threshold in the procurement regulations is different from the one in articles 21 (3) (b) and 22 (2) of the Law, the one set in the Model Law will prevail; if a threshold in article 21 (3) (b) is different from the one in article 22 (2), the one in article 22 (2) will prevail as more relevant for the purposes of article 32 (4).

<sup>5</sup> At its nineteenth session, the Working Group was requested to consider whether the Model Law, instead of fixing any threshold in its provisions, should refer the matter to the procurement regulations consistently throughout the Model Law, in particular in the light of the fluctuating value of currencies (inflation, etc.) (A/CN.9/WG.I/WP.75/Add.2, footnotes 31 and 38). The Working Group did not consider that suggestion. However, the suggestion was made, during expert consultations on the guidance to be provided for this procurement method, that the Working Group and the Commission may wish to reconsider the point so as to ensure consistent approach to the location of thresholds. Given the need for periodic adjustment as economic circumstances change, the thresholds themselves may best be set out in regulations (by comparison with article 22 (2)).

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.<sup>6</sup> Where the procuring entity uses electronic means of advertisement and communication, it is possible to include in the invitation a Web link to the solicitation documents themselves: this approach is proving beneficial in terms of both efficiency and transparency.

18. The article does not apply, as stated in paragraph (3), in the cases of pre-qualification. This exemption does not indicate that the need for wide international solicitation is not present when pre-qualification proceedings are involved: to the contrary, open participation is mandatory in such proceedings. The solicitation, in those cases however, follows a different pattern: an invitation to tender or to the auction is preceded by an invitation to pre-qualification. The latter is to be issued in accordance with the provisions of article 17 (2) that parallel the provisions of article 32. Wide international outreach to potentially interested suppliers and contractors is therefore ensured also when pre-qualification is involved, except in the cases referred to in article 32 (4). [Cross-reference to appropriate discussion of the principles of open pre-qualification].

### 3. Procedures

*The relevant provision of the revised Model Law on procedures:*

#### **“Article 47. 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 present, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals<sup>7</sup> without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the subject matter of the procurement as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

(3) The procuring entity may, in the first stage, engage in discussions with suppliers or contractors whose tenders have not been rejected pursuant to provisions of this Law, concerning any aspect of their tenders. When the procuring entity engages in discussions with any supplier or contractor, it shall extend an equal opportunity to participate in discussions to all suppliers or contractors.

(4) (a) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite all suppliers or contractors whose tenders were

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<sup>6</sup> This sentence is based on the 1994 commentary to article 24 of the 1994 Model Law. It reflects a general point that may be more appropriate in the general discussion on solicitation e.g. in the introductory part to section II of chapter II. If so, only a cross-reference will be needed here and the following discussion of electronic publication can be moved to that discussion in addition.

<sup>7</sup> The Working Group may wish to recommend that the term “proposals” be replaced with the term “proposed solutions”, so as to avoid confusion with request-for-proposals proceedings.

not rejected at the first stage to present final tenders with prices in response to a revised set of terms and conditions for the procurement;

(b) In revising the relevant terms and conditions of the procurement, the procuring entity may:

(i) Delete or modify any aspect of the technical or quality characteristics of the subject matter of the procurement initially provided, and may add any new characteristic that conforms to the requirements of this Law;

(ii) Delete or modify any criterion for examining or evaluating tenders initially provided, and may add any new criterion that conforms to the requirements of this Law, to the extent only that the deletion or modification is required as a result of changes made in the technical or quality characteristics of the subject matter of the procurement;

(c) Any deletion, modification or addition made pursuant to subparagraph (b) of this paragraph shall be communicated to suppliers or contractors in the invitation to present final tenders;

(d) A supplier or contractor not wishing to present 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;

(e) The final tenders shall be evaluated in order to ascertain the successful tender as defined in article 42 (4) (b) of this Law.”

*Proposed text for the Guide:*

19. This article regulates the procedures for two-stage tendering proceedings. Paragraph (1) serves as a reminder that the rules of open tendering apply to two-stage tendering, save where modification is required by the procedures particular to the latter method. Some of the open tendering rules will be applicable without modification, such as procedures for soliciting tenders (article 35), contents of invitation to tender (article 36) and provision of solicitation documents (article 37). Some other rules of chapter III will require modification in the light of the specific features of two-stage tendering described in paragraphs (2) to (4) of article 47. For example, the provisions of article 38 on the contents of the solicitation documents referring to tender price will not be relevant when initial tenders are solicited. The provisions of article 40 on the period of effectiveness of tenders and modification and withdrawal of tenders are to be read together with paragraph (4) (d) of article 47, which allows a supplier or contractor not wishing to present a final tender to withdraw from the proceedings without forfeiting any tender security (on a justification for the deviation from the applicable open tendering rules, see paragraph [30] below).

20. Some provisions of chapter III, such as article 41 on opening of tenders and provisions of article 42 on evaluation of tenders, will be applicable only to final tenders submitted in response to the revised set of terms and conditions for the procurement. The provisions on presentation of tenders in article 39 and on examination of tenders in article 42 will, on the other hand, be applicable to both initial and final tenders. The provisions of article 43, prohibiting negotiation with

suppliers or contractors after tenders have been submitted, should be interpreted in the context of two-stage tendering as not preventing the non-bargaining type of discussions that may take place in two-stage tendering between the procuring entity and any supplier or contractor with respect to their initial tenders. The prohibition of negotiations of a bargaining nature applies throughout the two-stage tendering proceedings (including to the period after final tenders have been submitted).

21. Paragraph (2) contains specific rules for the solicitation of initial tenders. They modify the rules on solicitation of chapter III. At this stage, the procuring entity may solicit proposed solutions with respect to any terms and conditions of the procurement other than tender price. In the light of the conditions for use of this procurement method (see article 29 (1); for the guidance to this article, see paragraphs [...] above), it is expected that the procuring entity will solicit various solutions relating in the first place to the technical and quality requirements for the subject matter of the procurement and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors. Certain quality requirements may have a commercial impact, such as the acquisition or transfer of intellectual property rights: such aspects can properly form part of the terms and conditions of the procurement and be discussed with suppliers. For example, there may be a requirement in the solicitation documents for solutions to the use of intellectual property (for example, such rights could be licensed or acquired). If so, these requirements form part of the technical aspects of the procurement. Otherwise, the related costs for the use of the intellectual property concerned will be simply part of the tender price submitted at the second stage.

22. The article does not provide for any specific rules on presentation and examination of initial tenders. The relevant provisions of chapter III apply. In particular, the applicable provisions of article 42 (3) will regulate the instances in which rejection of initial tenders will be possible: they are where the supplier or contractor that presented a tender is not qualified; where the tender presented is not responsive; or where a supplier or contractor is excluded from the procurement proceedings on the grounds specified in article 20 (inducement, unfair competitive advantage or conflicts of interest). Other grounds for rejection specified in article 42 (3) are not applicable; they apply to situations when tender prices are examined, which is not the case at this first stage of two-stage tendering. All suppliers whose tenders are not rejected are entitled to participate further in the procurement proceedings.

23. Paragraph (3) provides for the possibility of holding discussions with suppliers or contractors whose tenders have not been rejected, concerning any aspect of their tenders. Discussions may involve any aspect of the procurement but price and are of a non-bargaining nature (on this point, see the guidance in paragraphs [...] above). Discussions will not always be necessary since the procuring entity may be able to refine and finalize the terms and conditions of the procurement itself, on the basis of the initial tenders received. The provisions of paragraph (3) require that, when the procuring entity decides to engage in discussions, it must extend an equal opportunity to discuss to all suppliers or contractors concerned.

24. Paragraph (4) regulates the procedural steps involved at the subsequent stages of the two-stage tendering to the extent that they are different from the rules of open tendering in chapter III of the Model Law. It also regulates issues arising from the

preparation and issue of a final revised set of terms and conditions, such as the extent of permissible changes to the terms and conditions originally advertised.

25. Subparagraph (a) imposes the obligation on the procuring entity to extend the invitation to present final tenders, following the issuance of a revised set of terms and conditions for the procurement, to all suppliers or contractors whose tenders were not rejected at the first stage. Final tenders are equivalent to the tenders submitted in open tendering: that is, they will be assessed for responsiveness to the solicitation and will include prices.

26. Subparagraph (b) addresses the extent of permissible changes to the terms and conditions of the procurement originally announced. Changes (deletions, modifications or additions) are permitted to the technical and quality aspects of the subject matter and to the criteria for examining and evaluating tenders, under certain conditions that aim at limiting the discretion of the procuring entity in this respect. In the light of the objective of the Model Law of providing for the fair and equitable treatment of all suppliers and contractors, changes to the technical and quality aspects made following the first stage of the procedure may not change the description of the subject matter of the procurement as originally announced. If the description of the subject matter would be so changed, new procurement proceedings must be held to allow new suppliers or contractors to participate (including suppliers or contractors whose initial tenders were rejected or that would now become qualified). Article 15 (3) is relevant in this context: it requires the procuring entity to re-advertise the procurement if, as a result of clarifications and modifications of the solicitation documents, the information about procurement published when first soliciting participation of suppliers or contractors in the procurement proceedings has become materially inaccurate (for the guidance to article 15 (3), see paragraphs [...] above).

27. Subparagraph (b) (i) addresses the extent of permissible changes to the description of the subject matter of the procurement. They refer primarily to technical and quality aspects of the subject matter of the procurement in the light of the main aim of the two-stage tendering — to enhance the precision of technical and quality specifications of the subject matter of the procurement, to narrow down the possible options to the one that would best meet the procuring entity's needs, and on that basis to finalize a single set of terms and conditions of the procurement.

28. Changes to technical or quality aspects of the subject matter of the procurement may necessarily require changes to the examination and/or evaluation criteria, as otherwise the examination and/or evaluation criteria at the second stage would not reflect the applicable technical and quality aspects. Subparagraph (b) (ii) therefore provides that only those changes may be introduced to the examination and evaluation criteria that are strictly necessary as a result of changes made to the technical or quality aspects of the subject matter of the procurement.

29. Subparagraph (c) requires any changes made to the terms and conditions of the procurement as originally announced to be communicated to suppliers or contractors, through the medium of the invitation to present final tenders.

30. Subparagraph (d) permits suppliers or contractors to refrain from 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 included to enhance participation by suppliers or contractors since, upon the deadline for submission of initial tenders,

the suppliers or contractors cannot be expected to know what changes to the terms and conditions of the procurement may subsequently be made. In the light of the features of this procurement method, tender securities most likely will be required however in the context of presentation of final tenders rather than of initial tenders.

31. Subparagraph (e) subjects the procedural steps involved in examination and evaluation of final tenders and determination of the successful tender to the rules of open tendering in chapter III of the Model Law.

32. Enacting States should note the particular importance of the provisions of article 23 on confidentiality in the context of this procurement method (as in any other procurement method under chapter V). The risks of revealing, inadvertently or otherwise, commercially sensitive information of competing suppliers or contractors may arise not only at the stage of discussions but also in the formulation of the revised set of the terms and conditions of the procurement (for example, in the use of requirements, symbols and terminology to describe the revised technical and quality aspects of the subject matter, which may inadvertently reveal the source of information) and in the communication, as required under paragraph (4) (c), of changes made to the terms and conditions originally advertised to the suppliers or contractors. In conformity with the requirements of article 23, the procuring entity must respect the confidentiality of the suppliers or contractors' technical proposals throughout the process. The importance of this safeguard should not be underestimated if the integrity of, and fairness and public confidence in, the procurement process is to be preserved, and the participation of suppliers or contractors in the ongoing and any future two-stage procurement proceedings is to be ensured.

*For a discussion of the changes in procedures from the 1994 text, see section 4 immediately below.*

**4. Points regarding two-stage tendering proceedings proposed to be discussed in the Section of the Guide to Enactment addressing changes from the 1994 text of the Model Law**

*Conditions for use*

33. The provisions on two-stage tendering in the revised Model Law draw on the provisions of the 1994 Model Law regulating the same procurement method (article 19 (1)). Changes have been made to the 1994 provisions to make the primary condition for use of this procurement method (as reflected in subparagraph (a) of article 29 (1)) more specific and distinct from the conditions for use of other procurement methods of chapter V (in the 1994 text, the same conditions for use applied to three procurement methods: two-stage tendering, request for proposals and competitive negotiations). In addition, the phrasing of the conditions for use in subparagraph (a) has been amended to make it clear that discussions with suppliers or contractors are an optional feature of the method.

34. A reference to seeking external approval for the use of this procurement method, which was present in the 1994 text, has been deleted in conformity with the UNCITRAL decision not to require, as a general rule, in the revised Model Law the procuring entity to seek an approval of another body for steps to be taken by the procuring entity (for the guidance on this point, see paragraphs [...] above).

*Procedures*

35. The procedures for two-stage tendering are based on article 46 of the 1994 Model Law. Substantive revisions, aimed at enhancing precision and strengthening safeguards against abuses in this procurement method, have been made in paragraph (3) and (4) of the article [detail to be added at a later date].



**(A/CN.9/WG.I/WP.77/Add.8) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twentieth session****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany the related provisions of chapters II and V of the UNCITRAL Model Law on Public Procurement on request for proposals with dialogue.

**GUIDE TO ENACTMENT  
OF  
THE UNCITRAL MODEL LAW  
ON PUBLIC PROCUREMENT**

**Part II. Article-by-article commentary**

[For ease of reference, this addendum consolidates the proposed article-by-article commentary to various provisions of the Model Law regulating request for proposals with dialogue.]

...

**Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals with dialogue**

**1. Conditions for use**

*The relevant provision of the revised Model Law on conditions for use:*

**“Article 29. Conditions for use of methods of procurement under chapter V of this Law (... request for proposals with dialogue ...)**

(2) (Subject to approval by the [name of the organ designated by the enacting State to issue the approval]), a procuring entity may engage in procurement by means of request for proposals with dialogue in accordance with article 48 of this Law where:

(a) It is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement in accordance with article 10 of this Law,<sup>1</sup> and the procuring entity assesses that dialogue

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<sup>1</sup> The Working Group may wish to correct an inaccuracy in this condition for use identified during expert consultations on the draft guidance to this procurement method. Article 10 (1) does not require any particular level of detail in the description of the subject matter of the procurement that is to be included in the solicitation documents, and article 10 (4) sets out the requirements for “any description” without qualification. Thus it would always be possible to fulfil the

with suppliers or contractors is needed to obtain the most satisfactory solution to its procurement needs;

(b) The procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) The procuring entity determines that the selected method is the most appropriate method of procurement for the protection of essential security interests of the State; or

(d) Open tendering was engaged in but no tenders were presented or the procurement was cancelled by the procuring entity pursuant to article 18 (1) of this Law and where, in the judgement of the procuring entity, engaging in new open tendering proceedings or a procurement method under chapter IV of this Law would be unlikely to result in a procurement contract.”

*Proposed text for the Guide:*

1. Paragraph (2) provides conditions for use of the procurement method called request for proposals with dialogue, a procedure that is designed for the procurement of relatively complex goods, construction and services. As with all procurement methods under the Model Law, the use of this method is not intended exclusively for any type of procurement (be it procurement of goods, construction or services). Also in common with all procurement methods under the Model Law, the procuring entity will be able to choose this procurement method when the conditions for use are satisfied, and when it assesses that the method is best suited to the given circumstances. Article 27 (setting out general principles for the choice of procurement methods, guidance to which is found at ...), paragraph (2) of this article setting out conditions for use of this procurement method, and the distinct procedural features of this procurement method (as set out in article 48) will guide the procuring entity in taking its decision in this regard.

2. The procedure itself involves two stages. At the first stage, the procuring entity issues a solicitation setting out a description of its needs expressed as terms of reference to guide suppliers in drafting their proposals. The needs can be expressed in functional, performance or output terms but are required to include minimum technical requirements. The second stage of the procedure is designed to enable suppliers and contractors to understand, through dialogue with the procuring entity, the needs of the procuring entity as outlined in its request for proposals. Upon conclusion of the dialogue, the suppliers and contractors make best and final offers (“BAFOs”) to meet those needs. BAFOs may be similar in some respects while significantly different in others, in particular as regards proposed technical solutions. The method therefore gives the procuring entity the opportunity of comparing different technical solutions to and alternatives and options for its needs. By comparison with two-stage tendering (which is a procedurally similar but

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requirements of article 10. An alternative formulation could be to refer to a “complete description” in paragraph 2 (a) of article 29, and to amend article 10 (1) and (4) to require a complete description that complies with the minimum requirements set out in article 10 (4) to be set out in the solicitation documents.

substantively different method), it is not intended that the procedure will involve the procuring entity in setting out a full technical description of the subject matter of the procurement.

3. Methods based on this type of dialogue have proved to be beneficial to the procuring entity in procurement of complex works and services where the opportunity cost of not engaging in negotiations with the supply side is high, while the economic gains of engaging in the process are evident. They are appropriate for example in the procurement of architectural or construction works, where there are many possible solutions to the procuring entity's needs and in which the personal skill and expertise of the supplier or contractor can be evaluated only through negotiations. The complexity need not be at the technical level: in infrastructure projects, for example there may be different locations and types of construction as the main variables. The method has enabled the procuring entity in such situations to identify and obtain the best solution to its procurement needs.

4. Since the dialogue normally involves complex and time-consuming procedures, the method should be utilized only when its benefits are appropriate, and not for simple items that are usually procured through procurement methods not involving interaction with suppliers. The procurement method is, for example, not intended to apply to cases where negotiations are required because of urgency or because there is an insufficient competitive base (in such cases, the use of competitive negotiations or single-source procurement is authorized under the revised Model Law). It does not address the type of negotiations that seek only technical improvements and/or price reductions, as are envisaged in request for proposals with consecutive negotiations. Nor it is intended to apply in situations in which two-stage tendering proceedings should be used in accordance with paragraph (1) of this article — i.e. when the procuring entity needs to refine its procurement needs and envisages formulating a single set of terms and conditions (including specifications) for the procurement, against which tenders can be presented.

5. Paragraph (2) (a) of the article sets out the condition for what is expected to be the main use of request for proposals with dialogue: that the procuring entity cannot formulate a complete description of the subject matter of the procurement at the outset of the procedure, and it will need to engage in several phases of dialogue with suppliers or contractors capable of delivering the subject matter of the procurement in order to come to acceptable solutions to satisfy its needs. In practice, the procuring entity must be able to describe its broad needs at the outset of the procurement at the level of functional (or performance or output) requirements. This requirement reflects the fact that inadequate planning is likely to mean that the procurement will be unsuccessful; it is also needed so as to provide the minimum technical requirements that article 48 calls for and to allow the effective participation of suppliers or contractors.

6. Similarly to the situation envisaged in sub-paragraph 2 (a), the situation described in subparagraph (b) refers to procurement in which a tailor-made solution is needed (for example, an information technology system for the archiving of legal records, which may need particular features such as long-term accessibility), and where technical excellence is an issue. The third condition, in subparagraph (c), refers to procurement for the protection of essential security interests of the State. This condition would usually cover the security and defence sectors where the need

may involve the procurement of highly complex subject matter and/or conditions for supply, at the same time requiring measures for the protection of classified information.

7. The last condition for use of this method, in subparagraph (d), is the same as one of the conditions for use of two-stage tendering — open tendering was engaged in but it failed. In such situations the procuring entity must analyse the reasons for the failure of open tendering. Where it concludes that using open tendering again or using any of the procurement methods under chapter IV of this Law would not be successful, it may also conclude that it faces difficulties in formulating sufficiently precise terms and conditions of the procurement at the outset of the procurement. The reasons for the earlier failure should guide the procuring entity in selecting between two-stage tendering under paragraph (1) (b) of this article and request for proposals with dialogue under paragraph (2) (d) of this article. In order to use request for proposals with dialogue proceedings, the procuring entity would have to conclude that formulating a complete single set of terms and conditions of the procurement would not be possible or would not be appropriate, and therefore dialogue with suppliers or contractors is necessary for the procurement to succeed.

8. Enacting States should be aware of the practice accumulated with the use of procurement methods involving dialogue of the type envisaged in the request for proposals with dialogue of the Model Law, in particular their benefits, difficulties and risks. It is evident that the method presupposes significant discretion in decision-making on the part of the procuring entity, which must therefore possess sufficient knowledge and skills in the use of negotiating tools to match those of their counterparts in dialogue, or otherwise it will be placed in a disadvantaged bargaining position during the dialogue. Although the supply side of the market, not the procuring entity, makes proposals to meet the procuring entity's needs, suppliers should not take a lead in defining those needs.

9. The Model Law regulates this procurement method in considerable detail to mitigate the risks and difficulties that it can involve where used inappropriately or without the degree of care and capacity required to use it effectively. The conditions in paragraph (2) may mitigate concerns over the inappropriate use of this procurement method, by effectively preventing its use to procure items that should be procured through tendering or other, less flexible, methods of procurement.

10. Apart from imposing exhaustive conditions for use of this procurement method, the revised Model Law refers to the possibility of requiring external approval for the use of this procurement method. If an enacting State decides to provide for ex ante approval by a designated authority for such use, it must enact the opening phrase put in parenthesis in the chapeau provisions of paragraph (2). [It is an exceptional measure since the decision of UNCITRAL has been not to require, as a general rule, in the revised Model Law a high-level approval for resort to any procurement method (for the guidance on this point, see paragraphs ... above).] The exception was made in this case to signal to enacting States that higher measures of control over resort to this procurement method may be justifiable in the light of the particular features of this procurement method that make it at risk of abusive behaviour, which may be difficult to mitigate in some enacting States.

11. If the provisions are enacted, it will be for the enacting State to designate an approving authority and its prerogatives in the procurement proceedings, in

particular whether these prerogatives will end with granting to the procuring entity the approval to use this procurement method or also extend to some form of supervision on the way proceedings are handled. As a matter of good practice, the approving authority in exercise of its functions should be independent from the procuring entity and should have authority to bar the use of the method if the appropriate institutional framework, capacity and integrity within the procuring entity are not available or where the method is intended for use where it is not justified (for example, to avoid appropriate preparation for the procurement and shift responsibility of defining procurement needs to the supply side).

12. Article 48 contains detailed rules regulating the procedures for this procurement method, which are designed to include safeguards against possible abuses or improper use of this method and robust controls. Nonetheless, they also preserve the necessary flexibility and discretion on the part of the procuring entity in the use of the method, without which the benefits of the procedure disappear. The provisions have been aligned with the UNCITRAL instruments on privately financed infrastructure projects (see paragraphs ... below).<sup>2</sup>

13. The safeguards in particular aim at: (a) transparency by requiring proper notification of all concerned about the essential decisions taken in the beginning, during and at the end of the procurement proceedings, at the same time preserving confidentiality of commercially sensitive information as required under article 23; (b) objectivity, certainty and predictability in the process, in particular by requiring that all methods of limiting or reducing a number of participants in the procurement proceedings are made known from the outset of the procurement, and also by regulating the extent of permissible modifications to the terms and conditions of the procurement and by prohibiting post-BAFOs negotiations; (c) promoting effective competition through the same mechanism; (d) enhancing participation and ensuring the equitable treatment of suppliers and contractors by requiring that the dialogue be held on a concurrent basis and be conducted by the same representatives of the procuring entity, by regulating communication of information from the procuring entity to the participating suppliers or contractors during the dialogue stage and by setting rules for the stages following the completion of the dialogue; and (d) accountability by requiring comprehensive record-keeping in supplementing provisions of article 24.

14. Some other measures aim at enhancing participation of suppliers in procurement by this method. For example, inherent in the method is the fact that participating suppliers or contractors will invest significant time and resources in their participation. Participation will be discouraged if there is no reasonable chance of winning the contract to be awarded at the end of the procurement process. The procedures for the method therefore set out a process that enables the procuring entity to limit the number of participants to an appropriate number.

15. Similarly, suppliers or contractors will not be willing to participate if their proposals, which have a commercial value, are subsequently turned into a description available to all potential participants. The procedures for the method, as explained above, provide safeguards since they do not envisage the issue of a

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<sup>2</sup> The UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects and the UNCITRAL Legislative Guide on the same subject, available as of the date of this report at [www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html).

complete set of terms and conditions of the procurement against which proposals can be presented at any stage of this procurement method (by contrast with the position in two-stage tendering). A single set of minimum requirements and an ordered list of evaluation criteria are made available at the outset of the procurement, which cannot be varied during the proceedings. During the dialogue process, the procuring entity evaluates proposals of various suppliers or contractors against those requirements and criteria. Suppliers or contractors may have several chances to refine their original and subsequent proposals in order to adjust them to the needs of the procuring entity as clarified during the dialogue. The final stage in this procurement method — the selection of the successful proposal after completion of the dialogue phase — involves the evaluation of BAFOs that contain the final proposal from each supplier or contractor and the terms and conditions of their respective offers.

16. The dialogue is to be conducted “concurrently”. This term is used in the text to stress that all suppliers and contractors are entitled to an equal opportunity to participate in the dialogue, and there are no consecutive discussions. The term also seeks to avoid the impression that the dialogue is to be conducted at precisely the same time with all suppliers or contractors, which would presuppose that different procurement officials or negotiating committees composed of different procurement officials are engaged in dialogue. Such a stance has been considered undesirable as it may lead to the unequal treatment of suppliers and contractors. For guidance on the conduct of the dialogue, see paragraphs [...] below.

17. Enacting States should recognize that regulatory and procedural safeguards alone will not be sufficient. They must be supported by an appropriate institutional framework, measures of good governance, high standards of administration and high-skilled procurement personnel. The experience of the multilateral development banks has indicated that putting in place the institutional frameworks and safeguards that are a prerequisite for the use of this method have proved to be among the most difficult reforms to implement.

18. As an example of a supporting measure that can mitigate the higher risks of corruption and abuse than in other less flexible procedures inherent in the dialogue format in this procedure, is the use of independent “probity officers” who can observe the conduct of dialogue. Such observation can prevent the disclosure of commercially sensitive information, such as price, to competitors, and the provision of important information to favoured suppliers only. The enacting State may wish to encourage procuring entities to take such practical steps as part of the managerial tools necessary for the effective use of this procurement method.

19. Because of the inherent features and the associated risks of this procurement method, some multilateral development banks may have a general difficulty with authorizing the use of this procurement method in projects financed by them, in particular for quantifiable (or non-intellectual) types of services and intellectual services that might be more appropriately procured through consecutive rather than concurrent negotiations. Ex ante approval by a designated authority [and establishing a threshold] for resort to this procurement method may accommodate concerns of multilateral development banks that resort to this procurement method

may occur in improper circumstances and in the absence of the adequate enabling framework and capacities on the side of the procuring entity.<sup>3</sup>

## 2. Solicitation

[Please see in the guidance on RfP without negotiation.]

## 3. Procedures

*The relevant provision of the revised Model Law on procedures:*

### [Article 48. Request for proposals with dialogue]

Not reproduced for reasons of otherwise exceeding the word and page limits imposed by the United Nations General Assembly on the length of documents produced by the Secretariat.]

*Proposed text for the Guide:*

20. The article regulates request for proposals with dialogue procedures. The steps involved in this procedure are: (a) an optional request for expressions of interest, which does not confer any rights on suppliers or contractors, including any right to have their proposals evaluated by the procuring entity. In this sense, it resembles an advance notice of possible future procurement referred to in article 6 (2) (for the guidance to article 6, see paragraphs ... above); (b) pre-qualification or pre-selection when it is expected that more than the optimum number of qualified candidates would express interest in participating; if neither pre-qualification or pre-selection is involved, open or direct solicitation as regulated by article 34; (c) issue of the request for proposals to those responding to the open or direct solicitation or to those pre-qualified or pre-selected, as the case may be; (d) concurrent dialogue, which as a general rule is held in several rounds or phases; (e) completion of the dialogue stage with a request for BAFOs; and (f) award. The article regulates these procedural steps in the listed chronology, except for an optional request for expressions of interest, which, as stated, is covered by provisions of article 6.

21. Paragraph (1), by cross-referring to article 34, reiterates the default rule contained in article 34 (1) of the Model Law that an invitation to participate in the request for proposals with dialogue proceedings must as a general rule be publicized as widely as possible to ensure wide participation and competition (unless the solicitation has been preceded by pre-qualification or pre-selection, both of which procedures also include a substantive requirement for wide publicity). The solicitation options are at the choice of the procuring entity in the light of the circumstances of the given procurement and subject to the requirements of article 34. (For the guidance to article 34, see paragraphs ... above.) Relevant

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<sup>3</sup> The Working Group decided that detailed commentary in the Guide addressing the issues in selecting among the methods of chapter V would be necessary, from the perspective both of legislators and of procuring entities, and that the guidance should address the elements of that selection that could not be addressed in a legislative text and should draw on real-life examples. If the Working Group considers that the above discussion is insufficient, it is requested to provide further guidance to assist the Secretariat in expanding it. Further discussion may also be appropriate in the guidance to articles 26 and 27.

exceptions to the open solicitation rule are provided for in article 34, such as there being a limited supply base or the procurement involving classified information.

22. When open solicitation without pre-qualification or pre-selection is involved, an invitation to participate in the request for proposals with dialogue is issued, which must contain the minimum information listed in paragraph (2). This minimum information is designed to assist suppliers or contractors to determine whether they are interested and eligible to participate in the procurement proceedings and, if so, how they can participate. The information specified is similar to that required for an invitation to tender (article 36). The procuring entity may omit information about the currency of payment and about languages, referred to in subparagraphs (j) and (k), in domestic procurement, if it would be unnecessary in the circumstances; however, an indication of the language or languages may still be important in some multilingual countries in the context of domestic procurement.

23. Paragraph (2) lists the required minimum information and does not preclude the procuring entity from including additional information that it considers appropriate. The procuring entity should take into account however that it is the usual practice to keep the invitation brief and include the most essential information about procurement; that information is also most relevant to the initial stage of the procurement proceedings. All other information about the procurement, including further detail of the information contained in the invitation, is included in the request for proposals (see paragraph (5) of this article). This approach helps to avoid repetitions, possible inconsistencies and confusion in the content of the documents issued by the procuring entity to suppliers or contractors. It is in particular advisable in this procurement method since some information may become available or be refined later in the procurement proceedings (to the extent permitted by paragraph (9) of the article).

24. Paragraph (3) regulates pre-selection proceedings, as an option for the procuring entity to limit a number of suppliers or contractors from which to request proposals. The provisions have been aligned generally with the provisions on pre-selection found in the UNCITRAL instruments on privately financed infrastructure projects. Pre-selection proceedings allow the procuring entity to specify from the outset of the procurement that only a certain number of best qualified suppliers or contractors will be admitted to the next stage of the procurement proceedings. This tool is available as an option where it is expected that many qualified candidates will express interest in participating in the procurement proceedings. The Model Law provides for this possibility only in this procurement method: it is considered justifiable in the light of the significant time and cost that would be involved in examining and evaluating a large number of proposals. It is therefore an exception to the general rule of open participation as described in [...] above.

25. The number of suppliers or contractors to be admitted to the next stage of the procurement proceedings may also, in fact, be limited as a result of pre-qualification. The latter, however, cannot be used under the Model Law with certainty that it will limit the participation to a pre-determined maximum number of participants because it merely excludes unqualified suppliers whose qualifications can only be estimated in advance. If all suppliers or contractors applying for pre-qualification will turn out to be qualified, they must be admitted to the next stage of the procurement proceedings.



26. Pre-selection is held in accordance with the rules applicable to pre-qualification proceedings. The provisions of article 17 therefore apply to pre-selection, to the extent that they are not derogated from in paragraph (3) (to reflect the nature and purpose of pre-selection proceedings). For example, to ensure transparency and the equitable treatment of suppliers and contractors, paragraph (3) requires the procuring entity from the outset of the procurement to specify that the pre-selection proceedings will be used, the maximum number of pre-selected suppliers or contractors from which proposals will be requested, the manner in which the selection of that number of suppliers or contractors will be carried out and criteria that will be used for ranking suppliers or contractors, which should constitute qualification criteria and should be objective and non-discriminatory.

27. The maximum number of suppliers to be pre-selected must be established by the procuring entity in the light of the circumstances of the given procurement to ensure effective competition. When possible, the minimum should be at least three. If the procuring entity decides to regulate the number of suppliers or contractors to be admitted to the dialogue (see paragraph (5) (g) of the article), the maximum number of suppliers or contractors from which proposals will be requested should be established taking into account the minimum and maximum numbers of suppliers or contractors intended to be admitted to the dialogue phase as will be specified in the request for proposals under paragraph (5) (g) of this article. It is recommended that the maximum number of suppliers or contractors from which proposals will be requested should be higher than the maximum to be admitted to the dialogue phase, in order to allow the procuring entity to select from a bigger pool the most suitable candidates for the dialogue phase. To enable effective challenge, the provisions require promptly notifying suppliers or contractors of the results of the pre-selection and providing to those that have not been pre-selected reasons therefor.

28. Paragraph (4) specifies the group of suppliers or contractors to which the request for proposals is to be issued. Depending on the circumstances of the given procurement, this group could constitute the entire group of suppliers or contractors that respond to the invitation; or, if pre-qualification or pre-selection was involved, to only those that were pre-qualified or pre-selected; in the case of direct solicitation, the group would comprise of only those that are directly invited. The provisions also contain a standard clause in the Model Law that the price that may be charged for the request for proposals may reflect only the cost of providing the request for proposals to the suppliers or contractors concerned.

29. Paragraph (5) contains a list of the minimum information that should be included in the request for proposals in order to assist the suppliers or contractors in preparing their proposals [and to enable the procuring entity to compare the proposals on an equal basis].<sup>4</sup> The list is largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (article 38) and contents of request for proposals in the request for proposals without negotiation proceedings (article 46 (4)). The differences reflect the procedural specifics of this procurement method.

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<sup>4</sup> The Working Group may wish to consider the accuracy of the statement put in square brackets in the context of this procurement method.

30. The procuring entity may omit information about the currency of payment referred to in subparagraph (c), in domestic procurement, if it would be unnecessary in the circumstances. This information as well as related information about the proposal price may also be irrelevant in procurement of non-quantifiable advisory services where the cost is not a significant evaluation criterion and therefore initial proposals often need not contain financial aspects or price. Instead, in the context of evaluation criteria referred to in subparagraph (h), the emphasis in this type of procurement will be placed on the service-provider's experience for the specific assignment, the quality of the understanding of the assignment under consideration and of the methodology proposed, the qualifications of the key staff proposed, transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the description of the assignment, and when applicable, the extent of participation by nationals among key staff in the performance of the services.

31. The inclusion of such criteria as evaluation criteria does not preclude specifying a particular level required as qualification criteria under article 9 and paragraph (2) (e) of this article. Whereas by virtue of article 9 the procuring entity has the authority not to evaluate or pursue the proposals of unqualified suppliers or contractors, by specifying the same criteria as the evaluation criteria, the procuring entity will be able to weigh, for example, the required experience of one service provider against experience of others. On the basis of such comparison, it might feel more, or less, confident in the ability of one particular supplier or contractor than in that of another to implement the proposal.<sup>5</sup>

32. While the primary focus of dialogue typically may be on technical aspects or legal or other supporting issues, the subject matter of the procurement and market conditions may allow and even encourage the procuring entity to use price as an aspect of dialogue. In addition, in some cases, it is not possible to separate price and non-price criteria. Thus a preliminary price may be required to be provided in the initial proposals. The price is always included in the BAFOs.

33. Paragraph (5) (g) is applicable in situations when the procuring entity, in the light of the circumstances of the given procurement, decides that a minimum and/or maximum number of suppliers or contractors with whom to engage in dialogue should be established. Those limits should aim at reaching the optimum number of participants, taking into account that in practice holding concurrent negotiations with many suppliers has proved to be very cumbersome and unworkable, and may discourage participation. The provisions refer to a desirable minimum of three participants. They are supplemented by provisions of paragraphs (6) (b) and (7).

34. Paragraph (5) (h) refers to the criteria and procedures for evaluating the proposals in accordance with article 11 that in particular sets out exceptions to default requirements as regards assigning the relative weights to all evaluation criteria, to accommodate the specific features of this procurement method. These features may make it impossible for the procuring entity to determine from the outset of the procurement the relative weights of all evaluation criteria. It is therefore permitted under article 11 to list the relevant criteria in the descending order of importance. Where sub-criteria are also known in advance, they should be

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<sup>5</sup> The Working Group may wish to consider whether this point is relevant in other procurement methods, and whether it should be discussed in the context of qualification generally.

specified as well and assigned relative weight if possible; if not, they should also be listed in the descending order of importance. It is recognized that different procurements might require different levels of flexibility as regards specification of evaluation criteria and procedures in this procurement method. However, providing a true picture of the evaluation criteria and procedure from the outset of the procurement proceedings is important as a general transparency measure.<sup>6</sup>

35. In the context of paragraph (5) (m) requiring the procuring entity to specify in the request for proposals any other requirements relating to the proceedings, it may be beneficial to include the timetable envisaged for the procedure. The proceedings by means of this procurement method are usually time- and resource-consuming on both sides — the procuring entity and suppliers or contractors. An estimated timetable of the proceedings in the request for proposals encourages better procurement planning and makes the process more predictable, in particular as regards the maximum period of time during which suppliers or contractors should be expected to commit their time and resources. It also gives both sides a better idea as regards the timing of various stages and which resources (personnel, experts, documents, designs, etc.) would be relevant, and should be made available, at which stage.

36. After the provision of the request for proposals to the relevant suppliers or contractors, sufficient time should be allowed for suppliers or contractors to prepare and submit their proposals. The relevant timeframe is to be specified in the request for proposals and may be adjusted if need be, in accordance with the requirements of article 14.

37. Paragraph (6) regulates the examination (assessment of responsiveness) of proposals. All proposals are to be assessed against the established minimum examination criteria notified to suppliers or contractors in the invitation to the procurement and/or request for proposals. The number of suppliers or contractors to be admitted to the next stage of the procurement proceedings — dialogue — may fall as a result of the rejection of non-responsive proposals, i.e. those that do not meet the established minimum criteria. As in the case with pre-qualification proceedings (see paragraph [25] above), examination procedures cannot be used for the purpose of limiting the number of suppliers or contractor to be admitted to the next stage of the procurement proceedings. If all suppliers or contractors presenting proposals turn out to be responsive, they all must be admitted to the dialogue unless the procuring entity reserved the right to invite only a limited number. As stated in the context of paragraph (5) (g) (see paragraph [33] above), such a right can be reserved in the request for proposals. In this case, if the number of responsive proposals exceeds the established maximum, the procuring entity will select the maximum number of responsive proposals in accordance with the criteria and procedure specified in the request for proposals. The Model Law itself does not regulate this procedure and criteria, which may vary from procurement to procurement. A certain level of subjectivity in the selection cannot be excluded in this procurement method. The risk of abusive practices should be mitigated by the requirement to specify the applicable selection procedure and criteria in the request for proposals, and to provide prompt notification of the results of the examination

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<sup>6</sup> The Working Group may wish to consider whether this point is relevant in other procurement methods, and whether it should be discussed in the context of evaluation generally.

procedure, including reasons for rejection when applicable. These requirements should allow the aggrieved suppliers effectively to challenge the procuring entity's decisions. Managerial techniques to oversee the procedure can also support these regulatory tools.

38. In accordance with paragraph (7), the number of suppliers or contractors invited to the dialogue in any event must be sufficient to ensure effective competition. The desirable minimum of three suppliers or contractors mentioned in paragraph (5) (g) is reiterated in this paragraph. The procuring entity will not however be precluded from continuing with the procurement proceedings if only one or two responsive proposals are presented. The reason for allowing the procuring entity to continue with the procurement in such case is that, even if there is a sufficient number of responsive proposals, the procuring entity has no means of ensuring that the competitive base remains until the end of the dialogue phase: suppliers or contractors are not prevented from withdrawing at any time from the dialogue. [This issue can be addressed to some extent in the requirement to provide a tender security in accordance with article 16 (for the guidance to article 16, see paragraphs ... above).]<sup>7</sup>

39. Paragraph (8) sets out two requirements for the format of dialogue: that it should be held on a concurrent basis and that the same representatives of the procuring entity should be involved to ensure consistent results. The reference to "representatives" of the procuring entity is in plural in these provisions since the use of committees comprising of several people is considered to be good practice, especially in the fight against corruption. This requirement does not prevent the procuring entity from holding dialogue with only one supplier or contractor, as explained above. Dialogue may involve several rounds or phases. By the end of each round or phase, the needs of the procuring entity are refined and participating suppliers or contractors are given a chance to modify their proposals in the light of those refined needs and the questions and comments put forward by the negotiating committee during dialogue.

40. The reference in subsequent paragraphs of this article to "suppliers or contractors remaining in the procurement proceedings" indicates that the group of suppliers or contractors entering the dialogue at the first phase may decline throughout the dialogue process. Some suppliers or contractors may decide not to participate further in dialogue, or they may be excluded from further negotiations by the procuring entity on the grounds permitted under the Model Law or other provisions of applicable law of the enacting State. Unlike some systems with similar procurement methods, the Model Law does not give an unconditional right to the procuring entity to terminate competitive dialogue with a supplier or contractor, for example, only because in the view of the procuring entity that supplier or contractor would not have a realistic chance of being awarded the contract. The dialogue phase involves constant modification of solutions and it would be unfair to eliminate any supplier only because at some stage of dialogue a solution appeared not acceptable to the procuring entity. Although terminating the dialogue with such a supplier might allow both sides to avoid wasting time and resources (which could turn out to

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<sup>7</sup> The Working Group is invited to consider the accuracy of the statement put in square brackets, in particular the likelihood of obtaining a tender security against largely undefined terms and conditions of the procurement.

be significant in this type of procurement), and might consequently reduce the risk of reduced competition in future procurements, UNCITRAL has proceeded on the basis that the risks to objectivity, transparency and equal treatment significantly outweigh the benefits.

41. On the other hand, the procuring entity should not be prohibited from terminating dialogue with suppliers or contractors on the grounds specified in the Model Law or through other provisions of applicable law of the enacting State. Some provisions in the Model Law would require the procuring entity to exclude suppliers or contractors from the procurement proceedings. For example, they must be excluded on the basis of article 20 (inducement, unfair competitive advantage or conflicts of interest), or if they are no longer qualified (for example in the case of bankruptcy), or if they materially deviate during the dialogue phase from the minimum responsive requirements or other key elements that were identified as non-negotiable at the outset of the procurement. In such cases, the possibility of a meaningful challenge under chapter VIII by aggrieved suppliers or contractors is ensured since the procuring entity will be obligated to notify promptly suppliers or contractors of the procuring entity's decision to terminate the dialogue and to provide grounds for that decision. It may be useful to provide suppliers or contractors at the outset of the procurement proceedings with information about the grounds on which the procuring entity will be required under law to exclude them from the procurement.

42. Paragraph (9) imposes limits on the extent of modification of the terms and conditions of the procurement as set out at the outset of the procurement proceedings. Unlike article 15 that regulates modification of the solicitation documents before the submissions/proposals are presented, paragraph (9) deals with restriction on modification of any aspect of the request for proposals after the initial proposals have been presented. The possibility of making such modifications is inherent in this procurement method; not allowing sufficient flexibility to the procuring entity in this respect will defeat the purpose of the procedure. The need for modifications may be justified in the light of dialogue but also in the light of circumstances not related to dialogue (such as administrative measures).

43. At the same time, the negative consequences of unfettered discretion may significantly outweigh the benefits in terms of flexibility. The provisions of paragraph (9) seek to achieve the required balance by preventing the procuring entity from making changes to those terms and conditions of the procurement that are considered to be so essential for the advertised procurement that their modification would have to lead to the new procurement. They are the subject matter of the procurement, qualification and evaluation criteria, the minimum requirements established pursuant to paragraph (2) (f) of this article and any elements of the description of the subject matter of the procurement or term or condition of the procurement contract that the procuring entity explicitly excludes from the dialogue at the outset of the procurement (i.e. non-negotiable requirements). The provisions would not prevent suppliers or contractors from making changes in their proposals as a result of the dialogue; however, deviation from the essential requirements of the procurement (such as the subject matter of the procurement, the minimum or non-negotiable requirements) may become a ground for the exclusion from the procurement of the supplier or contractor proposing such unacceptable deviations.

44. Paragraph (10) provides an essential measure to achieve equal treatment of suppliers and contractors in the communication of information from the procuring entity to suppliers or contractors during the dialogue phase. It subjects any such communication to the provisions of article 23 on confidentiality, some of which are specifically designed for chapter V procurement methods. Concerns over confidentiality are particularly relevant in this procurement method in the light of the format and comprehensive scope of the dialogue. The general rule is that no information pertinent to any particular supplier or its proposal should be disclosed to any other participating supplier without consent of the former. Further exceptions are listed in article 23 (3) (disclosure is required by law, or ordered by competent authorities, or permitted in the solicitation documents). (For the guidance to article 23, see paragraphs ... above.)

45. Achieving equal treatment of all participants during the dialogue requires implementing a number of practical measures. The Model Law refers only to the most essential ones, such as those in paragraph (10), and the requirement that negotiations be held on a concurrent basis by the same representatives of the procuring entity (paragraph (8) as explained in paragraph [39] above). Other measures, such as ensuring that the same topic is considered with the participants concurrently for the same amount of time, should be thought through by committees when preparing for the dialogue phase. Enacting States may wish to provide for other practical measures in the procurement regulations.

46. Upon completion of the dialogue stage, all the remaining participants must be given an equal chance to present BAFOs, which are defined as best and final with respect to each supplier's proposal. This definition highlights one of the main distinct features of this procurement method — the absence of any complete single set of terms and conditions of the procurement beyond the minimum technical requirements against which final submissions are evaluated. Paragraphs (11) and (12) regulate the BAFOs stage. The safeguards contained in these paragraphs intend to maximize competition and transparency. The request for BAFOs must specify the manner, place and deadline for presenting them. No negotiation with suppliers or contractors is possible after BAFOs have been presented and no subsequent call for further BAFOs can be made. Thus the BAFO stage puts an end to the dialogue stage and freezes all the specifications and contract terms offered by suppliers and contractors so as to restrict an undesirable situation in which the procuring entity uses the offer made by one supplier or contractor to pressure another supplier or contractor, in particular as regards the price offered. Otherwise, in anticipation of such pressure, suppliers or contractors may be led to raise the prices offered, and there is a risk to the integrity of the marketplace.

47. Paragraph (13) deals with the award of the procurement contract under this procurement method. It is to be awarded to the successful offer, which is determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals. The reference to the criteria and procedure for evaluating the proposals as set out in the request for proposals in this provision reiterates the prohibition of modification of those criteria and procedures during the dialogue stage, found in paragraph (9) of the article as explained in paragraphs [42 and 43] above.

48. The procuring entity will be required to maintain a comprehensive written record of the procurement proceedings, including a record of the dialogue with each

supplier or contractor, and to give access to the relevant parts of the record to the suppliers or contractors concerned, in accordance with article 24. This is an essential measure in this procurement method to ensure effective oversight, including audit, and possible challenges by aggrieved suppliers or contractors.

**4. Points regarding request for proposals with dialogue proposed to be discussed in the Section of the Guide to Enactment addressing changes from the 1994 text of the Model Law**

*Conditions for use*

49. Paragraph (2) of article 29 provides conditions for use of a new procurement method, request for proposals with dialogue, that combines the features of articles 43 (selection procedures with simultaneous negotiations for procurement of services) and 48 (request for proposals) of the 1994 Model Law. These two procurement methods in the 1994 text have many similarities and can be used for procurement of services. Request for proposals with dialogue retains the main feature of those 1994 procurement methods — the use of interaction with suppliers, which is held concurrently with a group of suppliers or contractors (as opposed to consecutive negotiations as envisaged under paragraph (3) of this article and article 49 of the Model Law; for the guidance on those provisions, see paragraphs ... below). In order to avoid confusion over terminology and the choice of procurement methods in those States that enacted their procurement legislation on the basis of the 1994 Model Law, the revised Model Law uses a distinct term to identify this new procurement method.

[Detail with respect to solicitation and procedures will be added at a later stage.]

(A/CN.9/WG.I/WP.77/Add.9) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twentieth session**

**ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany the related provisions of chapters II and V of the UNCITRAL Model Law on Public Procurement on competitive negotiations and single-source procurement.

**GUIDE TO ENACTMENT OF THE UNCITRAL MODEL  
LAW ON PUBLIC PROCUREMENT**

**Part II. Article-by-article commentary**

[For ease of reference, this addendum consolidates the proposed article-by-article commentary to various provisions of the Model Law regulating competitive negotiations and single-source procurement.]

...

**A. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of competitive negotiations**

**1. Conditions for use**

*The relevant provision of the revised Model Law on conditions for use:*

**“Article 29. Conditions for use of methods of procurement under chapter V of this Law (... competitive negotiations ...)**

(4) A procuring entity may engage in competitive negotiations, in accordance with the provisions of article 50 of this Law, in the following circumstances:

(a) There is an urgent need for the subject matter of the procurement, and engaging in open tendering proceedings or any other competitive method of procurement because of the time involved in using those methods 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;

(b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use open tendering proceedings or any other competitive method of procurement because of the time involved in using those methods; or



(c) Where the procuring entity determines that the use of any other competitive method of procurement is not appropriate for the protection of essential security interests of the State.”

*Proposed text for the Guide:*

1. Paragraph (4) of this article sets out the conditions for use of competitive negotiations, a procurement method that may be used only in the exceptional circumstances set out in subparagraphs (a) to (c): urgency, catastrophic events and the protection of essential security interests of the enacting State. Such restrictions are necessary in the light of the very flexible procedures of the method itself. Those procedures do not provide the same levels of transparency, integrity and objectivity in the process as are present in other competitive procurement methods, and the method is therefore at greater risk of abuse and corruption.
2. Subparagraph (a) addresses situations of urgency not caused by the conduct of the procuring entity, and that do not arise out of foreseeable circumstances. Subparagraph (b) refers to urgency arising out of catastrophic events. Both subparagraphs refer to situations when the use of open tendering proceedings or any other competitive method of procurement is impractical because of the time involved in using those methods. The cases of urgency contemplated in both paragraphs are intended to be truly exceptional, and not merely cases of convenience: such as the need for urgent medical or other supplies after a natural disaster or the need to replace an item of equipment in regular use that has malfunctioned. The method is not available if the urgency is due to a lack of procurement planning or other action on the part of the procuring entity, and the extent of the procurement through this method must be directly derived from the urgency itself. In other words, if there is an urgent need for one item of equipment, and an anticipated need for several more of the same type, competitive negotiations can be used only for the item needed immediately.
3. Subparagraph (c) refers to the procurement for the protection of essential security interests of the State [cross refer to where the scope of this topic is discussed] where the procuring entity determines that the use of any other competitive method of procurement is not appropriate.
4. The provisions in subparagraphs (a) to (c) are without prejudice to the general principle contained in article 27 (2) according to which the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method, and to have regard to the circumstances of the procurement. It is therefore to be understood that where an alternative to competitive negotiation, such as restricted tendering or request for quotations, is available, the procuring entity must select a method so as to ensure the greatest level of competition as is compatible with other circumstances of the procurement, such as the urgent need for the subject matter of the procurement.
5. In conformity with the same principle, subparagraph (b) dealing with cases of urgency owing to a catastrophic event, and subparagraph (c) dealing with procurement for the protection of essential security interests of the State, prevent the procuring entity from resorting to single-source procurement where competitive negotiations are available. In situations covered by these subparagraphs, the procuring entity is required first to consider the use of open tendering or any other competitive method of procurement. Where the procuring entity concludes that the

use of other competitive methods is impractical, it must resort to competitive negotiations, not to single-source procurement, unless it concludes that there is extreme urgency or another distinct ground justifying the use of single-source procurement under paragraph (5) of this article (for example, the absence of a competitive base, exclusive rights involved, etc.). This is because competitive negotiations are inherently more competitive than single-source procurement and more rigorous safeguards are built in the provisions of the Model Law regulating procedures in competitive negotiations, making the latter more structured and transparent than single-source procurement. This method is therefore the preferred alternative to single-source procurement in situations of urgency and for the protection of the essential security interests of the State.

6. It follows from the above considerations that competitive negotiations should not be considered as an alternative to any other methods in the Model Law, other than single-source procurement in the limited situations described in the preceding paragraph. For procurement of subject matter such as advisory services or complex technical items that may require interaction with suppliers, two-stage tendering, request for proposals with dialogue or with consecutive negotiations is available.

7. The unstructured nature of the procedures in competitive dialogue, as described in article 50 and explained in paragraphs [...] below mean managing the use of the method will be the key to ensuring its success in appropriate circumstances. The issues discussed regarding managerial techniques in the context of request for proposals with dialogue proceedings (see paragraphs [...] of the guidance to that procurement method) will apply to competitive negotiations, particularly given the heightened integrity risks that this method involves.<sup>1</sup>

*For a discussion of the changes in conditions for use from the 1994 text, see section A.4 below.*

## 2. Solicitation

*The relevant provision of the revised Model Law on solicitation:*

### **“Article 33. Solicitation in ...competitive negotiations ... Requirement for an advance notice of the procurement**

(3) Where the procuring entity engages in procurement by means of competitive negotiations in accordance with article 29 (4) of this Law, it shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

...

(5) Prior to direct solicitation in accordance with the provisions of paragraphs (1), (3) and (4) of this article, the procuring entity shall cause a notice of the procurement to be published in ... (the enacting State specifies

<sup>1</sup> The Working Group may wish to consider whether additional guidance, such as on ensuring effective negotiation skills and capacity on the part of procuring entities, the use of centralized oversight systems and other institutional support for competitive negotiations might be appropriate.

the official gazette or other official publication in which the notice is to be published). The notice shall contain at a minimum the following information:

- (a) The name and address of the procuring entity;
  - (b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into in the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;
  - (c) A declaration pursuant to article 8 of this Law; and
  - (d) The method of procurement to be used.
- (6) The requirements of paragraph (5) shall not apply in the case of urgency as referred to in articles 29 (4) (b) and 29 (5) (b)."

*Proposed text for the Guide:*

8. Paragraph (3) regulates solicitation in competitive negotiations, and is coupled with the requirement of paragraph (5) of this article for an advance notice of the procurement. That notice must specify, in particular, that competitive negotiations will be used and must also provide a summary of the principal terms and conditions of the procurement contract envisaged. This is an essential public oversight measure. On the basis of the information published, any aggrieved supplier or contractor may challenge the use of competitive negotiations where a more transparent and regulated procurement method is available. This safeguard is particularly important in the context of this procurement method and of single-source procurement, both of which are considered exceptional and justified for use only in the very limited cases provided for in article 29 of the Model Law.

9. The procuring entity will not be required to publish such a notice, but may still choose to do so, when competitive negotiations are used in situations of urgency due to catastrophic events (article 29 (4) (b)). This exemption is set out in paragraph (6) of this article. In the other cases of urgency referred to in article 29 (4) (a), providing an advance notice of the procurement is the default rule. This is also the default rule when resort to competitive negotiations is made in procurement for the protection of essential security interests of the State referred to in article 29 (4) (c). The default rule is subject to any exemptions on the basis of confidentiality that may apply under the provisions of law of the enacting State. For example, procurement involving the protection of essential security interests of the State may also involve classified information; in such cases, the procuring entity may be authorized (by the procurement regulations or by other provisions of law of the enacting State) not to publish any public notice related to the procurement (for the guidance on the relevant provisions of the Model Law on confidentiality and procurement involving classified information, see paragraphs ... above).

10. Additional guidance on both the use of advance notices under paragraphs (5) and (6) of article 33 and on the objective identification of suppliers to participate in

the process is found in the guidance on restricted tendering. The issues raised there are also relevant in the context of competitive negotiations.

*For a discussion of the changes as regards solicitation from the 1994 text, see section A.4 below.*

### 3. Procedures

*The relevant provision of the revised Model Law on procedures:*

#### **“Article 50. Competitive negotiations**

(1) Paragraphs (3), (5) and (6) of article 33 of this Law shall apply to the procedure preceding the negotiations.

(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 before or during the negotiations shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article 23 of this Law.

(3) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present, by a specified date, a best and final offer with respect to all aspects of their proposals.

(4) No negotiations shall take place between the procuring entity and suppliers or contractors with respect to their best and final offers.

(5) The successful offer shall be the offer that best meets the needs of the procuring entity.”

*Proposed text for the Guide:*

11. The article addresses the procedures for competitive negotiations. Safeguards have been included aimed at ensuring transparency and the equal treatment of participants in procurement by means of this procurement method.

12. The article is relatively short in the light of the flexible nature of the method itself. However, it would be wrong to state that procedures of this procurement method remain largely unregulated in the Model Law. This procurement method, as any other, is subject to the general provisions and rules set out in chapters I and II of the Model Law, the procurement regulations and any other bodies of applicable law. For example, under the Model Law, the procuring entity will be required to maintain a detailed record of the procurement proceedings, including details of negotiations with each participating supplier or contractor, and to provide access by suppliers or contractors to the record, as provided by article 24. This requirement is an essential measure for this procurement method to ensure effective oversight, and to permit challenges by aggrieved suppliers.

13. To the extent that the procuring entity complies with all the applicable rules, and that the negotiations are conducted on a concurrent basis and so as to ensure

equal treatment of the suppliers, the procuring entity may organize and conduct the negotiations as it sees fit. The rules that are set out in the present article are intended to confer this freedom upon the procuring entity, while attempting to foster competition in the proceedings and objectivity in the selection and evaluation process.

14. Paragraph (1) cross-refers to the relevant provisions of article 33 on solicitation in competitive negotiations, one of which requires providing an advance notice of the procurement, except in cases of urgency. (For the guidance to the relevant provisions of article 33, see paragraphs ... above.)

15. Paragraph (2), regulating communication of information during negotiations, is subject to the rules on confidentiality contained in article 23 of the Model Law. The provisions are similar to the provisions addressing request for proposals with dialogue contained in article 48 (10). The guidance to article 48 (10) is therefore relevant in the context of this paragraph (see paragraphs ... above).

16. Paragraph (3) provides that the procuring entity should, at the end of the negotiations, request suppliers or contractors to submit best and final offers (BAFOs),<sup>2</sup> on the basis of which the successful offer is to be selected. BAFOs are defined as best and final with respect to all aspects of each supplier's proposal. (Thus, as in request for dialogue procedures (guidance to which is found in [...]), no single set of terms and conditions of the procurement against which final submissions are evaluated is issued in this procurement method.) BAFOs are to be presented by a date specified by the procuring entity in its request for BAFOs. To ensure that all participating suppliers are on an equal footing as regards receiving information about termination of negotiations and available time to prepare their BAFO, it is good practice to issue the request in writing and to communicate it simultaneously to all participating suppliers. The provisions are similar to those of article 48 (11). The guidance to article 48 (11) (see paragraphs ... above) is therefore relevant in the context of this paragraph.

17. UNCITRAL considers the BAFO stage essential since it provides for the equal treatment of participating suppliers. It puts an end to the negotiations and freezes all the specifications and the contract terms offered by suppliers and contractors. In addition, requiring requests for BAFOs to be issued to all suppliers remaining in the negotiations, leaves an audit trail as regards all actual offers that were before the procuring entity and that it should have considered in making the selection in accordance with paragraph (5) of this article. Without that stage, excess discretion is given to the procuring entity to decide with which supplier or contractor to conclude the contract, with no transparency and verifiable traces in the process that would allow effective challenge.

18. Paragraph (4) prohibits negotiations after BAFOs were submitted, so as to conform the competitive negotiations procedure with equivalent stages in other procurement methods and to ensure the equal treatment of suppliers. It draws on similar provisions in article 48 (12). The guidance to article 48 (12) (see paragraphs ... above) is therefore relevant in the context of this paragraph.

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<sup>2</sup> The Working Group may wish to note that this term will be the subject of description in the glossary of terms to be included in the Guide, explaining (among other things) that there can be only one round of BAFOs.

UNCITRAL considers it best practice to prevent the procuring entity from negotiating further after BAFOs have been presented, and to prevent multiple requests for “BAFOs” and this stance is taken consistently throughout the Model Law where the BAFOs stage is envisaged.

19. The enacting State may impose additional requirements in the context of this procurement method by requiring in the procurement regulations that the procuring entity take steps such as: establishing basic rules and procedures relating to the conduct of the negotiations in order to help ensure that they proceed in an efficient manner; preparing various documents to serve as the basis for the negotiations, including documents setting out the desired technical characteristics of the goods or construction to be procured, or a description of the nature of services to be procured, and the desired contractual terms and conditions; and requesting the suppliers or contractors with which it negotiates to itemize their prices so as to assist the procuring entity in comparing what is being offered by one supplier or contractor during the negotiations with offers from the other suppliers or contractors. (For more detailed guidance on such comparisons, including risk mitigation, see the discussion on evaluation in request for proposals with dialogue proceedings.)

*For a discussion of the changes in procedures from the 1994 text, see section A.4 immediately below.*

**4. Points regarding competitive negotiations proposed to be discussed in the Section of the Guide to Enactment addressing changes from the 1994 text of the Model Law**

*Conditions for use*

20. Competitive negotiations is the title of a procurement method that draws its main features from the method of the same name in the 1994 Model Law. The conditions for use of competitive negotiations in the 1994 Model Law (article 19) have been substantially revised. Competitive negotiations may now be used only in the exceptional circumstances set out in subparagraphs (a) to (c): urgency, catastrophic events and the protection of essential security interests of the enacting State. For further guidance on the use of the method in these circumstances, and related considerations, see paragraphs [...] of the guidance to the method itself.

21. The revised Model Law, unlike the 1994 text, does not require an approval by a designated organ for resort to competitive negotiations. This approach reflects the decision of UNCITRAL, as a general rule, that the Model Law should not require the procuring entity to seek an approval of another body for steps to be taken by the procuring entity (for the guidance on this point, see paragraphs ... above).

*Solicitation*

22. Paragraph (3) of article 33 regulates solicitation in competitive negotiations. It draws on the provisions of article 49 (1) of the 1994 Model Law [detail of differences to be added at a later date].

*Procedures*

23. Article 50 addresses the procedures for competitive negotiations and draws largely on article 49 of the 1994 Model Law. The main change is the introduction of an express prohibition of post-BAFO negotiations in paragraph (4) [detail of other differences to be added at a later date].

## **B. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of single-source procurement**

### **1. Conditions for use**

*The relevant provision of the revised Model Law on conditions for use:*

**“Article 29. Conditions for use of methods of procurement under chapter V of this Law (...single-source procurement)**

(5) A procuring entity may engage in single-source procurement in accordance with the provisions of article 51 of this Law in the following exceptional circumstances:

(a) The subject matter of the procurement is available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible;

(b) Owing to a catastrophic event, there is an extremely urgent need for the subject matter of the procurement, and engaging in any other method of procurement would be impractical because of the time involved in using those methods;

(c) The procuring entity, having procured goods, equipment, technology or services 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, technology or services, 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 or services in question;

(d) Where the procuring entity determines that the use of any other method of procurement is not appropriate for the protection of essential security interests of the State; or

(e) Subject to approval by the [name of the organ designated by the enacting State to issue the approval], and following public notice and adequate opportunity to comment, where procurement from a particular supplier or contractor is necessary in order to implement a socio-economic policy of this State, provided that procurement from no other supplier or contractor is capable of promoting that policy.”

*Proposed text for the Guide:*

1. Paragraph (5) sets out the conditions for use of single-source procurement. The first, in subparagraph (a), refers to objectively justifiable reasons for resort to single-source procurement: the existence of only one supplier or contractor capable of providing the subject matter, either because that supplier or contractor has exclusive rights with respect to the subject matter of the procurement or for other reasons that confirm the exclusivity. The rules concerning the description of the subject matter of the procurement contained in article 10 of the Model Law prohibit the procuring entity from formulating the description of the subject matter of the procurement in a way that artificially limits the market concerned to a single source. Where the risk or practices of formulating such narrow descriptions exist, the use of functional descriptions (performance/output specifications) should be encouraged.<sup>3</sup> The enacting State should in addition ensure, through appropriate authorities, the regular monitoring of the practice of its procurement entities with the use of the ground referred to in subparagraph (a) as justification for resort to single-source procurement since its improper use may encourage monopolies and corruption, whether inadvertently or intentionally. Enacting the requirement for an advance public notice of single-source procurement (contained in article 33 (5) of the Model Law) should be considered an essential safeguard against the negative effects of relying on the ground set out in subparagraph (a) on transparency and accountability in procurement practices.
2. The conditions in subparagraph (b), referring to extreme urgency owing to a catastrophic event, overlap to some extent with the condition for use of the competitive negotiations in the case of urgency owing to a catastrophic event (paragraph (4) (b) of this article). The difference is in the level of urgency: to justify resort to single-source procurement, the urgency must be so extreme that holding negotiations with more than one supplier would be impractical. For example, following a catastrophic event, there may be immediate needs for clean water and medical supplies; a need for semi-permanent shelter may arise out of the same catastrophe but is normally not so urgent. As is the case in competitive negotiations, the need to link the extent of the procurement with the extreme urgency will limit the amount that can be procured using this method.
3. Subparagraph (c) refers to the need for standardization or compatibility with existing goods, equipment, technology or services as the justification for resort to single-source procurement. The use of single-source procurement in such situations must be exceptional: otherwise needs may be cited that are in reality due to poor procurement planning on the part of the procuring entity. Procurement in such situations should therefore also be limited both in size and in time.
4. Subparagraph (d) justifies recourse to single-source procurement for the protection of essential security interests of the State. This provision addresses, in particular, procurement involving classified information where the procuring entity concludes that the information concerned will be insufficiently protected if any other method of procurement, including another exceptional method of procurement such as competitive negotiations, is used.

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<sup>3</sup> The Working Group may wish to consider the extent to which this point is of general application and its interaction with the main distinguishing features of tendering as compared with request-for-proposals-based procurement methods, as set out in the guidance to articles 26 and 27.



5. Subparagraph (e) 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. This subparagraph contains safeguards to ensure that it does not give rise to more than a very exceptional use of single-source procurement. It should be interpreted in very restrictive terms, not to allow the use of single-source procurement for such extrinsic considerations, for example, as transfer of technology, shadow-pricing or counter trade.<sup>4</sup>

6. The decision to use single-source procurement in the economic emergency type of circumstance referred to in the provisions would and should ordinarily be taken at the highest levels of Government. The subparagraph therefore requires the procuring entity to receive the prior approval of an organ designated by the enacting State for resort to single-source procurement in such situations. In addition, the subparagraph requires a public notice of the anticipated single-source procurement in the economic emergency type of circumstance and adequate opportunity to comment. Although this stage is not regulated in detail in the Model Law, to make the opportunity to comment meaningful, the procuring entity should allow sufficient time to elapse between the notice and the start of the procurement proceedings. The procuring entity may receive comments from any member of the public and should be expected to provide explanations. The enacting States may wish to regulate further aspects of these provisions in the procurement regulations, in particular, whose comments should specifically be sought (for example, of local communities) and the purpose or the effect of comments, especially negative, if received.

7. Other than in situations referred to in subparagraph (e), the revised Model Law does not require approval by a designated organ for resort to the use of single-source procurement. This approach is in conformity with the decision of UNCITRAL not to require, as a general rule, in the revised Model Law the procuring entity to seek an approval of another body for steps to be taken by the procuring entity (for guidance on this point, see paragraphs ... above). This stance has also been applied as regards procuring entity's decision to resort to single-source procurement. UNCITRAL has however recognized that, some enacting States may require procuring entities to obtain a prior approval from a higher-level authority for use of such an exceptional measure as single-source procurement. While not discouraging such practices in the context of this particular procurement method in order to prevent corruption and arbitrary decisions on the side of the procuring entities, UNCITRAL acknowledges that this safeguard may be illusory: there can be elevated risks of corruption involving the approval chain where resort to single-source procurement is sought in improper cases. At the same time, there can be an unjustifiable waste of time and costs where permission for use of single-source procurement is sought for perfectly appropriate circumstances.

8. In view of the non-competitive character of single-source procurement, this method is considered under the Model Law the method of last resort after all other alternatives had been exhausted. The provisions of paragraph (5) should therefore be

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<sup>4</sup> The text in this paragraph is taken from the 1994 Guide. The Working Group is invited to reconsider it, in particular in the light of article 11 of the draft revised Model Law.

implemented without prejudice to the general principle contained in article 27 (2) according to which the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method. It is therefore understood that when an alternative to single-source procurement, such as restricted tendering, request for quotations or competitive negotiation, is appropriate, the procuring entity must select the procurement method that would ensure most competition in the circumstances of the given procurement without jeopardizing, however, other no less important considerations, such as the level of urgency of delivery of the subject matter of the procurement. It is recognized that, except for situations described in subparagraphs (a), (d) and (e), in other situations referred to in paragraph (5) the procuring entity may avoid the use of single-source procurement by using alternative methods or tools or through proper procurement planning. For example, in situations of extreme urgency due to a catastrophic event where negotiations with more than one supplier would be impractical (subparagraph (b)), the procuring entity may consider using procurement methods not involving negotiations, such as request for quotations for procurement of off-the-shelf items. A closed framework agreement without second-stage competition may also effectively address situations of extreme urgency, where it concluded in advance against a background of an identified and probable need occurring on a periodic basis or within a given time frame. With a better procurement planning, framework agreements may also be a viable alternative to single-source procurement in situations referred to in subparagraph (c) (the need for additional supplies from the same source for reasons of standardization and compatibility).

*For a discussion of the changes in conditions for use from the 1994 text, see section B.4 below.*

## 2. Solicitation

*The relevant provision of the revised Model Law on solicitation:*

### **“Article 33. Solicitation in ... single-source procurement. Requirement for an advance notice of the procurement**

(4) Where the procuring entity engages in single-source procurement in accordance with article 29 (5) of this Law, it shall solicit a proposal or price quotation from a single supplier or contractor.

(5) Prior to direct solicitation in accordance with the provisions of paragraphs (1), (3) and (4) of this article, the procuring entity shall cause a notice of the procurement to be published in ... (the enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall contain at a minimum the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into in the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply

of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) A declaration pursuant to article 8 of this Law; and

(d) The method of procurement to be used.

(6) The requirements of paragraph (5) shall not apply in the case of urgency as referred to in articles 29 (4) (b) and 29 (5) (b).”

*Proposed text for the Guide:*

9. Paragraph (4) regulates solicitation in single-source procurement and is coupled with the requirement in paragraph (5) of this article for an advance notice of the procurement. That notice must specify in particular that single-source procurement will be used and must also provide a summary of the principal required terms and conditions of the envisaged procurement contract. This is an essential public oversight measure. On the basis of the information published, any aggrieved supplier or contractor may challenge the use of single-source procurement where a competitive method of procurement appropriate in the circumstances of the given procurement is available. This safeguard is particularly important in the context of this procurement method, which is considered exceptional and justified for use only in the very limited cases provided for in article 29 (5) of the Model Law.

10. The procuring entity will not be required to publish such a notice, but may still choose to do so, when single-source procurement is used in situations of extreme urgency owing to a catastrophic event (article 29 (5) (b)). This exemption is set out in paragraph (6) of this article. In the other cases justifying resort to single-source procurement, providing an advance notice of the procurement is the default rule, subject to any exemptions on the basis of confidentiality that may apply under the provisions of law of the enacting State. For example, procurement involving the protection of the essential security interests of the State may also involve classified information; in such cases, the procuring entity may be authorized (by the procurement regulations or by other provisions of law of the enacting State) not to publish any public notice related to the procurement. This situation may arise in particular when resort to single-source procurement is made in procurement for the protection of essential security interests of the State under article 29 (5) (d). (For the guidance on the relevant provisions of the Model Law on confidentiality and procurement involving classified information, see paragraphs ... above).

11. Additional guidance on both the use of advance notices under paragraphs (5) and (6) of article 33 and on the objective identification of suppliers to participate in the process is found in the guidance on Restricted tendering. The issues raised there are also relevant in the context of single-source procurement.

*For a discussion of the changes as regards solicitation from the 1994 text, see section B.4 below.*

### 3. Procedures

*The relevant provision of the revised Model Law on procedures:*

**“Article 51. Single-source procurement**

Paragraphs (4) to (6) of article 33 of this Law shall apply to the procedure preceding the solicitation of a proposal or price quotation from a single supplier or contractor. The procuring entity shall engage in negotiations with the supplier or contractor from which a proposal or price quotation is solicited unless such negotiations are not feasible in the circumstances of the procurement concerned.”

*Proposed text for the Guide:*

12. The article sets out relatively simple procedures for single-source procurement procedures. The simplicity reflects the very flexible nature of single-source procurement, which involves a sole supplier or contractor, thus making the procedure essentially a contract negotiation (and which therefore falls outside the general scope of the Model Law). Issues of competition and equal treatment of suppliers or contractors in the procurement proceedings, although important at the stage when the decision on the resort to this procurement method is made, do not arise during the procurement proceedings.

13. The provisions cross-refer to the requirement of an advance notice of the procurement and an exemption thereto in article 33. They also contain the requirement of engaging in negotiations, unless to do so is not feasible. It has been introduced in the light of the utility for the procuring entity to negotiate and request, when feasible and necessary, market data or costs clarifications, in order to avoid unreasonably priced proposals or quotations.

14. The provisions of chapter I are generally applicable to single-source procurement, including the obligation to cancel the procurement in situations described in article 20 (for example, when the sole supplier must be excluded from further participation in the procurement proceedings on the ground of inducement, unfair competitive advantage or conflicts of interest). In addition, a number of provisions of the Model Law aimed at transparency in the procurement proceedings will be applicable, such as article 22 on publication of notices of procurement contract awards, article 24 on keeping the comprehensive record of the procurement proceedings, including justifications for resort to single-source procurement, and article 33 on an advance notice of the procurement. The procedures of single-source procurement should not therefore be regarded as largely unregulated in the Model Law because of the short provisions in article 51. They must be implemented taking into account all applicable provisions of the Model Law as well as those of procurement regulations and other applicable provisions of law of the enacting State.

*For a discussion of the changes in procedures from the 1994 text, see section B.4 immediately below.*

**4. Points regarding single-source procurement proposed to be discussed in the Section of the Guide to Enactment addressing changes from the 1994 text of the Model Law**

*Conditions for use*

15. Article 29 sets out the conditions for use of single-source procurement. It is based on the provisions of article 22 of the 1994 Model Law, save that some justifications for the use of single-source procurement found in the 1994 text have been eliminated. [Detail to be included at a later date.] For further guidance on the use of the method in the circumstances permitted by article 29, and related considerations, see paragraphs [...] of the guidance to the method itself.

16. Other than in situations referred to in article 29 (5) (e) (see paragraphs [...] above), the revised Model Law, unlike the 1994 text, does not require an approval by a designated organ for resort to single-source procurement. This is in conformity with the decision of UNCITRAL not to require, as a general rule, in the revised Model Law the procuring entity to seek an approval of another body for steps to be taken by the procuring entity (for the guidance on this point, see paragraphs ... above). This stance has also been applied as regards procuring entity's decision to resort to single-source procurement, taking into account the changes made in the conditions for use of this procurement method, which, compared to the 1994 Model Law, are considerably more restrictive.

*Solicitation*

17. Paragraph (4) of article 33 regulates solicitation in single-source procurement. It draws on the provisions of article 51 of the 1994 Model Law [detail of differences to be added at a later date].

*Procedures*

18. Article 51 addresses the procedures for single-source procurement. An equivalent provision was not included in the 1994 Model Law. Article 51 of the 1994 Model Law provided only the manner of solicitation, which in the revised Model Law is reflected in article 33 (4) of the revised Model Law. The provisions in the revised Model Law also require the procuring entity to engage in negotiations, unless to do so is not feasible (see the guidance to the article 51 above).

## E. Note by the Secretariat on the draft revised text of the Model Law

(A/CN.9/729 and Add.1-8)

[Original: English]

1. This note sets out in annex I a table of content of the draft revised Model Law as emanated from the work of the nineteenth session of UNCITRAL Working Group I (Procurement) (Vienna, 1-5 November 2010) (the “draft revised Model Law”), showing also concordance between the articles of the draft revised Model Law and the provisions of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “1994 Model Law”).
2. This note sets out in annex II a table of concordance between the articles of the 1994 Model Law and the provisions of the draft revised Model Law.
3. The draft revised Model Law is contained in addenda 1 to 8 to this note.

### Annex I

#### Table of contents of the draft revised Model Law, showing also concordance between the articles of the draft revised Model Law and the provisions of the 1994 Model Law

Article of the draft revised Model Law	Relevant provisions of the 1994 Model Law where applicable
<b>Preamble</b>	<b>Preamble</b>
<b>Chapter I. GENERAL PROVISIONS</b>	<b>Chapter I. GENERAL PROVISIONS</b>
<b>Articles 1-25</b>	
Article 1. Scope of application	Article 1. Scope of application
Article 2. Definitions	Article 2. Definitions
Article 3. International obligations of this State relating to procurement (and intergovernmental agreements within (this State))	Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]
Article 4. Procurement regulations	Article 4. Procurement regulations
Article 5. Publication of legal texts	Article 5. Public accessibility of legal texts
Article 6. Information on possible forthcoming procurement ( <b>new provisions</b> )	
Article 7. Communications in procurement	Article 9. Form of communications
Article 8. Participation by suppliers or contractors	Article 8. Participation by suppliers or contractors

Article of the draft revised Model Law	Relevant provisions of the 1994 Model Law where applicable
Article 9. Qualifications of suppliers and contractors	Article 6. Qualifications of suppliers and contractors  Article 10. Rules concerning documentary evidence provided by suppliers or contractors
Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement	Article 16. Rules concerning description of goods, construction or services
Article 11. Rules concerning evaluation criteria and procedures <b>(new provisions based on the 1994 text)</b>	Articles 27 (e), 34 (4), 38 (m), 39 and 48 (3)
Article 12. Rules concerning estimation of the value of procurement <b>(new provisions)</b>	
Article 13. Rules concerning the language of documents	Article 17. Language  Article 29. Language of tenders
Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions <b>(new provisions based on the 1994 text)</b>	Articles 7 (3) (a) (iv) and 30 (1) to (4)
Article 15. Clarifications and modifications of solicitation documents	Article 28. Clarifications and modifications of solicitation documents
Article 16. Tender securities	Article 32. Tender securities
Article 17. Pre-qualification proceedings	Article 7. Pre-qualification proceedings  Also provisions related to pre-qualification of articles 23, 24 and 25
Article 18. Cancellation of the procurement	Article 12. Rejection of all tenders, proposals, offers or quotations
Article 19. Rejection of abnormally low submissions <b>(new provisions)</b>	
Article 20. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest	Article 15. Inducements from suppliers or contractors

<b>Article of the draft revised Model Law</b>	<b>Relevant provisions of the 1994 Model Law where applicable</b>
Article 21. Acceptance of the successful submission and entry into force of the procurement contract	Article 13. Entry into force of the procurement contract  Article 36. Acceptance of tender and entry into force of procurement contract
Article 22. Public notice of awards of procurement contract and framework agreement	Article 14. Public notice of procurement contract awards
Article 23. Confidentiality	Articles 45, 48 (7) and 49 (3)
Article 24. Documentary record of procurement proceedings	Article 11. Record of procurement proceedings
Article 25. Code of conduct (new provisions)	
<b>Chapter II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE. SOLICITATION AND NOTICES OF THE PROCUREMENT</b>  <b>Articles 26-34</b>	<b>Chapter II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE</b>
<b>Section I. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE</b>  <b>Articles 26-31</b>	
Article 26. Methods of procurement (new provisions)	
Article 27. General rules applicable to the selection of a procurement method	Article 18. Methods of procurement
Article 28. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)	Articles 20 and 21
Article 29. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)	Articles 19 and 22
Article 30. Conditions for use of an electronic reverse auction	



<b>Article of the draft revised Model Law</b>	<b>Relevant provisions of the 1994 Model Law where applicable</b>
<b>(new provisions)</b>	
Article 31. Conditions for use of a framework agreement procedure <b>(new provisions)</b>	
<b>Section II. SOLICITATION AND NOTICES OF THE PROCUREMENT</b>  <b>Articles 32-34 (new provisions based on the relevant provisions of the 1994 Model Law)</b>	
Article 32. Solicitation in open tendering, two-stage tendering and in procurement by means of an electronic reverse auction	Article 24. Procedures for soliciting tenders or applications to pre-qualify
Article 33. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement. Requirement for an advance notice of the procurement	Articles 47 (1) and (2), 49 (1), 50 (1) and 51
Article 34. Solicitation in request for proposals proceedings	Articles 37 and 48 (1) and (2)
<b>Chapter III. OPEN TENDERING</b>  <b>Articles 35-43</b>	<b>Chapter III. TENDERING PROCEEDINGS</b>
Article 35. Procedures for soliciting tenders	Article 24. Procedures for soliciting tenders or applications to pre-qualify
Article 36. Contents of invitation to tender	Article 25. Contents of invitation to tender and invitation to pre-qualify (para. (1))
Article 37. Provision of solicitation documents	Article 26. Provision of solicitation documents
Article 38. Contents of solicitation documents	Article 27. Contents of solicitation documents
Article 39. Presentation of tenders	Article 30. Submission of tenders (paras. (5) and (6))
Article 40. Period of effectiveness of tenders; modification and withdrawal of tenders	Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders
Article 41. Opening of tenders	Article 33. Opening of tenders
Article 42. Examination and evaluation of tenders	Article 34. Examination, evaluation and comparison of tenders
Article 43. Prohibition of negotiations with suppliers or contractors	Article 35. Prohibition of negotiations with suppliers or contractors

Article of the draft revised Model Law	Relevant provisions of the 1994 Model Law where applicable
<b>Chapter IV.</b> <b>PROCEDURES FOR RESTRICTED TENDERING, REQUEST FOR QUOTATIONS AND REQUEST FOR PROPOSALS WITHOUT NEGOTIATION</b>  <b>Articles 44-46</b>	Chapter IV, article 42 and other relevant provisions; and chapter V, articles 47 and 50
Article 44. Restricted tendering	Article 47. Restricted tendering
Article 45. Request for quotations	Article 50. Request for quotations
Article 46. Request for proposals without negotiation	Article 42. Selection procedure without negotiation, and other relevant provisions of chapter IV. Principal method for procurement of services
<b>Chapter V.</b> <b>PROCEDURES FOR TWO-STAGE TENDERING, REQUEST FOR PROPOSALS WITH DIALOGUE, REQUEST FOR PROPOSALS WITH CONSECUTIVE NEGOTIATIONS, COMPETITIVE NEGOTIATIONS AND SINGLE-SOURCE PROCUREMENT</b>  <b>Articles 47-51</b>	Chapter IV, articles 43 and 44 and other relevant provisions; chapter V, articles 46, 48, 49 and 51
Article 47. Two-stage tendering	Article 46. Two-stage tendering
Article 48. Request for proposals with dialogue	Article 43. Selection procedure with simultaneous negotiations Article 48. Request for proposals
Article 49. Request for proposals with consecutive negotiations	Article 44. Selection procedure with consecutive negotiations
Article 50. Competitive negotiations	Article 49. Competitive negotiation
Article 51. Single-source procurement	Article 51. Single-source procurement
<b>Chapter VI.</b> <b>ELECTRONIC REVERSE AUCTIONS</b>  <b>Articles 52-56</b> <b>(new provisions)</b>	
Article 52. Procedures for soliciting participation in procurement by means of an electronic reverse auction	

<b>Article of the draft revised Model Law</b>	<b>Relevant provisions of the 1994 Model Law where applicable</b>
Article 53. Procedures for soliciting participation in procurement proceedings involving an electronic reverse auction as a phase preceding the award of the procurement contract	
Article 54. Registration for the electronic reverse auction and timing of holding of the auction	
Article 55. Requirements during the electronic reverse auction	
Article 56. Requirements after the electronic reverse auction	
<b>Chapter VII.</b> <b>FRAMEWORK AGREEMENTS PROCEDURES</b>  <b>Articles 57-62</b> <b>(new provisions)</b>	
Article 57. Award of a closed framework agreement	
Article 58. Requirements of closed framework agreements	
Article 59. Establishment of an open framework agreement	
Article 60. Requirements of open framework agreements	
Article 61. Second stage of a framework agreement procedure	
Article 62. No material change during the operation of a framework agreement	
<b>Chapter VIII.</b> <b>CHALLENGES AND APPEALS</b>  <b>Articles 63-69</b>	Chapter VI. Review
Article 63. Right to challenge and appeal	Article 52. Right to review
Article 64. Effect of an application for reconsideration or review or an appeal <b>(new provisions)</b>	

<b>Article of the draft revised Model Law</b>	<b>Relevant provisions of the 1994 Model Law where applicable</b>
Article 65. Application for reconsideration before the procuring entity	Article 53. Review by procuring entity (or by approving authority); Article 55. Certain rules applicable to review proceedings under article 53 [and article 54], paras. (1) and (3); and Article 56. Suspension of procurement proceedings
Article 66. Application for review or an appeal before an independent body	Article 54. Administrative review; Article 55. Certain rules applicable to review proceedings under article 53 [and article 54], paras. (1) and (3); and Article 56. Suspension of procurement proceedings
Article 67. Rights of participants in challenge or appeal proceedings	Article 55. Certain rules applicable to review proceedings under article 53 [and article 54], para. (2)
Article 68. Confidentiality in challenge and appeal proceedings	Article 55. Certain rules applicable to review proceedings under article 53 [and article 54] (para. (3), last sentence)
Article 69. Judicial review	Article 57. Judicial review

## Annex II

### Table of concordance between the articles of the 1994 Model Law and the provisions of the draft revised Model Law

Article of the 1994 Model Law	Relevant provisions of the draft revised Model Law
<b>Chapter I. GENERAL PROVISIONS</b>	<b>Chapter I. GENERAL PROVISIONS</b>
Article 1. Scope of application	Article 1. Scope of application
Article 2. Definitions	Article 2. Definitions
Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]	Article 3. International obligations of this State relating to procurement (and intergovernmental agreements within (this State))
Article 4. Procurement regulations	Article 4. Procurement regulations
Article 5. Public accessibility of legal texts	Article 5. Publication of legal texts
Article 6. Qualifications of suppliers and contractors	Article 9. Qualifications of suppliers and contractors
Article 7. Pre-qualification proceedings  Article 7 (3) (a) (iv)	Article 17. Pre-qualification proceedings  Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions
Article 8. Participation by suppliers or contractors	Article 8. Participation by suppliers or contractors
Article 9. Form of communications	Article 7. Communications in procurement
Article 10. Rules concerning documentary evidence provided by suppliers or contractors	Article 9. Qualifications of suppliers and contractors (para. (7))
Article 11. Record of procurement proceedings	Article 24. Documentary record of procurement proceedings
Article 12. Rejection of all tenders, proposals, offers or quotations	Article 18. Cancellation of the procurement
Article 13. Entry into force of the procurement contract	Article 21. Acceptance of the successful submission and entry into force of the procurement contract
Article 14. Public notice of procurement contract awards	Article 22. Public notice of awards of procurement contract and framework agreement

Article of the 1994 Model Law	Relevant provisions of the draft revised Model Law
Article 15. Inducements from suppliers or contractors	Article 20. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest
Article 16. Rules concerning description of goods, construction or services	Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement
Article 17. Language	Article 13. Rules concerning the language of documents
<b>Chapter II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE</b>	<b>Chapter II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE. SOLICITATION AND NOTICES OF THE PROCUREMENT</b>
Article 18. Methods of procurement	Article 27. General rules applicable to the selection of a procurement method
Article 19. Conditions for use of two-stage tendering, request for proposals or competitive negotiation	Article 29. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)
Article 20. Conditions for use of restricted tendering	Article 28. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)
Article 21. Conditions for use of request for quotations	Article 28. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)
Article 22. Conditions for use of single-source procurement	Article 29. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)

<b>Article of the 1994 Model Law</b>	<b>Relevant provisions of the draft revised Model Law</b>
<b>Chapter III. TENDERING PROCEEDINGS</b>	<b>Chapter III. OPEN TENDERING</b>
<b>Section I. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PRE-QUALIFY</b>	<b>Section I. SOLICITATION OF TENDERS</b>
Article 23. Domestic tendering	Article 32. Solicitation in open tendering, two-stage tendering and in procurement by means of an electronic reverse auction (para. (4))
Provisions related to pre-qualification in: Article 24. Procedures for soliciting tenders or applications to pre-qualify and Article 25. Contents of invitation to tender and invitation to pre-qualify,  Other provisions from these articles	Article 17. Pre-qualification proceedings   Article 35. Procedures for soliciting tenders Article 36. Contents of invitation to tender
Article 26. Provision of solicitation documents	Article 37. Provision of solicitation documents
Article 27. Contents of solicitation documents	Article 38. Contents of solicitation documents
Articles 28. Clarifications and modifications of solicitation documents	Article 15. Clarifications and modifications of solicitation documents
<b>Section II. SUBMISSION OF TENDERS</b>	<b>Section II. PRESENTATION OF TENDERS</b>
Article 29. Language of tenders	Article 13. Rules concerning the language of documents
Article 30. Submission of tenders  Paragraphs (1) to (4)   Paragraphs (5) and (6)	Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions   Article 39. Presentation of tenders

<b>Article of the 1994 Model Law</b>	<b>Relevant provisions of the draft revised Model Law</b>
Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders	Article 40. Period of effectiveness of tenders; modification and withdrawal of tenders
Article 32. Tender securities	Article 16. Tender securities
<b>Section III. EVALUATION AND COMPARISON OF TENDERS</b>	<b>Section III. EVALUATION OF TENDERS</b>
Article 33. Opening of tenders	Article 41. Opening of tenders
Article 34. Examination, evaluation and comparison of tenders	Article 42. Examination and evaluation of tenders
Article 35. Prohibition of negotiations with suppliers or contractors	Article 43. Prohibition of negotiations with suppliers or contractors
Article 36. Acceptance of tender and entry into force of procurement contract	Article 21. Acceptance of the successful submission and entry into force of the procurement contract
<b>Chapter IV. PRINCIPAL METHOD FOR PROCUREMENT OF SERVICES</b>	<b>Chapter IV, article 46, and Chapter V, articles 48 and 49</b>
Article 37. Notice of solicitation of proposals	Article 34. Solicitation in request for proposals proceedings
Article 38. Contents of requests for proposals for services	Article 46. Request for proposals without negotiation; and Article 48. Request for proposals with dialogue
Article 39. Criteria for the evaluation of proposals	Article 11. Rules concerning evaluation criteria and procedures
Article 40. Clarification and modification of requests for proposals	Article 15. Clarifications and modifications of solicitation documents
Article 41. Choice of selection procedure	Article 27. General rules applicable to the selection of a procurement method
Article 42. Selection procedure without negotiation	Article 46. Request for proposals without negotiation
Article 43. Selection procedure with simultaneous negotiations	Article 48. Request for proposals with dialogue
Article 44. Selection procedure with consecutive negotiations	Article 49. Request for proposals with consecutive negotiations
Article 45. Confidentiality	Article 23. Confidentiality



Article of the 1994 Model Law	Relevant provisions of the draft revised Model Law
<b>Chapter V. PROCEDURES FOR ALTERNATIVE METHODS OF PROCUREMENT</b>	<b>Chapter IV, articles 44 and 45, and Chapter V, articles 47, 48, 50 and 51</b>
Article 46. Two-stage tendering	Article 47. Two-stage tendering
Article 47. Restricted tendering	Article 44. Restricted tendering Article 33. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement. Requirement for an advance notice of the procurement
Article 48. Request for proposals	Article 48. Request for proposals with dialogue Article 34. Solicitation in request for proposals proceedings
Article 49. Competitive negotiation	Article 50. Competitive negotiations Article 33. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement. Requirement for an advance notice of the procurement
• Articles 48 (7) and 49 (3)	• Article 23. Confidentiality
Article 50. Request for quotations	Article 45. Request for quotations Article 33. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement. Requirement for an advance notice of the procurement
Article 51. Single-source procurement	Article 51. Single-source procurement Article 33. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement. Requirement for an advance notice of the procurement
<b>Chapter VI. REVIEW</b>	<b>Chapter VIII. CHALLENGES AND APPEALS</b>
Article 52. Right to review	Article 63. Right to challenge and appeal
Article 53. Review by procuring entity (or by approving authority)	Article 65. Application for reconsideration before the procuring entity
Article 54. Administrative review	Article 66. Application for review or an appeal before an independent body

Article of the 1994 Model Law	Relevant provisions of the draft revised Model Law
Article 55. Certain rules applicable to review proceedings under article 53 [and article 54]	Article 65. Application for reconsideration before the procuring entity; Article 66. Application for review or an appeal before an independent body; Article 67. Rights of participants in challenge or appeal proceedings; and Article 68. Confidentiality in challenge and appeal proceedings
Article 56. Suspension of procurement proceedings	Article 64. Effect of an application for reconsideration or review or an appeal; Article 65. Application for reconsideration before the procuring entity; Article 66. Application for review or an appeal before an independent body
Article 57. Judicial review	Article 69. Judicial review

**(A/CN.9/729/Add.1) (Original: English)**  
**Note by the Secretariat on the draft revised text of the Model Law**

**ADDENDUM**

This note sets out a proposal for the Preamble and articles 1 to 13 of chapter I (General provisions) of the revised Model Law.

**UNCITRAL MODEL LAW ON PUBLIC  
PROCUREMENT**

**Preamble**

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement 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 regardless of nationality, and thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;
- (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;
- (f) Achieving transparency in the procedures relating to procurement.

Be it therefore enacted as follows.

**CHAPTER I. GENERAL PROVISIONS**

**Article 1. Scope of application**

This Law applies to all public procurement.

**Article 2. Definitions**

For the purposes of this Law:

- (a) “Currency” includes monetary unit of account;
- (b) “Direct solicitation” means solicitation addressed directly to one or a restricted number of suppliers or contractors. This excludes solicitation addressed to a limited number of suppliers or contractors following pre-qualification or preselection proceedings;

(c) “Domestic procurement” means procurement limited to domestic suppliers or contractors pursuant to article 8 of this Law;

(d) “Electronic reverse auction” means an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves presentation by suppliers or contractors of successively lowered bids during a scheduled period of time and the automatic evaluation of bids;

(e) “Framework agreement procedure” means a procurement conducted in two stages: a first stage to select supplier(s) or contractor(s) to be the party or parties to a framework agreement with a procuring entity, and a second stage to award a procurement contract under the framework agreement to a supplier or contractor party to the framework agreement:

(i) “Framework agreement” means an agreement or agreements between the procuring entity and the selected supplier(s) or contractor(s) concluded upon completion of the first stage of the framework agreement procedure;

(ii) “Closed framework agreement” means a framework agreement to which no supplier or contractor that is not initially a party to the framework agreement may subsequently become a party;

(iii) “Open framework agreement” means a framework agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties;

(iv) “Framework agreement procedure with second-stage competition” means a procedure under an open framework agreement or a closed framework agreement with more than one supplier or contractor in which certain terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded are to be established or refined through the second-stage competition;

(v) “Framework agreement procedure without second-stage competition” means a procedure under a closed framework agreement in which all terms and conditions of the procurement are established when the framework agreement is concluded;

(f) “Pre-qualification documents” means documents issued by the procuring entity under article 17 of this Law that set out the terms and conditions of the pre-qualification proceedings;

(g) “Preselection documents” means documents issued by the procuring entity under article 48 (3) of this Law that set out the terms and conditions of the preselection proceedings;

(h) “Procurement” means the acquisition of goods, construction or services (the “subject matter of the procurement”);

(i) “Procurement contract(s)” means a contract or contracts concluded between the procuring entity and supplier(s) or contractor(s) at the end of the procurement proceedings;

(j) “Procurement involving classified information” means procurement in which the procuring entity may be authorized by the procurement regulations or by

other provisions of law of this State to take measures and impose requirements for the protection of classified information;

(k) “Procurement regulations” means regulations enacted in accordance with article 4 of this Law;

(l) “Procuring entity” means:

(i) *Option I*

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

*Option II*

Any department, agency, organ or other unit, or any subdivision or multiplicity 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”);

(m) “Public procurement” means procurement carried out by a procuring entity;

(n) “Socio-economic policies” means environmental, social, economic and other policies of this State authorized or required by the procurement regulations or other provisions of law of this State to be taken into account by the procuring entity in the procurement proceedings. (The enacting State may expand this subparagraph by providing an illustrative list of such policies.);

(o) “Solicitation” means an invitation to tender or to present proposals, quotations or bids, according to the context;

(p) “Solicitation documents” means documents issued by the procuring entity, including any amendments thereto, that set out the terms and conditions of the given procurement;

(q) “Standstill period” means the period starting from the dispatch of a notice as required by article 21 (2) of this Law, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge, under chapter VIII of this Law, the decision so notified;

(r) “Submission(s)” means tender(s), proposal(s), offer(s), quotation(s) and bid(s) referred to collectively or generically;

(s) “Supplier or contractor” means, according to the context, any potential party or any party to the procurement proceedings with the procuring entity;

(t) “Tender security” means a security required from suppliers or contractors by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation referred to in article 16 (1) (f) of this Law and includes such arrangements as bank guarantees, surety bonds, standby letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of

exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract.

**Article 3. International obligations of this State relating to  
procurement (and intergovernmental agreements  
within (this State))<sup>1</sup>**

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 [name of the organ or authority authorized to promulgate the procurement regulations] is authorized to promulgate procurement regulations to fulfil the objectives and to implement the provisions of this Law.

**Article 5. Publication of legal texts**

(1) Except as provided for in paragraph (2) of this article, the text of this Law, the procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

(2) Judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public.

**Article 6. Information on possible forthcoming procurement**

(1) Procuring entities may publish information regarding planned procurement activities for forthcoming months or years.

(2) Procuring entities may also publish an advance notice of possible future procurement.

(3) Publication under this article does not constitute a solicitation, does not oblige the procuring entity to issue a solicitation and does not confer any rights on suppliers or contractors.

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<sup>1</sup> The texts in parenthesis in this article are relevant to, and intended for consideration by, federal States.

**Article 7. Communications in procurement**

(1) Any document, notification, decision or any other information generated in the course of a procurement and communicated as required by this Law, including in connection with challenge and appeal proceedings under chapter VIII or in the course of a meeting, or forming part of the record of procurement proceedings under article 24, shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(2) Direct solicitation and communication of information between suppliers or contractors and the procuring entity referred to in articles 16 (1) (d), 17 (6) and (9), 40 (2) (a), 42 (1) and 49 (2) to (4), may be made by means that do not provide a record of the content of the information on the condition that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall specify:

(a) Any requirement of form;

(b) In procurement involving classified information, if the procuring entity considers it necessary, measures and requirements needed to ensure the protection of classified information at the requisite level;

(c) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to the public or by a supplier or contractor to the procuring entity or other entity acting on its behalf;

(d) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and

(e) The means to be used to hold any meeting of suppliers or contractors.

(4) The procuring entity may use only those means of communication that are in common use by suppliers or contractors in the context of the particular procurement. In any meeting held with suppliers or contractors, the procuring entity shall use only those means that ensure in addition that suppliers or contractors can fully and contemporaneously participate in the meeting.

(5) The procuring entity shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of information concerned.

**Article 8. Participation by suppliers or contractors**

(1) Suppliers or contractors shall be permitted to participate in procurement proceedings without regard to nationality, except where the procuring entity decides to limit participation in procurement proceedings on the basis of nationality on grounds specified in the procurement regulations or other provisions of law of this State.

(2) Except when authorized or required to do so by the procurement regulations or other provisions of law of this State, the procuring entity shall establish no other requirement aimed at limiting participation of suppliers or contractors in

procurement proceedings that discriminates against or among suppliers or contractors or against categories thereof.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare whether participation of suppliers or contractors in the procurement proceedings is limited pursuant to this article and on which ground. Any such declaration may not later be altered.

(4) A procuring entity that decides to limit participation of suppliers or contractors in procurement proceedings pursuant to this article shall include in the record of the procurement proceedings a statement of the reasons and circumstances on which it relied.

(5) The procuring entity shall make available to any member of the public, upon request, its reasons for limiting participation of suppliers or contractors in the procurement proceedings pursuant to this article.

#### **Article 9. Qualifications of suppliers and contractors**

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

(2) Suppliers or contractors shall meet such of the following criteria as the procuring entity considers appropriate and relevant in the circumstances of the particular procurement:

(a) That they have the necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and the personnel to perform the procurement contract;

(b) That they meet ethical and other standards applicable in this State;

(c) That they have legal capacity to enter into the procurement contract;

(d) 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;

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

(f) 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 debarment proceedings.

(3) 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 appropriate documentary



evidence or other information to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (2).

(4) Any requirement established pursuant to this article shall be set out in the pre-qualification or preselection documents, if any, and in the solicitation documents, 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 Law.

(5) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set out in the pre-qualification or preselection documents, if any, and in the solicitation documents.

(6) Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article 8 of this Law, 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, or that is not objectively justifiable.

(7) Notwithstanding paragraph (6) of this article, the procuring entity may require the legalization of documentary evidence provided by the supplier or contractor presenting the successful submission so as to demonstrate its qualifications for the particular procurement. In doing so, 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.

(8) (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, however, be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity;

(d) The procuring entity may require a supplier or contractor that was pre-qualified in accordance with article 17 of this Law to demonstrate its qualifications again in accordance with the same criteria used to pre-qualify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate its qualifications again if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate its qualifications again as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

**Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement**

(1) The procuring entity shall set out in the pre-qualification or preselection documents, if any, and in the solicitation documents, the description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied.

(2) Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article 8 of this Law, no description of the subject matter of a procurement that may restrict the participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction based on nationality, shall be included or used in the pre-qualification or preselection documents, if any, or in the solicitation documents.

(3) The description of the subject matter of the procurement may include specifications, plans, drawings, designs, requirements, including concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology.

(4) To the extent practicable, any description of the subject matter of the procurement shall be objective, functional and generic, and shall set out the relevant technical and quality characteristics or the performance characteristics of that subject matter. There shall be no requirement for or reference to a particular trademark or trade name, patent, design or type, specific origin or producer 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.

(5) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the subject matter of the procurement shall be used, where available, in formulating any description of the subject matter of the procurement to be included in the pre-qualification or preselection documents, if any, and in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms and standardized conditions, where available, in formulating the terms and conditions of the procurement and the procurement contract or the framework agreement to be entered into in the procurement proceedings, and in formulating other relevant aspects of the pre-qualification or preselection documents, if any, and solicitation documents.

**Article 11. Rules concerning evaluation criteria and procedures**

(1) Except for the criteria set out in paragraph (4) of this article, the evaluation criteria shall relate to the subject matter of the procurement.

(2) The evaluation criteria may include:

(a) The price;

(b) The cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the characteristics of the subject matter of the procurement, such as the functional characteristics of goods or construction and the environmental characteristics of the subject matter, the terms of payment and of guarantees in respect of the subject matter of the procurement;

(c) Where relevant in procurement conducted in accordance with articles 46, 48 and 49, the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement.

(3) All non-price evaluation criteria shall, to the extent practicable, be objective, quantifiable and expressed in monetary terms.

(4) In addition to the criteria set out in paragraph (2), the evaluation criteria may include:

(a) Any criteria that the procurement regulations or other provisions of law of this State authorize or require to be taken into account;

(b) A margin of preference for the benefit of domestic suppliers or contractors or domestically produced goods, if authorized or required by the procurement regulations or other provisions of law of this State. The margin of preference shall be calculated in accordance with the procurement regulations.

(5) The procuring entity shall set out in the solicitation documents:

(a) Whether the successful submission will be ascertained on the basis of price or of price and other criteria;

(b) All evaluation criteria established pursuant to this article, including the price and any margin of preference;

(c) Where any criteria other than price are to be used in the evaluation procedure, the relative weights of all evaluation criteria, including price and any margin of preference, except where the procurement is conducted under article 48, in which case the procuring entity shall list all evaluation criteria in descending order of importance;

(d) The manner of application of the criteria in the evaluation procedure.

(6) In evaluating submissions and determining the successful submission, the procuring entity shall use only those criteria and procedures that have been set out in the solicitation documents, and shall apply those criteria and procedures in the manner that has been disclosed in those solicitation documents. No criterion or procedure shall be used that has not been set out in accordance with this provision.

#### **Article 12. Rules concerning estimation of the value of procurement**

(1) A procuring entity shall neither divide its procurement nor use a particular valuation method for estimating the value of procurement so as to limit competition among suppliers or contractors or otherwise avoid its obligations under this Law.

(2) In estimating the value of procurement, the procuring entity shall include the estimated maximum total value of the procurement contract or of all procurement contracts envisaged under a framework agreement over its entire duration, taking into account all forms of remuneration.

### **Article 13. Rules concerning the language of documents**

(1) The pre-qualification or preselection documents, if any, and the solicitation documents shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade unless decided otherwise by the procuring entity in the circumstances referred to in article 32 (4) of this Law).

(2) Applications to pre-qualify or for preselection, if any, and submissions may be formulated and presented in the language of the pre-qualification or preselection documents, if any, and solicitation documents, respectively, or in any other language permitted by those documents.

**(A/CN.9/729/Add.2) (Original: English)**  
**Note by the Secretariat on the draft revised text of the Model Law**

**ADDENDUM**

This note sets out a proposal for articles 14-25 of chapter I (General provisions).

**CHAPTER I. GENERAL PROVISIONS**  
*(continued)*

**Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for preselection or for presenting submissions**

- (1) The manner, place and deadline for presenting applications to pre-qualify or for preselection shall be set out in the invitation to pre-qualify or to preselection and the pre-qualification or preselection documents, as applicable. The manner, place and deadline for presenting submissions shall be set out in the solicitation documents.
- (2) Deadlines for presenting applications to pre-qualify or for preselection or for presenting submissions shall be expressed as a specific date and time and shall allow sufficient time for suppliers or contractors to prepare and present their applications or submissions, taking into account the reasonable needs of the procuring entity.
- (3) If the procuring entity issues a clarification or modification of the pre-qualification, preselection or solicitation documents, it shall, prior to applicable deadline for presenting applications to pre-qualify or for preselection or for presenting submissions, extend the deadline if necessary or as required under article 15 (3) of this Law, in order to afford suppliers or contractors sufficient time to take the clarification or modification into account in their applications or submissions.
- (4) The procuring entity may, in its absolute discretion, prior to a deadline for presenting applications to pre-qualify or for preselection or for presenting submissions, extend the applicable deadline if it is not possible for one or more suppliers or contractors to present their applications or submissions by the deadline initially stipulated, because of any circumstance beyond their control.
- (5) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the pre-qualification, preselection or solicitation documents.

**Article 15. 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

presenting submissions. The procuring entity shall respond within such time as will enable the supplier or contractor to present its submission in timely fashion 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 presenting submissions, 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 as a result of a clarification or modification issued in accordance with this article, the information published when first soliciting the participation of suppliers or contractors in the procurement proceedings becomes materially inaccurate, the procuring entity shall cause the amended information to be published in the same manner and place in which the original information was published, and shall extend the deadline for presentation of submissions as provided for in article 14 (3) of this Law.

(4) 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 submissions.

#### **Article 16. Tender securities**

(1) When the procuring entity requires suppliers or contractors presenting submissions to provide a tender security:

(a) The requirement shall apply to all 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. In cases of domestic procurement, the solicitation documents may in addition stipulate that the tender security shall be issued by an issuer in this State;

(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 out in the solicitation documents, unless:

(i) The acceptance by the procuring entity of such a tender security would be in violation of a law of this State; or

(ii) The procuring entity in cases of domestic procurement requires a tender security to be issued by an issuer in this State;

(d) Prior to presenting a submission, 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 has otherwise ceased to be creditworthy;

(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 the conduct of the supplier or contractor presenting the submission may relate only to:

(i) Withdrawal or modification of the submission after the deadline for presenting submissions, or before the deadline if so stipulated in the solicitation documents;

(ii) Failure to sign a procurement contract if so required by the solicitation documents; and

(iii) Failure to provide a required security for the performance of the contract after the successful submission 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 security document after the earliest of the following events:

(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 cancellation of the procurement;

(d) The withdrawal of a submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

#### **Article 17. Pre-qualification proceedings**

(1) The procuring entity may engage in pre-qualification proceedings with a view to identifying, prior to solicitation, suppliers and contractors that are qualified. The provisions of article 9 of this Law shall apply to pre-qualification proceedings.

(2) If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to pre-qualify is to be published). Unless decided otherwise by the procuring entity in the circumstances referred to in article 32 (4) of this Law, the invitation to pre-qualify 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 or professional journal of wide international circulation.

(3) The invitation to pre-qualify shall include the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into in the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article 9 of this Law;

(d) A declaration as required by article 8 of this Law;

(e) The means of obtaining the pre-qualification documents and the place where they may be obtained;

(f) The price, if any, to be charged by the procuring entity for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents;

(g) If a price is charged, the means of payment for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents, and the currency of payment;

(h) The language or languages in which the pre-qualification documents and, subsequent to pre-qualification, the solicitation documents are available;

(i) The manner, place and deadline for presenting applications to pre-qualify and, if already known, the manner, place and deadline for presenting submissions, in conformity with article 14 of this Law.

(4) The procuring entity shall provide a set of pre-qualification documents to each supplier or contractor that requests them in accordance with the invitation to pre-qualify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the pre-qualification documents shall reflect only the cost of providing them to suppliers or contractors.

(5) The pre-qualification documents shall include the following information:

(a) Instructions for preparing and presenting pre-qualification applications;

(b) Any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;

(c) 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 pre-qualification proceedings, without the intervention of an intermediary;



(d) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the pre-qualification proceedings and the place where these laws and regulations may be found;

(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 presentation of applications to pre-qualify and to the pre-qualification proceedings.

(6) The procuring entity shall respond to any request by a supplier or contractor for clarification of the pre-qualification documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting applications to pre-qualify. The procuring entity shall respond within such time as will enable the supplier or contractor to present its application to pre-qualify in timely fashion. 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 has provided the pre-qualification documents.

(7) The procuring entity shall take a decision with respect to the qualifications of each supplier or contractor presenting an application to pre-qualify. In reaching that decision, the procuring entity shall apply only the criteria and procedures set out in the invitation to pre-qualify and in the pre-qualification documents.

(8) Only suppliers or contractors that have been pre-qualified are entitled to participate further in the procurement proceedings.

(9) The procuring entity shall promptly notify each supplier or contractor presenting an application to pre-qualify whether or not it has been pre-qualified. It shall also make available to any member of the public, upon request, the names of all suppliers or contractors that have been pre-qualified.

(10) The procuring entity shall promptly communicate to each supplier or contractor that has not been pre-qualified the reasons therefor.

#### **Article 18. Cancellation of the procurement**

(1) The procuring entity may cancel the procurement at any time prior to the acceptance of the successful submission and, after the successful submission was accepted, in the circumstances referred to in article 21 (8) of this Law. The procuring entity shall not open any tenders or proposals after taking a decision to cancel the procurement.

(2) The decision of the procuring entity to cancel the procurement and reasons for the decision shall be included in the record of the procurement proceedings and promptly communicated to any supplier or contractor that presented a submission. The procuring entity shall in addition promptly publish a notice of the cancellation of the procurement in the same manner and place in which the original information regarding the procurement proceedings was published, and return any tenders or proposals that remain unopened at the time of the decision to the suppliers or contractors that presented them.

(3) Unless the cancellation of the procurement was a consequence of irresponsible or dilatory conduct on the part of the procuring entity, the procuring entity shall

incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have presented submissions.

#### **Article 19. Rejection of abnormally low submissions**

(1) The procuring entity may reject a submission if the procuring entity has determined that the price in combination with other constituent elements of the submission is abnormally low in relation to the subject matter of the procurement and raises concerns with the procuring entity as to the ability of the supplier or contractor that presented that submission to perform the procurement contract, provided that the procuring entity has taken the following actions:

(a) The procuring entity has requested in writing from the supplier or contractor details of the submission that gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;

(b) The procuring entity has taken account of any information provided by the supplier or contractor following this request, and the information included in the submission, but continues, on the basis of all such information, to hold concerns; and

(c) The procuring entity has recorded the concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.

(2) The decision of the procuring entity to reject a submission in accordance with this article and reasons for the decision shall be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

#### **Article 20. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest**

(1) A procuring entity shall exclude a supplier or contractor from the procurement proceedings if:

(a) The supplier or contractor 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, so as to influence an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings; or

(b) The supplier or contractor has an unfair competitive advantage or a conflict of interest in violation of provisions of law of this State.

(2) Any decision of the procuring entity to exclude a supplier or contractor from the procurement proceedings under this article and the reasons therefor shall be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

**Article 21. Acceptance of the successful submission and entry  
into force of the procurement contract**

- (1) The procuring entity shall accept the successful submission unless:
- (a) The supplier or contractor presenting the successful submission is disqualified in accordance with article 9 of this Law; or
  - (b) The procurement is cancelled in accordance with article 18 (1) of this Law; or
  - (c) The submission found successful at the end of evaluation is rejected as abnormally low under article 19 of this Law; or
  - (d) The supplier or contractor presenting the successful submission is excluded from the procurement proceedings on the grounds specified in article 20 of this Law.
- (2) The procuring entity shall promptly notify each supplier or contractor that presented submissions of its decision to accept the successful submission at the end of the standstill period. The notice shall contain, at a minimum, the following information:
- (a) The name and address of the supplier or contractor presenting the successful submission;
  - (b) The contract price or, where the successful submission was ascertained on the basis of price and other criteria, the contract price and a summary of other characteristics and relative advantages of the successful submission; and
  - (c) The duration of the standstill period as set out in the solicitation documents, which shall be [at least] ... working days (the enacting State specifies the period of time) [unless the procurement regulations provide otherwise] and shall run from the date of the dispatch of the notice under this paragraph to all suppliers or contractors that presented submissions.
- (3) Paragraph (2) of this article shall not apply to awards of procurement contracts:
- (a) Under a framework agreement procedure without second-stage competition;
  - (b) Where the contract price is less than ... (the enacting State specifies a threshold); or
  - (c) Where the procuring entity determines that urgent public interest considerations require the procurement to proceed without a standstill period. The decision of the procuring entity that such urgent considerations exist and the reasons for the decision shall be included in the record of the procurement proceedings.
- (4) Upon expiry of the standstill period, or where there is none, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor that presented that submission, unless the [name of court or courts] or [name of the relevant organ designated by the enacting State] orders otherwise.

(5) Unless a written procurement contract and/or approval by another authority is/are required, a procurement contract in accordance with the terms and conditions of the successful submission enters into force when the notice of acceptance is dispatched to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in effect.

(6) Where the solicitation documents require the supplier or contractor whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the accepted submission:

(a) The procuring entity and the supplier or contractor concerned shall sign the procurement contract within a reasonable period of time after the notice of acceptance is dispatched to the supplier or contractor concerned;

(b) Unless the solicitation documents stipulate that the procurement contract is subject to approval by another authority, the procurement contract enters into force when the contract is signed by the supplier or contractor concerned and by the procuring entity. Between the time when the notice of acceptance is dispatched to the supplier or contractor concerned and the entry into force of the procurement contract, neither the procuring entity nor that supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(7) Where the solicitation documents stipulate that the procurement contract is subject to approval by another 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 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 submissions specified in the solicitation documents or the period of effectiveness of the tender security required under article 16 of this Law.

(8) If the supplier or contractor whose submission has been accepted fails to sign any written procurement contract as required, or fails to provide any required security for the performance of the contract, the procuring entity may either cancel the procurement, or may decide to select the next successful submission from among those remaining in effect, in accordance with the criteria and procedures set out in this Law and in the solicitation documents. In the latter case, the provisions of this article shall apply *mutatis mutandis* to such submission.

(9) Notices under this article are dispatched when they are promptly and 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 any reliable means specified in accordance with article 7 of this Law.

(10) 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 promptly 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.

### **Article 22. Public notice of awards of procurement contract and framework agreement**

- (1) Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name(s) of the supplier(s) or contractor(s) to which the procurement contract or the framework agreement was awarded and, in the case of procurement contracts, the contract price.
- (2) Paragraph (1) is not applicable to awards where the contract price is less than ... (the enacting State specifies a threshold). The procuring entity shall publish a cumulative notice of such awards from time to time but at least once a year.
- (3) The procurement regulations shall provide for the manner of publication of the notices required under this article.

### **Article 23. Confidentiality**

- (1) In its communications with suppliers or contractors or the public, the procuring entity shall not disclose any information if its non-disclosure is necessary for the protection of essential security interests of the State or if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition, unless disclosure of that information is ordered by the [name of court or courts] or [name of the relevant organ designated by the enacting State] and in such case, subject to the conditions of such an order.
- (2) Other than when providing or publishing information pursuant to articles 21 (2) and (10), 22, 24 and 41 of this Law, the procuring entity shall treat applications to pre-qualify or for preselection and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors or to any other person not authorized to have access to this type of information.
- (3) Any discussions, communications, negotiations and dialogue between the procuring entity and a supplier or contractor pursuant to articles 47 (3) and 48 to 50 of this Law shall be confidential. Unless required by law or ordered by the [name of court or courts] or [name of the relevant organ designated by the enacting State] or permitted in the solicitation documents, no party to any discussions, communications, negotiations or dialogue shall disclose to any other person any technical, price or other information relating to these discussions, communications, negotiations or dialogue without the consent of the other party.
- (4) Subject to the requirements in paragraph (1) of this article, in procurement involving classified information, the procuring entity may:
  - (a) Impose on suppliers or contractors requirements aimed at protecting classified information; and
  - (b) Demand that suppliers or contractors ensure compliance with requirements aimed at protecting classified information by their subcontractors.

**Article 24. Documentary record of procurement proceedings**

(1) The procuring entity shall maintain a record of the procurement proceedings that includes the following information:

- (a) A brief description of the subject matter of the procurement;
- (b) The names and addresses of suppliers or contractors that presented submissions, and the name(s) and address(es) of the supplier(s) or contractor(s) with which the procurement contract is entered into and the contract price (in the case of a framework agreement procedure, in addition the name(s) and address(es) of the supplier(s) or contractor(s) with which the framework agreement is concluded);
- (c) A statement of the reasons and circumstances relied upon by the procuring entity for the decision as regards means of communication and any requirement of form;
- (d) In the procurement proceedings in which the procuring entity, in accordance with article 8 of this Law, limits participation of suppliers or contractors, a statement of the reasons and circumstances relied upon by the procuring entity for imposing the limitation;
- (e) If the procuring entity uses a method of procurement other than open tendering, a statement of the reasons and circumstances relied upon by the procuring entity to justify the use of such other method;
- (f) In the case of procurement by means of an auction or involving an auction as a phase preceding the award of the procurement contract, a statement of the reasons and circumstances relied upon by the procuring entity for the use of the auction, and information about the date and time of the opening and closing of the auction;
- (g) In the case of a framework agreement procedure, a statement of the reasons and circumstances upon which it relied to justify the use of a framework agreement procedure and the type of framework agreement selected;
- (h) If the procurement is cancelled pursuant to article 18 (1) of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision to cancel the procurement;
- (i) If any socio-economic policies were considered in the procurement proceedings, details of such policies and the manner in which they were applied;
- (j) If no standstill period was applied, a statement of the reasons and circumstances relied upon by the procuring entity in deciding not to apply a standstill period;
- (k) In the case of a challenge or appeal under chapter VIII of this Law, a copy of the application for reconsideration or review and the appeal, as applicable, and of all decisions taken in the relevant challenge or appeal proceedings or both and the reasons therefor;
- (l) A summary of any requests for clarification of the pre-qualification or preselection documents, if any, or solicitation documents, the responses thereto, as well as a summary of any modification of those documents;

(m) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented applications to pre-qualify or for preselection, if any, or submissions;

(n) If a submission is rejected pursuant to article 19 of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision;

(o) If a supplier or contractor is excluded from the procurement proceedings pursuant to article 20 of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision;

(p) A copy of the notice of the standstill period given in accordance with article 21 (2) of this Law;

(q) If the procurement proceedings resulted in the award of a procurement contract in accordance with article 21 (8) of this Law, a statement to that effect and of the reasons therefor;

(r) The contract price and other principal terms and conditions of the procurement contract; where the written procurement contract has been concluded, a copy thereof. (In the case of a framework agreement procedure, in addition a summary of the principal terms and conditions of the framework agreement or copy of any written framework agreement concluded);

(s) The price, or the basis for determining the price, and a summary of the other principal terms and conditions, of each submission;

(t) A summary of the evaluation of submissions, including the application of any margin of preference pursuant to article 11 (4) (b) of this Law, and the reasons and circumstances on which the procuring entity relied to justify any rejection of bids presented during the auction;

(u) Where exemptions from disclosure of information were invoked under article 23 (1) or 68 of this Law, the reasons and circumstances relied upon in invoking them;

(v) In procurement involving classified information, any requirements imposed on suppliers or contractors for the protection of classified information pursuant to article 23 (4) of this Law; and

(w) Other information required to be included in the record in accordance with the provisions of this Law or the procurement regulations.

(2) The portion of the record referred to in subparagraphs (a) to (k) of paragraph (1) of this article shall, on request, be made available to any person after the successful submission has been accepted or the procurement has been cancelled.

(3) Except as disclosed pursuant to article 41 (3) of this Law, the portion of the record referred to in subparagraphs (p) to (t) of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that presented submissions after the decision on acceptance of the successful submission or on cancellation of the procurement has become known to them. Disclosure of the portion of the record referred to in subparagraphs (s) and (t) may be ordered at an earlier stage only by the [name of court or courts] or [name of the relevant organ designated by the enacting State].

(4) Except when ordered to do so by the [name of court or courts] or [name of the relevant organ designated by the enacting State], and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information from the record of the procurement proceedings if its non-disclosure is necessary for the protection of essential security interests of the State or if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition;

(b) Information relating to the examination and evaluation of submissions, and submission prices, other than the summary referred to in subparagraph (t) of paragraph (1) of this article.

(5) The procurement entity shall record, file and preserve all documents relating to the procurement proceedings, according to procurement regulations or other provisions of law of this State.

#### **Article 25. Code of conduct**

A code of conduct for officers or employees of procuring entities shall be enacted. It shall address, *inter alia*, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements. The code of conduct so enacted shall be promptly made accessible to the public and systematically maintained.



**(A/CN.9/729/Add.3) (Original: English)**  
**Note by the Secretariat on the draft revised text of the Model Law**

**ADDENDUM**

This note sets out a proposal for chapter II (Methods of procurement and their conditions for use. Solicitation and notices of the procurement) of the revised Model Law, comprising articles 26-34, and for chapter III (Open tendering) of the revised Model Law, comprising articles 35-43.

**CHAPTER II. METHODS OF PROCUREMENT AND  
THEIR CONDITIONS FOR USE. SOLICITATION AND  
NOTICES OF THE PROCUREMENT**

**SECTION I. METHODS OF PROCUREMENT AND  
THEIR CONDITIONS FOR USE**

**Article 26. Methods of procurement<sup>1</sup>**

- (1) The procuring entity may conduct procurement by means of:
- (a) Open tendering;
  - (b) Restricted tendering;
  - (c) Request for quotations;
  - (d) Request for proposals without negotiation;
  - (e) Two-stage tendering;
  - (f) Request for proposals with dialogue;
  - (g) Request for proposals with consecutive negotiations;
  - (h) Competitive negotiations;
  - (i) Electronic reverse auction; and
  - (j) Single-source procurement.
- (2) The procuring entity may engage in a framework agreement procedure in accordance with the provisions of chapter VII of this Law.

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<sup>1</sup> States may choose not to incorporate all the methods of procurement listed in this article into their national legislation, though an appropriate range of options, including open tendering, should be always provided for. On this question, see the Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/...). States may consider whether, for certain methods of procurement, to include a requirement of a high-level approval by a designated organ. On this question, see the Guide to Enactment.

**Article 27. General rules applicable to the selection  
of a procurement method**

- (1) Except as otherwise provided for in articles 28 to 30 of this Law, a procuring entity shall conduct procurement by means of open tendering.
- (2) A procuring entity may use a method of procurement other than open tendering only in accordance with articles 28 to 30 of this Law, shall select the other method of procurement to accommodate the circumstances of the procurement concerned, and shall seek to maximize competition to the extent practicable.
- (3) If the procuring entity uses a method of procurement other than open tendering, it shall include in the record required under article 24 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of that method.

**Article 28. Conditions for use of methods of procurement under chapter IV  
of this Law (restricted tendering, request for quotations and request for  
proposals without negotiation)**

- (1) The procuring entity may engage in procurement by means of restricted tendering in accordance with article 44 of this Law when:
  - (a) The subject matter of the procurement, by reason of its highly complex or specialized nature, is 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 subject matter of the procurement.
- (2) A procuring entity may engage in procurement by means of a request for quotations in accordance with article 45 of this Law for the procurement of readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the threshold amount set out in the procurement regulations.
- (3) The procuring entity may engage in procurement by means of request for proposals without negotiation in accordance with article 46 of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposals.

**Article 29. Conditions for use of methods of procurement under chapter V  
of this Law (two-stage tendering, request for proposals with dialogue, request  
for proposals with consecutive negotiations, competitive negotiations and  
single-source procurement)**

- (1) A procuring entity may engage in procurement by means of two-stage tendering in accordance with article 47 of this Law where:
  - (a) The procuring entity assesses that discussions with suppliers or contractors are needed to refine aspects of the description of the subject matter of the procurement and to formulate them with the precision required under article 10

of this Law and in order to allow the procuring entity to obtain the most satisfactory solution to its procurement needs; or

(b) Open tendering was engaged in but no tenders were presented or the procurement was cancelled by the procuring entity pursuant to article 18 (1) of this Law and where, in the judgement of the procuring entity, engaging in new open tendering proceedings or a procurement method under chapter IV of this Law would be unlikely to result in a procurement contract.

(2) (Subject to approval by the [name of the organ designated by the enacting State to issue the approval]),<sup>2</sup> a procuring entity may engage in procurement by means of request for proposals with dialogue in accordance with article 48 of this Law where:

(a) It is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement in accordance with article 10 of this Law, and the procuring entity assesses that dialogue with suppliers or contractors is needed to obtain the most satisfactory solution to its procurement needs;

(b) The procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) The procuring entity determines that the selected method is the most appropriate method of procurement for the protection of essential security interests of the State; or

(d) Open tendering was engaged in but no tenders were presented or the procurement was cancelled by the procuring entity pursuant to article 18 (1) of this Law and where, in the judgement of the procuring entity, engaging in new open tendering proceedings or a procurement method under chapter IV of this Law would be unlikely to result in a procurement contract.

(3) A procuring entity may engage in procurement by means of request for proposals with consecutive negotiations in accordance with article 49 of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposals, and it assesses that consecutive negotiations with suppliers or contractors are needed in order to ensure that the financial terms and conditions of the procurement contract are acceptable to the procuring entity.

(4) A procuring entity may engage in competitive negotiations, in accordance with the provisions of article 50 of this Law, in the following circumstances:

(a) There is an urgent need for the subject matter of the procurement, and engaging in open tendering proceedings or any other competitive method of procurement because of the time involved in using those methods would therefore be impractical, provided that the circumstances giving rise to the urgency were

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<sup>2</sup> The enacting State may consider enacting the provisions in parenthesis where it wishes to subject the use of this procurement method to a measure of ex ante control.

neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use open tendering proceedings or any other competitive method of procurement because of the time involved in using those methods; or

(c) Where the procuring entity determines that the use of any other competitive method of procurement is not appropriate for the protection of essential security interests of the State.

(5) A procuring entity may engage in single-source procurement in accordance with the provisions of article 51 of this Law in the following exceptional circumstances:

(a) The subject matter of the procurement is available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible;

(b) Owing to a catastrophic event, there is an extremely urgent need for the subject matter of the procurement, and engaging in any other method of procurement would be impractical because of the time involved in using those methods;

(c) The procuring entity, having procured goods, equipment, technology or services 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, technology or services, 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 or services in question;

(d) Where the procuring entity determines that the use of any other method of procurement is not appropriate for the protection of essential security interests of the State; or

(e) Subject to approval by the [name of the organ designated by the enacting State to issue the approval], and following public notice and adequate opportunity to comment, where procurement from a particular supplier or contractor is necessary in order to implement a socio-economic policy of this State, provided that procurement from no other supplier or contractor is capable of promoting that policy.

### **Article 30. Conditions for use of an electronic reverse auction**

(1) A procuring entity may engage in procurement by means of an electronic reverse auction in accordance with the provisions of chapter VI of this Law, under the following conditions:

(a) Where it is feasible for the procuring entity to formulate a detailed and precise description of the subject matter of the procurement;

(b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction, such that effective competition is ensured; and

(c) Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.

(2) A procuring entity may use an electronic reverse auction as a phase preceding the award of the procurement contract in a procurement method as appropriate under the provisions of this Law. It may also use an electronic reverse auction for award of a procurement contract in a framework agreement procedure with second-stage competition in accordance with the provisions of this Law. An electronic reverse auction under this paragraph may be used only where the conditions of paragraph (1) (c) of this article are satisfied.

#### **Article 31. Conditions for use of a framework agreement procedure**

(1) A procuring entity may engage in a framework agreement procedure in accordance with chapter VII of this Law where it determines that:

(a) The need for the subject matter of the procurement is expected to arise on an indefinite basis during a given period of time; or

(b) By virtue of the nature of the subject matter of the procurement, the need for it may arise on an urgent basis during a given period of time.

(2) The procuring entity shall include in the record required under article 24 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of a framework agreement procedure and the type of framework agreement selected.

## **SECTION II. SOLICITATION AND NOTICES OF THE PROCUREMENT**

#### **Article 32. Solicitation in open tendering, two-stage tendering and in procurement by means of an electronic reverse auction**

(1) An invitation to tender in open tendering or two-stage tendering and an invitation to an electronic reverse auction under article 52 of this Law shall be published in ... (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published).

(2) The invitation 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 or professional journal of wide international circulation.

(3) The provisions of this article shall not apply where the procuring entity engages in pre-qualification proceedings in accordance with article 17 of this Law.

(4) The procuring entity shall not be required to cause the invitation to be published in accordance with paragraph (2) of this article in domestic procurement and in procurement proceedings where the procuring entity decides, in view of the

low value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in presenting submissions.

**Article 33. Solicitation in restricted tendering, request for quotations,  
competitive negotiations and single-source procurement.  
Requirement for an advance notice of the procurement**

(1) (a) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified in article 28 (1) (a) of this Law, it shall solicit tenders from all suppliers and contractors from which the subject matter of the procurement is available;

(b) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified in article 28 (1) (b) of this Law, it shall select suppliers or contractors from which to solicit tenders in a non-discriminatory manner, and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(2) Where the procuring entity engages in procurement by means of request for quotations in accordance with article 28 (2) of this Law, it shall request quotations from as many suppliers or contractors as practicable, but from at least three.

(3) Where the procuring entity engages in procurement by means of competitive negotiations in accordance with article 29 (4) of this Law, it shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(4) Where the procuring entity engages in single-source procurement in accordance with article 29 (5) of this Law, it shall solicit a proposal or price quotation from a single supplier or contractor.

(5) Prior to direct solicitation in accordance with the provisions of paragraphs (1), (3) and (4) of this article, the procuring entity shall cause a notice of the procurement to be published in ... (the enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall contain at a minimum the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into in the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) A declaration pursuant to article 8 of this Law; and

(d) The method of procurement to be used.

(6) The requirements of paragraph (5) shall not apply in the case of urgency as referred to in articles 29 (4) (b) and 29 (5) (b).

**Article 34. Solicitation in request for proposals proceedings**

(1) An invitation to participate in the request for proposals proceedings shall be published in accordance with article 32 (1) and (2), except where:

(a) The procuring entity engages in pre-qualification proceedings in accordance with article 17 of this Law or in preselection proceedings in accordance with article 48 (3) of this Law; or

(b) The procuring entity engages in direct solicitation under the conditions set out in paragraph (2) of this article; or

(c) The procuring entity decides not to cause the invitation to be published in accordance with article 32 (2) of this Law in the circumstances referred to in article 32 (4) of this Law.

(2) The procuring entity may engage in direct solicitation in request for proposals proceedings if:

(a) The subject matter to be procured is available only from a limited number of suppliers or contractors, provided that the procuring entity solicits proposals from all those suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the subject matter to be procured, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) The procurement involves classified information, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.

(3) The procuring entity shall include in the record required under article 24 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request for proposals proceedings.

(4) The procuring entity shall cause a notice of the procurement to be published in accordance with the requirements set out in article 33 (5) where it engages in direct solicitation in request for proposals proceedings.

**CHAPTER III. OPEN TENDERING****SECTION I. SOLICITATION OF TENDERS****Article 35. Procedures for soliciting tenders**

The procuring entity shall solicit tenders by causing an invitation to tender to be published in accordance with the provisions of article 32 of this Law.

**Article 36. Contents of invitation to tender**

The invitation to tender shall include the following information:

(a) The name and address of the procuring entity;

(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, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, and any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law;

(d) A declaration pursuant to article 8 of this Law;

(e) The means of obtaining the solicitation documents and the place where they may be obtained;

(f) The price, if any, charged by the procuring entity for the solicitation documents;

(g) If a price is charged for the solicitation documents, the means and currency of payment;

(h) The language or languages in which the solicitation documents are available;

(i) The manner, place and deadline for presenting tenders.

#### **Article 37. Provision of solicitation documents**

The procuring entity shall provide the solicitation documents to each supplier or contractor that responds to the invitation to tender in accordance with the procedures and requirements specified therein. If pre-qualification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been pre-qualified 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 providing them to suppliers or contractors.

#### **Article 38. Contents of solicitation documents**

The solicitation documents shall include the following information:

(a) Instructions for preparing tenders;

(b) The criteria and procedures, in conformity with the provisions of article 9 of this Law, that will be applied in the ascertainment of the qualifications of suppliers or contractors and in any further demonstration of qualifications pursuant to article 42 (6) of this Law;

(c) The requirements as to documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;

(d) The description of the subject matter of the procurement, in conformity with article 10 of this Law; the quantity of the goods; services to be performed; the



location where the goods are to be delivered, construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;

(e) 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;

(f) If alternatives to the characteristics of the subject matter of the procurement, contractual terms and conditions or other requirements set out 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;

(g) If suppliers or contractors are permitted to present tenders for only a portion of the subject matter of the procurement, a description of the portion or portions for which tenders may be presented;

(h) 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 subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(i) The currency or currencies in which the tender price is to be formulated and expressed;

(j) The language or languages, in conformity with article 13 of this Law, in which tenders are to be prepared;

(k) 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 presenting tenders in accordance with article 16 of this Law, 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 material bonds;

(l) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security, a statement to that effect;

(m) The manner, place and deadline for presenting tenders, in conformity with article 14 of this Law;

(n) The means by which, pursuant to article 15 of this Law, 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;

(o) The period of time during which tenders shall be in effect, in conformity with article 40 of this Law;

(p) The manner, place, date and time for the opening of tenders, in conformity with article 41 of this Law;

(q) The criteria and procedure for examining tenders against the description of the subject matter of the procurement;

(r) The criteria and procedure for evaluating tenders in accordance with article 11 of this Law;

(s) The currency that will be used for the purpose of evaluating tenders pursuant to article 42 (5) of this Law 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, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(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) Notice of the right provided under article 63 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(w) Any formalities that will be required once a successful 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 21 of this Law, and approval by another authority and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(x) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of tenders and to other aspects of the procurement proceedings.

## **SECTION II. PRESENTATION OF TENDERS**

### **Article 39. Presentation of tenders**

(1) Tenders shall be presented in the manner, at the place and by the deadline specified in the solicitation documents.

(2) (a) A tender shall be presented in writing, and signed, and:

(i) If in paper form, in a sealed envelope; or

(ii) If in any other form, according to requirements specified by the procuring entity in the solicitation documents, which ensure at least a similar degree of authenticity, security, integrity and confidentiality;

(b) The procuring entity shall provide to the supplier or contractor a receipt showing the date and time when its tender was received;

(c) The procuring entity shall preserve the security, integrity and confidentiality of a tender, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law.

(3) A tender received by the procuring entity after the deadline for presenting tenders shall not be opened and shall be returned unopened to the supplier or contractor that presented it.

**Article 40. 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;

(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 presenting 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 presenting tenders.

### **SECTION III. EVALUATION OF TENDERS**

**Article 41. Opening of tenders**

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for presenting tenders. They shall be opened at the place and in accordance with the manner and procedures specified in the solicitation documents.

(2) All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they have been given opportunity to be fully and contemporaneously apprised of the opening of the 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 presented tenders but that are not present or represented at the opening of tenders, and included immediately in the record of the procurement proceedings required by article 24.

**Article 42. Examination and evaluation of tenders**

(1) (a) The procuring entity may ask a supplier or contractor for clarifications of its tender in order to assist in the examination and evaluation of tenders;

(b) 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 presented the tender;

(c) 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.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with article 10 of this Law;

(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 out 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 of tenders.

(3) The procuring entity shall reject a tender:

(a) If the supplier or contractor that presented the tender is not qualified;

(b) If the supplier or contractor that presented 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 19 or 20 of this Law.

(4) (a) The procuring entity shall evaluate the tenders that have not been rejected in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the criteria and procedures set out in the solicitation documents. No criterion or procedure shall be used that has not been set out in the solicitation documents;

(b) The successful tender shall be:

(i) Where price is the only award criterion, the tender with the lowest tender price; or

(ii) Where there are price and other award criteria, the most advantageous tender ascertained on the basis of the criteria and procedures for evaluating tenders specified in the solicitation documents in accordance with article 11 of this Law.

(5) When tender prices are expressed in two or more currencies, for the purpose of evaluating and comparing tenders the tender prices of all tenders shall be converted to the currency specified in the solicitation documents according to the rate set out in those documents, pursuant to article 38 (s) of this Law.

(6) Whether or not it has engaged in pre-qualification proceedings pursuant to article 17 of this Law, the procuring entity may require the supplier or contractor presenting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate its qualifications again, in accordance with the criteria and procedures conforming to the provisions of article 9 of this Law. The criteria and procedures to be used for such further demonstration shall be set out in the solicitation documents. Where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings.

(7) If the supplier or contractor presenting the successful tender is requested to demonstrate its qualifications again in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select the next successful tender from among those remaining in effect, in accordance with paragraph (4) of this article, subject to the right of the procuring entity to cancel the procurement in accordance with article 18 (1) of this Law.

**Article 43. 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 presented by the supplier or contractor.

**(A/CN.9/729/Add.4) (Original: English)**  
**Note by the Secretariat on the draft revised text of the Model Law**

**ADDENDUM**

This note sets out a proposal for chapter IV (Procedures for restricted tendering, request for quotations and request for proposals without negotiation) of the revised Model Law, comprising articles 44 to 46.

**Chapter IV. PROCEDURES FOR RESTRICTED  
TENDERING, REQUEST FOR QUOTATIONS AND  
REQUEST FOR PROPOSALS WITHOUT  
NEGOTIATION**

**Article 44. Restricted tendering**

- (1) The procuring entity shall solicit tenders in accordance with the provisions of article 33 (1) and (5) of this Law.
- (2) The provisions of chapter III of this Law, except for articles 35 to 37, shall apply to restricted tendering proceedings.

**Article 45. Request for quotations**

- (1) The procuring entity shall request quotations in accordance with the provisions of article 33 (2) of this Law. Each supplier or contractor from which a quotation is requested shall be informed whether any elements other than the charges for the subject matters of the procurement themselves, such as any applicable 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 presented by the supplier or contractor.
- (3) The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity as set out in the request for quotations.

**Article 46. Request for proposals without negotiation**

- (1) The procuring entity shall solicit proposals by causing an invitation to participate in the request for proposals without negotiation proceedings to be published in accordance with article 34 (1) of this Law, unless an exception provided for in that article applies.
- (2) The invitation shall include:
  - (a) The name and address of the procuring entity;
  - (b) A description of the subject matter of the procurement, and the desired or required time and location for the provision of such subject matter;

(c) 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;

(d) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law;

(e) The criteria and procedures for opening the proposals and for examining and evaluating the proposals in accordance with articles 10 and 11 of this Law, including the minimum requirements with respect to technical and quality characteristics that proposals must meet in order to be considered responsive in accordance with article 10 of this Law, and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;

(f) A declaration pursuant to article 8 of this Law;

(g) The means of obtaining the request for proposals and the place where it may be obtained;

(h) The price, if any, charged by the procuring entity for the request for proposals;

(i) If a price is charged for the request for proposals, the means and currency of payment for the request for proposals;

(j) The language or languages in which the requests for proposals are available;

(k) The manner, place and deadline for presenting proposals.

(3) The procuring entity shall issue the request for proposals:

(a) Where an invitation to participate in the request for proposals without negotiation proceedings has been published in accordance with the provisions of article 34 (1) of this Law, to each supplier or contractor that responds to the invitation in accordance with the procedures and requirements specified therein;

(b) In the case of pre-qualification, to each supplier or contractor pre-qualified in accordance with article 17 of this Law;

(c) In the case of direct solicitation under article 34 (2) of this Law, to each supplier or contractor selected by the procuring entity;

and that pays the price, if any, charged for the request for proposals. The price that the procuring entity may charge for the request for proposals shall reflect only the cost of providing it to suppliers or contractors.

(4) The request for proposals shall include, in addition to the information referred to in paragraphs (2)(a) to (e) and (k) of this article, the following information:

(a) Instructions for preparing and presenting proposals, including instructions to suppliers or contractors to present simultaneously to the procuring entity proposals in two envelopes: one envelope containing the technical and quality characteristics of the proposal and the other envelope containing the financial aspects of the proposal;

(b) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;

(c) The currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(d) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(e) The means by which, pursuant to article 15 of this Law, suppliers or contractors may seek clarifications of the request for proposals, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(f) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(g) 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;

(h) Notice of the right provided under article 63 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(i) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by another authority and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;

(j) 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 presentation of proposals and to the procurement proceedings.

(5) Before opening the envelopes containing the financial aspects of the proposals, the procuring entity shall examine and evaluate the technical and quality characteristics of proposals in accordance with the criteria and procedures specified in the request for proposals.

(6) The results of the examination and evaluation of the technical and quality characteristics of the proposals shall be immediately included in the record of the procurement proceedings.



(7) The proposals whose technical and quality characteristics fail to meet the relevant minimum requirements shall be considered to be non-responsive and shall be rejected on that ground. A notice of rejection and the reasons for the rejection, together with the unopened envelope containing the financial aspects of the proposal, shall be promptly dispatched to each respective supplier or contractor whose proposal was rejected.

(8) The proposals whose technical and quality characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive. The procuring entity shall promptly communicate to each supplier or contractor presenting such a proposal the score of the technical and quality characteristics of its respective proposal. The procuring entity shall invite all such suppliers or contractors to the opening of the envelopes containing the financial aspects of their proposals.

(9) The score of the technical and quality characteristics of each responsive proposal and the corresponding financial aspect of that proposal shall be read out in the presence of the suppliers or contractors invited in accordance with paragraph (8) of this article to the opening of the envelopes containing the financial aspects of the proposals.

(10) The procuring entity shall compare the financial aspects of the responsive proposals and on that basis identify the successful proposal in accordance with the criteria and the procedure set out in the request for proposals. The successful proposal shall be the proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price.

**(A/CN.9/729/Add.5) (Original: English)**  
**Note by the Secretariat on the draft revised text of the Model Law**

**ADDENDUM**

This note sets out a proposal for chapter V of the revised Model Law (Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement), comprising articles 47-51.

**Chapter V. Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement**

**Article 47. 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 present, 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 subject matter of the procurement as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.
- (3) The procuring entity may, in the first stage, engage in discussions with suppliers or contractors whose tenders have not been rejected pursuant to provisions of this Law, concerning any aspect of their tenders. When the procuring entity engages in discussions with any supplier or contractor, it shall extend an equal opportunity to participate in discussions to all suppliers or contractors.
- (4) (a) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite all suppliers or contractors whose tenders were not rejected at the first stage to present final tenders with prices in response to a revised set of terms and conditions for the procurement;  
  
(b) In revising the relevant terms and conditions of the procurement, the procuring entity may:
  - (i) Delete or modify any aspect of the technical or quality characteristics of the subject matter of the procurement initially provided, and may add any new characteristic that conforms to the requirements of this Law;
  - (ii) Delete or modify any criterion for examining or evaluating tenders initially provided, and may add any new criterion that conforms to the requirements of this Law, to the extent only that the deletion or modification is required as a result of changes made in the technical or quality characteristics of the subject matter of the procurement;

(c) Any deletion, modification or addition made pursuant to subparagraph (b) of this paragraph shall be communicated to suppliers or contractors in the invitation to present final tenders;

(d) A supplier or contractor not wishing to present 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;

(e) The final tenders shall be evaluated in order to ascertain the successful tender as defined in article 42 (4) (b) of this Law.

#### **Article 48. Request for proposals with dialogue**

(1) The procuring entity shall solicit proposals by causing an invitation to participate in the request for proposals with dialogue proceedings to be published in accordance with article 34 (1) of this Law, unless an exception provided for in that article applies.

(2) The invitation shall include:

(a) The name and address of the procuring entity;

(b) A description of the subject matter of the procurement to the extent known, and the desired or required time and location for the provision of such subject matter;

(c) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(d) The intended stages of the procedure;

(e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law;

(f) The minimum requirements that proposals must meet in order to be considered responsive in accordance with article 10 of this Law, and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;

(g) A declaration pursuant to article 8 of this Law;

(h) The means of obtaining the request for proposals and the place where it may be obtained;

(i) The price, if any, charged by the procuring entity for the request for proposals;

(j) If a price is charged for the request for proposals, the means and currency of payment for the request for proposals;

(k) The language or languages in which the requests for proposals are available;

(l) The manner, place and deadline for presenting proposals.

(3) For the purpose of limiting the number of suppliers or contractors from which to request proposals, the procuring entity may engage in preselection proceedings. The provisions of article 17 of this Law shall apply *mutatis mutandis* to the preselection proceedings, except to the extent that those provisions are derogated from in this paragraph:

(a) The procuring entity shall specify in the preselection documents that it will request proposals only from a limited number of preselected suppliers or contractors that best meet the qualification criteria specified in the preselection documents;

(b) The preselection documents shall set out the maximum number of preselected suppliers or contractors from which the proposals will be requested and the manner in which the selection of that number will be carried out. In establishing such a number the procuring entity shall bear in mind the need to ensure the effective competition;

(c) The procuring entity shall rate the suppliers or contractors that meet the criteria specified in the preselection documents according to the manner of rating that is set out in the invitation to preselection and the preselection documents.

(d) The procuring entity shall preselect suppliers or contractors that acquired the best rating up to the maximum number indicated in the preselection documents but at least three if possible;

(e) The procuring entity shall promptly notify each supplier or contractor whether or not it has been preselected and shall upon request communicate to suppliers or contractors that have not been preselected the reasons therefor. It shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been preselected.

(4) The procuring entity shall issue the request for proposals:

(a) Where an invitation to participate in the request for proposals with dialogue proceedings has been published in accordance with the provisions of article 34 (1) of this Law, to each supplier or contractor that responds to the invitation in accordance with the procedures and requirements specified therein;

(b) In the case of pre-qualification, to each supplier or contractor pre-qualified in accordance with article 17 of this Law;

(c) Where preselection proceedings have been engaged in, to each preselected supplier or contractor in accordance with the procedures and requirements specified in the preselection documents;

(d) In the case of direct solicitation under article 34 (2) of this Law, to each supplier or contractor selected by the procuring entity;

that pays the price, if any, charged for the request for proposals. The price that the procuring entity may charge for the request for proposals shall reflect only the cost of providing it to suppliers or contractors.

(5) The request for proposals shall include, in addition to the information referred to in paragraphs (2) (a) to (f) and (1) of this article, the following information:

(a) Instructions for preparing and presenting proposals;

(b) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;

(c) The currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(d) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(e) The means by which, pursuant to article 15 of this Law, suppliers or contractors may seek clarifications of the request for proposals, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(f) Any elements of the description of the subject matter of the procurement or term or condition of the procurement contract that will not be the subject of dialogue during the procedure;

(g) Where the procuring entity intends to limit the number of suppliers or contractors that it will invite to participate in the dialogue, the minimum number of suppliers or contractors, which shall be not lower than three, if possible, and, where appropriate, the maximum number and the criteria and procedure, in conformity with the provisions of this Law, that will be followed in selecting it;

(h) The criteria and procedure for evaluating the proposals in accordance with article 11 of this Law;

(i) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(j) 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;

(k) Notice of the right provided under article 63 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(l) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by another authority and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;

(m) 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 presentation of proposals and to the procurement proceedings.

(6) (a) The procuring entity shall examine all proposals received against the established minimum requirements and shall reject each proposal that fails to meet these minimum requirements on the ground that it is non-responsive;

(b) Where the limitation on the number of suppliers or contractors that can be invited to participate in the dialogue was established and the number of responsive proposals exceeds that maximum, the procuring entity shall select the maximum number of responsive proposals in accordance with the criteria and procedure specified in the request for proposals;

(c) A notice of rejection and the reasons for the rejection shall be promptly dispatched to each respective supplier or contractor whose proposal was rejected.

(7) The procuring entity shall invite each supplier or contractor that presented a responsive proposal, within any applicable maximum, to participate in dialogue. The procuring entity shall ensure that the number of suppliers invited to participate in the dialogue is sufficient to ensure effective competition, and shall be at least three, if possible.

(8) The dialogue shall be conducted by the same representatives of the procuring entity on a concurrent basis.

(9) During the course of the dialogue, the procuring entity shall not modify the subject matter of the procurement, nor any qualification or evaluation criterion, nor any minimum requirements established pursuant to paragraph (2) (f) of this article, nor any elements of the description of the subject matter of the procurement or term or condition of the procurement contract that is not subject to the dialogue as notified in the request for proposals.

(10) Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that are communicated by the procuring entity to a supplier or contractor shall be communicated at the same time on an equal basis to all other participating suppliers or contractors, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article 23 of this Law.

(11) Following the dialogue, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request shall be in writing, and shall specify the manner, place and deadline for presenting best and final offers.

(12) No negotiations shall take place between the procuring entity and suppliers or contractors with respect to their best and final offers.

(13) The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

**Article 49. Request for proposals with consecutive negotiations**

(1) The provisions of article 46 (1)-(7) of this Law shall apply mutatis mutandis to procurement conducted by means of request for proposals with consecutive negotiations, except to the extent those provisions are derogated from in this article.

(2) The proposals whose technical and quality characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive. The procuring entity shall rank each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals, and shall:

(a) Promptly communicate to each supplier or contractor presenting the responsive proposal the score of the technical and quality characteristics of its respective proposal and its ranking;

(b) Invite the supplier or contractor that has attained the best ranking in accordance with those criteria and procedure for negotiations on the financial aspects of its proposal; and

(c) Inform other suppliers or contractors that presented responsive proposals that they may be considered for negotiation if the negotiations with the suppliers or contractors with a better ranking do not result in a procurement contract.

(3) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (2) (b) 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.

(4) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second best ranking; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors still participating in the procurement proceedings for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

(5) During the course of the negotiations, the procuring entity shall not modify the subject matter of the procurement, nor any qualification, examination or evaluation criterion, including any established minimum requirements, nor any elements of the description of the subject matter of the procurement or term or condition of the procurement contract other than financial aspects of proposals that are subject to the negotiations as notified in the request for proposals.

(6) The procuring entity may not reopen negotiations with any supplier or contractor with which it has terminated negotiations.

**Article 50. Competitive negotiations**

(1) Paragraphs (3), (5) and (6) of article 33 of this Law shall apply to the procedure preceding the negotiations.

(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 before or during the negotiations shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement, unless they are specific or exclusive to

that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article 23 of this Law.

(3) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present, by a specified date, a best and final offer with respect to all aspects of their proposals.

(4) No negotiations shall take place between the procuring entity and suppliers or contractors with respect to their best and final offers.

(5) The successful offer shall be the offer that best meets the needs of the procuring entity.

#### **Article 51. Single-source procurement**

Paragraphs (4) to (6) of article 33 of this Law shall apply to the procedure preceding the solicitation of a proposal or price quotation from a single supplier or contractor. The procuring entity shall engage in negotiations with the supplier or contractor from which a proposal or price quotation is solicited unless such negotiations are not feasible in the circumstances of the procurement concerned.



**(A/CN.9/729/Add.6) (Original: English)**  
**Note by the Secretariat on the draft revised text of the Model Law**

**ADDENDUM**

This note sets out a proposal for chapter VI (Electronic reverse auctions) of the revised Model Law, comprising articles 52 to 56.

**Chapter VI. Electronic reverse auctions**

**Article 52. Procedures for soliciting participation in procurement by means of an electronic reverse auction**

(1) The procuring entity shall solicit bids by causing an invitation to the electronic reverse auction to be published in accordance with the provisions of article 32. The invitation shall include:

- (a) The name and address of the procuring entity;
- (b) A description of the subject matter of the procurement, in conformity with article 10 of this Law, and the desired or required time and location for the provision of such subject matter;
- (c) 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;
- (d) A declaration pursuant to article 8 of this Law;
- (e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article 9 of this Law;
- (f) The criteria and procedure for examining bids against the description of the subject matter of the procurement;
- (g) The criteria and procedure for evaluating bids in accordance with article 11 of this Law, including any mathematical formula that will be used in the evaluation procedure during the auction;
- (h) The manner in which the bid 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 subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;
- (i) The currency or currencies in which the bid price is to be formulated and expressed;
- (j) The minimum number of suppliers or contractors required to register for the auction in order for the auction to be held, which shall be sufficient to ensure effective competition;
- ((k) If any limitation on the number of suppliers or contractors that can be registered for the auction is imposed in accordance with paragraph (2) of this

article, the relevant maximum number and the criteria and procedure, in conformity with the provisions of this Law, that will be followed in selecting it;)<sup>1</sup>

(l) How the auction can be accessed, including appropriate information for connection to the auction;

(m) The deadline by which the suppliers and contractors shall register for the auction and the requirements for registration;

(n) The date and time of the opening of the auction and the requirements for identification of bidders at the opening of the auction;

(o) The criteria governing the closing of the auction;

(p) Other rules for the conduct of the auction, including the information that will be made available to the bidders in the course of the auction, the language in which it will be made available and the conditions under which the bidders will be able to bid;

(q) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(r) The means by which suppliers or contractors may seek clarifications of information relating to the procurement proceedings;

(s) 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 before and after the auction, without the intervention of an intermediary;

(t) Notice of the right provided under article 63 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(u) Any formalities that will be required after the auction for a procurement contract to enter into force, including, where applicable, ascertainment of qualifications or responsiveness in accordance with article 56 of this Law and the execution of a written procurement contract pursuant to article 21 of this Law;

(v) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the procurement proceedings.

((2) The procuring entity may impose a maximum number of suppliers or contractors that can be registered for the electronic reverse auction only to the extent that capacity limitations in its communication system so require. The procuring entity shall include a statement of the reasons and circumstances upon

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<sup>1</sup> The enacting State may consider omitting these provisions together with the provisions of paragraph (2) of this article if it considers them irrelevant in the light of prevailing circumstances in its jurisdiction(s).

which it relied to justify the imposition of such a maximum in the record required under article 24 of this Law.)

(3) The procuring entity may decide in the light of the circumstances of the given procurement that the electronic reverse auction shall be preceded by an examination or evaluation of initial bids. In such case, the invitation to the auction shall, in addition to information listed in paragraph (1) of this article, include:

(a) An invitation to present initial bids together with the instructions for preparing initial bids;

(b) The manner, place and deadline for presenting initial bids.

(4) Where the electronic reverse auction has been preceded by the examination or evaluation of initial bids, the procuring entity shall promptly after the completion of the examination or evaluation of initial bids:

(a) Dispatch the notice of rejection and reasons for rejection to each supplier or contractor whose initial bid was rejected;

(b) Issue an invitation to the auction to each qualified supplier or contractor whose initial bid is responsive, providing all information required to participate in the auction;

(c) Where an evaluation of initial bids has taken place, each invitation to the auction shall also be accompanied by the outcome of the evaluation as relevant to the supplier or contractor to which the invitation is addressed.

**Article 53. Procedures for soliciting participation in procurement proceedings involving an electronic reverse auction as a phase preceding the award of the procurement contract**

(1) Where an electronic reverse auction is to be used as a phase preceding the award of the procurement contract in a procurement method, as appropriate, or in a framework agreement procedure with second-stage competition, the procuring entity shall notify suppliers and contractors when first soliciting their participation in the procurement proceedings, that an auction will be held and shall provide, in addition to other information required to be included under provisions of this Law, the following information about the auction:

(a) The mathematical formula that will be used in the evaluation procedure during the auction;

(b) How the auction can be accessed, including appropriate information for connection to the auction.

(2) Before the electronic reverse auction is held, the procuring entity shall issue an invitation to the auction to all suppliers or contractors remaining in the proceedings specifying:

(a) The deadline by which the suppliers and contractors shall register for the auction and requirements for registration;

(b) The date and time of the opening of the auction and requirements for identification of bidders at the opening of the auction;

- (c) Criteria governing the closing of the auction;
- (d) Other rules for the conduct of the auction, including the information that will be made available to the bidders during the auction and the conditions under which the bidders will be able to bid.

**Article 54. Registration for the electronic reverse auction and timing of holding of the auction**

- (1) Confirmation of registration for the electronic reverse auction shall be communicated promptly to each registered supplier or contractor.
- (2) If the number of suppliers or contractors registered for the electronic reverse auction is insufficient to ensure effective competition, the procuring entity may cancel the auction. The cancellation of the auction shall be communicated promptly to each registered supplier or contractor.
- (3) The period of time between the issuance of the invitation to the electronic reverse auction and the auction shall be sufficiently long to allow suppliers or contractors to prepare for the auction, taking into account the reasonable needs of the procuring entity.

**Article 55. Requirements during the electronic reverse auction**

- (1) The electronic reverse auction shall be based on:
  - (a) Price, where the procurement contract is to be awarded to the lowest priced bid; or
  - (b) Price and other criteria specified to suppliers or contractors under articles 52 and 53 of this Law, as applicable, where the procurement contract is to be awarded to the most advantageous bid.
- (2) During the auction:
  - (a) All bidders shall have an equal and continuous opportunity to present their bids;
  - (b) There shall be automatic evaluation of all bids in accordance with the criteria, procedure and formula provided to suppliers or contractors under articles 52 and 53 of this Law, as applicable;
  - (c) Each bidder must receive, instantaneously and on a continuous basis during the auction, sufficient information allowing it to determine the standing of its bid vis-à-vis other bids;
  - (d) There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in subparagraphs (a) and (c) of this paragraph.
- (3) The procuring entity shall not disclose the identity of any bidder during the auction.
- (4) The auction shall be closed in accordance with the criteria specified to suppliers or contractors under articles 52 and 53 of this Law, as applicable.

(5) The procuring entity shall suspend or terminate the auction in the case of failures in its communication system that risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.

#### **Article 56. Requirements after the electronic reverse auction**

(1) The bid that at the closure of the electronic reverse auction is the lowest priced bid or the most advantageous bid, as applicable, shall be the successful bid.

(2) In procurement by means of an auction where the auction was not preceded by examination or evaluation of initial bids, the procuring entity shall ascertain after the auction the responsiveness of the successful bid and the qualifications of the supplier or contractor submitting it. The procuring entity shall reject that bid if it is found to be unresponsive or the supplier or contractor submitting it is found unqualified. Without prejudice to the right of the procuring entity to cancel the procurement in accordance with article 18 (1) of this Law, the procuring entity shall select the bid that was the next lowest priced or next most advantageous bid at the closure of the auction, provided that that bid is ascertained to be responsive and the supplier submitting it is ascertained to be qualified.

(3) Where the successful bid at the closure of the auction appears to the procuring entity to be abnormally low and gives rise to concerns of the procuring entity as to the ability of the bidder that presented it to perform the procurement contract, the procuring entity may follow the procedures described in article 19 of this Law. If the procuring entity rejects the bid as abnormally low under article 19, it shall select the bid that at the closure of the auction was the next lowest priced or next most advantageous bid. This provision is without prejudice to the right of the procuring entity to cancel the procurement in accordance with article 18 (1) of this Law.

**(A/CN.9/729/Add.7) (Original: English)**  
**Note by the Secretariat on the draft revised text of the Model Law**

**ADDENDUM**

This note sets out a proposal for chapter VII (Framework agreements procedures) of the revised Model Law, comprising articles 57 to 62.

**CHAPTER VII. FRAMEWORK  
AGREEMENTS PROCEDURES**

**Article 57. Award of a closed framework agreement**

- (1) The procuring entity shall award a closed framework agreement:
  - (a) By means of open tendering proceedings, in accordance with provisions of chapter III of this Law except to the extent that those provisions are derogated from in this chapter; or
  - (b) By means of other procurement methods, in accordance with the relevant provisions of chapters II, IV and V of this Law except to the extent that those provisions are derogated from in this chapter.
- (2) The provisions of this Law regulating the contents of the solicitation in the context of the procurement methods referred to in paragraph (1) of this article shall apply mutatis mutandis to the information to be provided to suppliers or contractors when first soliciting their participation in a closed framework agreement procedure. The procuring entity shall in addition specify at that stage:
  - (a) That the procurement will be conducted as a framework agreement procedure, leading to a closed framework agreement;
  - (b) Whether the framework agreement is to be concluded with one or more than one supplier or contractor;
  - (c) If the framework agreement will be concluded with more than one supplier or contractor, any minimum or maximum number of suppliers or contractors that will be parties thereto;
  - (d) The form, terms and conditions of the framework agreement in accordance with article 58 of this Law.
- (3) The provisions of article 21 of this Law shall apply mutatis mutandis to the award of a closed framework agreement.

**Article 58. Requirements of closed framework agreements**

- (1) A closed framework agreement shall be concluded in writing and shall set out:
  - (a) The duration of the framework agreement, which shall not exceed the maximum duration established by the procurement regulations;

(b) The description of the subject matter of the procurement and all other terms and conditions of the procurement established when the framework agreement is concluded;

(c) To the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded;

(d) Whether in a closed framework agreement concluded with more than one supplier or contractor there will be a second-stage competition to award a procurement contract under the framework agreement and, if so:

(i) A statement of the terms and conditions that are to be established or refined through second-stage competition;

(ii) The procedures for and the anticipated frequency of any second-stage competition and envisaged deadlines for presenting second-stage submissions;

(iii) The procedures and criteria to be applied during the second-stage competition, including the relative weight of such criteria and the manner in which they will be applied, in accordance with articles 10 and 11 of this Law. If the relative weights of the evaluation criteria may be varied during the second-stage competition, the framework agreement shall specify the permissible range;

(e) Whether the award of a procurement contract under the framework agreement will be to the lowest priced or to the most advantageous submission.

(2) A closed framework agreement with more than one supplier or contractor shall be concluded as one agreement between all parties unless:

(a) The procuring entity determines that it is in the interests of either party that separate agreements with each supplier or contractor party to the framework agreement be concluded; and

(b) The procuring entity includes in the record required under article 24 of this Law a statement of the reasons and circumstances on which it relied to justify the conclusion of separate agreements; and

(c) Any variation in the terms and conditions of the separate agreements for a given procurement is minor and concerns only those provisions that justify the conclusion of separate agreements.

(3) The framework agreement shall in addition to information specified elsewhere in this article contain all information necessary to allow the effective operation of the framework agreement, including information on how the agreement and notifications of forthcoming procurement contracts thereunder can be accessed and appropriate information for connection where applicable.

#### **Article 59. Establishment of an open framework agreement**

(1) The procuring entity shall establish and maintain an open framework agreement online.

(2) The procuring entity shall solicit participation in the open framework agreement by causing an invitation to become a party to the open framework agreement to be published in accordance with article 32 of this Law.

(3) The invitation to become a party to the open framework agreement shall include the following information:

(a) The name and address of the procuring entity that establishes and maintains the open framework agreement and the name and address of any other procuring entities that will have the right to award procurement contracts under the framework agreement;

(b) That the procurement will be conducted as a framework agreement procedure leading to an open framework agreement;

(c) That it is an open framework agreement that is to be concluded;

(d) The language or languages of the open framework agreement and all information about the operation of the agreement, including how the agreement and notifications of forthcoming procurement contracts thereunder can be accessed and appropriate information for connection;

(e) The terms and conditions for suppliers or contractors to be admitted to the open framework agreement, including:

(i) A declaration pursuant to article 8 of this Law;

(ii) If any limitation on the number of suppliers or contractors that are parties to the open framework agreement is imposed in accordance with paragraph (7) of this article, the relevant maximum number and the criteria and procedure, in conformity with this Law, that will be followed in selecting it;<sup>1</sup>

(iii) Instructions for preparing and presenting indicative submissions necessary to become a party to the open framework agreement, including the currency(ies) and the language(s) to be used, as well as the criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article 9 of this Law;

(iv) An explicit statement that suppliers or contractors may apply to become parties to the framework agreement at any time during the period of its operation by presenting indicative submissions, subject to any maximum number of suppliers, if any, and any declaration made pursuant to article 8 of this Law;

(f) Other terms and conditions of the open framework agreement, including all information required to be set out in the open framework agreement in accordance with article 60 of this Law;

(g) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those

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<sup>1</sup> The enacting State may consider omitting these provisions together with the provisions in paragraph (7) of this article if it considers them irrelevant in the light of circumstances prevailing in its jurisdiction(s).



applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(h) 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.

(4) Suppliers and contractors may apply to become a party or parties to the framework agreement at any time during its operation by presenting indicative submissions to the procuring entity in compliance with the requirements of the invitation to become a party to the framework agreement.

(5) The procuring entity shall examine all indicative submissions received during the period of operation of the framework agreement within a maximum of ... working days (the enacting State specifies the maximum period of time) in accordance with the procedures set out in the invitation to become a party to the framework agreement.

(6) The framework agreement shall be concluded with all qualified suppliers or contractors that presented submissions unless their submissions have been rejected on the grounds specified in the invitation to become a party to the framework agreement.

(7) The procuring entity may impose a maximum number of parties to the open framework agreement only to the extent that capacity limitations in its communication system so require. The procuring entity shall include a statement of the reasons and circumstances upon which it relied to justify the imposition of such a maximum in the record required under article 24 of this Law.)<sup>1</sup>

(8) The procuring entity shall promptly notify the suppliers or contractors whether they have become parties to the framework agreement and of the reasons for the rejection of their indicative submissions if they have not.

#### **Article 60. Requirements of open framework agreements**

(1) An open framework agreement shall provide for second-stage competition for the award of a procurement contract under the agreement and shall include:

(a) The duration of the framework agreement;

(b) The description of the subject matter of the procurement and all other terms and conditions of the procurement known when the open framework agreement is established;

(c) Any terms and conditions that may be refined through second-stage competition;

(d) The procedures and the anticipated frequency of second-stage competition;

(e) Whether the award of procurement contracts under the framework agreement will be to the lowest priced or the most advantageous submission;

(f) The procedures and criteria to be applied during the second-stage competition, including the relative weight of the evaluation criteria and the manner

in which they will be applied, in accordance with articles 10 and 11 of this Law. If the relative weights of the evaluation criteria may be varied during second-stage competition, the framework agreement shall specify the permissible range.

(2) The procuring entity shall, during the entire period of operation of the open framework agreement, republish at least annually the invitation to become a party to the open framework agreement and shall in addition ensure unrestricted, direct and full access to the terms and conditions of the framework agreement and to any other necessary information relevant to its operation.

#### **Article 61. Second stage of a framework agreement procedure**

(1) Any procurement contract under a framework agreement shall be awarded in accordance with the terms and conditions of the framework agreement and the provisions of this article.

(2) A procurement contract under a framework agreement may only be awarded to a supplier or contractor that is a party to the framework agreement.

(3) The provisions of article 21 of this Law, except for its paragraph (2), shall apply to the acceptance of the successful submission under framework agreements without second-stage competition.

(4) In a closed framework agreement with second-stage competition and in an open framework agreement, the following procedures shall apply to the award of a procurement contract:

(a) The procuring entity shall issue a written invitation to present submissions simultaneously to each supplier or contractor party to the framework agreement, or only to each of those parties of the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement;

(b) The invitation to present submissions shall include the following information:

(i) A restatement of the existing terms and conditions of the framework agreement to be included in the anticipated procurement contract, a statement of the terms and conditions that are to be subject to second-stage competition and further detail of these terms and conditions where necessary;

(ii) A restatement of the procedures and criteria for the award of the anticipated procurement contract (including their relative weight and the manner of their application);

(iii) Instructions for preparing submissions;

(iv) The manner, place and deadline for presenting submissions;

(v) If suppliers or contractors are permitted to present submissions for only a portion of the subject matter of the procurement, a description of the portion or portions for which submissions may be presented;

(vi) The manner in which the submission 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 subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(vii) Reference to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(viii) 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 second-stage competition, without the intervention of an intermediary;

(ix) Notice of the right provided under article 63 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(x) Any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 21 of this Law;

(xi) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of submissions and to other aspects of the second-stage competition;

(c) The procuring entity shall evaluate all submissions received and determine the successful submission in accordance with the evaluation criteria and the procedures set out in the invitation to present submissions;

(d) The procuring entity shall accept the successful submission in accordance with article 21 of this Law.

#### **Article 62. No material change during the operation of a framework agreement**

During the operation of a framework agreement, no change shall be allowed to the description of the subject matter of the procurement. Changes to other terms and conditions of the procurement, including to the criteria (and their relative weight and the manner of their application) and procedures for the award of the anticipated procurement contract, may occur only to the extent expressly permitted in the framework agreement.

**(A/CN.9/729/Add.8) (Original: English)**  
**Note by the Secretariat on the draft revised text of the Model Law**

**ADDENDUM**

This note sets out a proposal for chapter VIII (Challenges and appeals) of the revised Model Law, comprising articles 63 to 69.

**CHAPTER VIII. CHALLENGES AND APPEALS**

**Article 63. Right to challenge and appeal**

(1) A supplier or contractor that claims to have suffered or claims that it may suffer, loss or injury because of alleged non-compliance of a decision or action of the procuring entity with the provisions of this Law may challenge the decision or action concerned by way of an application for reconsideration to the procuring entity under article 65 of this Law, an application for review to the [name of independent body] under article 66 of this Law, or an application to the [name of court or courts].

(2) A supplier or contractor may appeal any decision taken in challenge proceedings under article 65 or 66 of this Law.

**Article 64. Effect of an application for reconsideration or review or an appeal**

(1) The procuring entity shall not enter into a procurement contract or framework agreement in the procurement proceedings concerned:

(a) Where it receives an application for reconsideration within the time-limits specified in article 65 (2); or

(b) Where it receives notice of an application for review or of an appeal from the [name of independent body] or from the [name of court or courts].

(2) The prohibition referred to in paragraph (1) shall lapse ... working days (the enacting State specifies the period) after the decision of the procuring entity, [name of independent body] or the [name of court or courts] on the challenge or appeal concerned has been communicated to the applicant or appellant, as the case may be, to the procuring entity where applicable, and to all other participants in the challenge or appeal proceedings.

(3) (a) The procuring entity may at any time request the [name of independent body] or the [name of court or courts] to authorize it to enter into the procurement contract or framework agreement on the ground that urgent public interest considerations so justify.

(b) The [name of independent body], upon consideration of such a request (or of its own motion) may<sup>6</sup> authorize the procuring entity to enter into the procurement contract or framework agreement where it is satisfied that urgent

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<sup>6</sup> The enacting State may consider not enacting the provisions within parenthesis where the independent body's taking action of its own motion would be inconsistent with the enacting State's legal tradition.

public interest considerations so justify. The decision of the [name of independent body] and reasons therefor shall be made part of the record of the procurement proceedings, and shall promptly be communicated to the procuring entity, to the applicant or appellant, as the case may be, to all other participants in the challenge or appeal proceedings and to all other participants in the procurement proceedings.

**Article 65. Application for reconsideration before the procuring entity**

(1) A supplier or contractor may apply to the procuring entity for a reconsideration of a decision or an action taken by the procuring entity in the procurement proceedings.

(2) Applications for reconsideration shall be submitted to the procuring entity in writing within the following time periods:

(a) Applications for reconsideration of the terms of solicitation, pre-qualification or pre-selection or decisions or actions taken by the procuring entity in pre-qualification or pre-selection proceedings shall be submitted prior to the deadline for presenting submissions;

(b) Applications for reconsideration of other decisions or actions taken by the procuring entity in the procurement proceedings shall be submitted within the standstill period applied pursuant to article 21 (2) of this Law, or, where none has been applied, prior to the entry into force of the procurement contract or the framework agreement.

(3) Promptly after receipt of the application, the procuring entity shall publish a notice of the application, and shall, not later than three (3) working days after receipt of the application:

(a) Decide whether the application shall be entertained or dismissed and, if it is to be entertained, whether the procurement proceedings shall be suspended. The procuring entity may dismiss the application if it decides that the application is manifestly without merit, was not submitted within the deadlines set out in paragraph (2) of this article, or if the applicant is without standing. Such a dismissal constitutes a decision on the application;

(b) Notify all participants in the procurement proceedings to which the application relates about the submission of the application and its substance;

(c) Notify the applicant and all other participants in the procurement proceedings of its decision on whether the application is to be entertained or is dismissed:

(i) If the application is entertained, the procuring entity shall in addition advise whether the procurement proceedings are suspended and, if so, the duration of the suspension;

(ii) If the application is dismissed or the procurement proceedings are not suspended, the procuring entity shall in addition advise the applicant of the reasons for its decision.

(4) If the procuring entity does not give notice to the applicant as required in paragraphs (3) (c) and (8) of this article within the time-limit specified in paragraph (3) of this article, or if the applicant is dissatisfied with the decision so

notified, the applicant may immediately thereafter commence proceedings in the [name of independent body] under article 66 of this Law or in the [name of court or courts]. Where such proceedings are commenced, the competence of the procuring entity to entertain the application ceases.

(5) In taking its decision on an application that it has entertained, the procuring entity may overturn, correct, vary or uphold any decision or action taken in the procurement proceedings to which the application relates.

(6) The decision of the procuring entity under paragraph (5) of this article shall be issued within ... working days (the enacting State specifies the period) after receipt of the application. The procuring entity shall immediately thereafter communicate the decision to the applicant, to all other participants in the challenge proceedings and to all other participants in the procurement proceedings.

(7) If the procuring entity does not communicate its decision to the applicant in accordance with the requirements of paragraphs (6) and (8) of this article, the applicant is entitled immediately thereafter to commence proceedings in the [name of independent body] under article 66 of this Law or in the [name of court or courts]. Where such proceedings are commenced, the competence of the procuring entity to entertain the application ceases.

(8) All decisions of the procuring entity under this article shall be in writing, shall state the action taken and the reasons therefor, and shall promptly be made part of the record of the procurement proceedings, together with the application received by the procuring entity under this article.

#### **Article 66. Application for review or an appeal before an independent body<sup>7</sup>**

(1) A supplier or contractor may apply to the [name of independent body] for review of a decision or action taken by the procuring entity in the procurement proceedings, or the failure of the procuring entity to take a decision under article 65 of this Law within the time-limits prescribed in that article, and may also file an appeal to that body against a decision of the procuring entity taken under article 65 of this Law.

(2) Applications for review and appeals shall be submitted to the [name of independent body] in writing within the following time periods:

(a) Applications for review of the terms of solicitation, pre-qualification or pre-selection or decisions or actions taken by the procuring entity in pre-qualification or pre-selection proceedings shall be submitted prior to the deadline for presenting submissions;

(b) Applications for review of other decisions or actions taken by the procuring entity in the procurement proceedings shall be submitted:

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<sup>7</sup> States where review of administrative actions, decisions and procedures is not a feature of the legal system may omit this article and provide only for judicial review (article 69). The enacting State should provide for an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption.

(i) Within the standstill period applied pursuant to article 21 (2) of this Law; or

(ii) Where no standstill period has been applied, within ... working days (the enacting State specifies the period) after the time when the applicant became aware of the circumstances giving rise to the application or when the applicant should have become aware of those circumstances, whichever is earlier, but not later than ... working days (the enacting State specifies the period) after the entry into force of the procurement contract or the framework agreement (or a decision to cancel the procurement)<sup>8</sup>;

(c) Notwithstanding subparagraph (b) (i) of this paragraph, a supplier or contractor may request the [name of independent body] to entertain an application for review filed after the expiry of the standstill period, but not later than ... working days (the enacting State specifies the period) after the entry into force of the procurement contract or the framework agreement (or a decision to cancel the procurement),<sup>8</sup> on the ground that the application raises significant public interest considerations. The [name of independent body] may entertain the application where it is satisfied that significant public interest considerations so justify. The decision of the [name of independent body] and reasons therefor shall promptly be communicated to the supplier or contractor concerned;

(d) Appeals against decisions of the procuring entity taken under article 65 of this Law, or applications for review of a failure of the procuring entity to issue a decision under article 65 of this Law within the time-limits prescribed in that article shall be submitted within ... working days (the enacting State specifies the period) after the decision of the procuring entity was communicated or should have been communicated to the appellant in accordance with the requirements of article 65 (3), (6) and (8) of this Law, as appropriate.

(3) Following receipt of an application for review or an appeal, the [name of the independent body] may, subject to the requirements of paragraph (4) of this article:

(a) Order the suspension of the procurement proceedings at any time before the entry into force of the procurement contract; (and

(b) Order the suspension of the performance of a procurement contract or operation of a framework agreement that has entered into force);<sup>9</sup>

if and for as long as it finds a suspension necessary to protect the interests of the applicant or appellant, as the case may be, unless the [name of the independent body] decides that urgent public interest considerations require the procurement proceedings(, the procurement contract or the framework agreement, as applicable,)<sup>9</sup> to proceed. The [name of the independent body] may also order that any suspension applied be extended or lifted, taking into account the aforementioned considerations.

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<sup>8</sup> The enacting State may consider not enacting the provisions within parenthesis where it decides that applications for review in the case of cancellation of the procurement should be reviewed only by the courts.

<sup>9</sup> The enacting State may consider not enacting the provisions within parenthesis when the independent body in its jurisdiction(s) does not have the power to suspend performance of the procurement contract or to suspend operation of the framework agreement.

(4) (a) The [name of the independent body] shall order the suspension of the procurement proceedings for a period of ten (10) working days where an application or an appeal is received prior to the deadline for presenting submissions; and

(b) The [name of the independent body] shall order the suspension of the procurement proceedings (or the performance of a procurement contract or the operation of a framework agreement, as the case may be)<sup>9</sup> where an application or an appeal is received after the deadline for presenting submissions and where no standstill period has been applied;

unless the [name of the independent body] decides that urgent public interest considerations require the procurement proceedings(, the procurement contract or the framework agreement, as applicable,)<sup>9</sup> to proceed.

(5) Promptly upon receipt of the application or appeal, the [name of independent body] shall:

(a) Suspend or decide not to suspend the procurement proceedings (or the performance of a procurement contract or the operation of a framework agreement, as the case may be)<sup>9</sup>;

(b) Notify the procuring entity and all identified participants in the procurement proceedings to which the application or appeal relates of the application or the appeal and its substance;

(c) Notify all identified participants in the procurement proceedings to which the application or appeal relates of its decision on suspension. Where the [insert name of the independent body] decides to suspend the procurement proceedings (or the performance of a procurement contract or the operation of a framework agreement, as the case may be),<sup>9</sup> it shall in addition specify the period of the suspension. Where it decides not to suspend them, it shall provide the reasons for its decision to the applicant or appellant, as the case may be, and to the procuring entity; and

(d) Publish a notice of the application or appeal.

(6) The [name of independent body] may dismiss the application or appeal, and shall lift any suspension applied, where it decides that:

(a) The application or appeal is manifestly without merit or was not presented in compliance with the deadlines set out in paragraph (2) of this article; or

(b) The applicant or appellant, as the case may be, is without standing.

The [name of independent body] shall promptly notify the applicant or appellant, as the case may be, the procuring entity and all other participants in the procurement proceedings of the dismissal and reasons therefor and that any suspension in force is lifted. Such a dismissal constitutes a decision on the application.

(7) The notices to the applicant or appellant, as the case may be, the procuring entity and other participants in the procurement proceedings under paragraphs (5) and (6) of this article shall be given no later than three (3) working days after receipt of the application or appeal.

(8) Promptly upon receipt of notice of an application for review or of an appeal from the [name of independent body], the procuring entity shall provide the [name



of the independent body] with all documents relating to the procurement proceedings in its possession.

(9) In taking its decision on an application or an appeal that it has entertained, the [name of independent body] may declare the legal rules or principles that govern the subject matter of the application or an appeal, shall address any suspension in force, and shall take one or more of the following actions, as appropriate:

(a) Prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(b) 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;

((c) Overturn in whole or in part an unlawful act or decision of the procuring entity (other than any act or decision bringing the procurement contract or the framework agreement into force)<sup>5</sup>;

(d) Revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, (other than any act or decision bringing the procurement contract or the framework agreement into force)<sup>6</sup> or confirm a lawful decision by the procuring entity;

(e) Overturn the award of a procurement contract or the framework agreement that has entered into force unlawfully and, if notice of the award of the procurement contract or the framework agreement has been published, order the publication of notice of the overturning of the award;)<sup>7</sup>

(f) Order that the procurement proceedings be terminated;

(g) Dismiss the application or appeal;

(h) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting an application or an appeal as a result of an unlawful act or decision of, or procedure followed by, the procuring entity in the procurement proceedings, and for any loss or damages suffered(, which shall be limited to costs for the preparation of the submission, or the costs relating to the application and the appeal where applicable, or both)<sup>8</sup>; or

(i) Take such alternative action as is appropriate in the circumstances.

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<sup>10</sup> The enacting State may consider not enacting the provisions within parenthesis when the independent body in its jurisdiction(s) has the power to overturn any act or decision of the procuring entity bringing the procurement contract or the framework agreement into force.

<sup>11</sup> The enacting State may consider not enacting the provisions within parenthesis when the independent body in its jurisdiction(s) has the power to revise or substitute any act or decision of the procuring entity bringing the procurement contract or the framework agreement into force.

<sup>12</sup> The enacting State may consider not enacting the provisions in subparagraphs (c) to (e) when the independent body in its jurisdiction(s) has no powers referred to in those subparagraphs. It may replace these subparagraphs with subparagraph (c) reading “Quash an unlawful decision or confirm a lawful decision taken by the procuring entity.”

<sup>13</sup> The enacting State may consider not enacting the provisions within parenthesis when the independent body in its jurisdiction(s) has the power to award in addition compensation for lost profits.

(10) The decision of the [name of the independent body] under paragraph (9) of this article shall be issued within ... working days (the enacting State specifies the period) after receipt of the application or the appeal. The [name of the independent body] shall immediately thereafter communicate the decision to the procuring entity, to the applicant or appellant, as the case may be, to all other participants in the challenge or appeal proceedings and to all other participants in the procurement proceedings.

(11) All decisions of the [name of the independent body] under this article shall be in writing, shall state the action taken and the reasons therefor, and shall promptly be made part of the record of the procurement proceedings, together with the application or appeal received by the [name of the independent body] under this article.

#### **Article 67. Rights of participants in challenge or appeal proceedings**

(1) Any supplier or contractor participating in the procurement proceedings to which the application or the appeal relates, as well as any governmental authority, whose interests are or could be affected by the application or the appeal, shall have the right to participate in the challenge or appeal proceedings under articles 65 and 66 of this Law. A supplier or contractor that fails to participate in such proceedings is barred from subsequently challenging under articles 65 and 66 of this Law the decisions or actions that are the subject matter of the application or appeal.

(2) The procuring entity shall have the right to participate in challenge or appeal proceedings under article 66 of this Law.

(3) The participants in challenge or appeal proceedings under articles 65 and 66 of this Law shall have the right to be present, represented and accompanied at all hearings during the relevant challenge or appeal proceedings, the right to be heard, the right to present evidence, including witnesses, the right to request that any hearing should take place in public, and the right to seek access to the record of the challenge or appeal proceedings subject to the provisions of article 68 of this Law.

#### **Article 68. Confidentiality in challenge and appeal proceedings**

No information shall be disclosed in challenge or appeal proceedings and no public hearing under articles 65 and 66 of this Law shall take place if so doing would impair the protection of essential security interests of the State, would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition.

**Article 69. Judicial review<sup>14</sup>**

The [name of court or courts] has jurisdiction pursuant to article 63.

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<sup>14</sup> States may provide for the system of appeal judicially, or administratively, or both, to reflect the legal system in the jurisdiction concerned. States that provide only for judicial review of the decisions of the procuring entity are required to put in place an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption. Such an effective system of judicial review shall in particular ensure: (i) that deadlines for submission of applications for judicial review or appeal of decisions of the procuring entity or the independent body, as the case may be, shall be appropriate in the procurement context, in particular the provisions of this Law on the standstill period shall be taken into account; (ii) that the court or courts with jurisdiction pursuant to article 63 may take any or any combination of the actions contemplated in article 66 (9) of this Law and to grant interim measures that it considers necessary to ensure effective review, including suspension of the procurement proceedings or performance of the procurement contract or the operation of the framework agreement, as applicable; and (iii) that minimum safeguards as regards the participation in the challenge or appeal proceedings, submission of evidence and protection of confidential information in the procurement context, contemplated in articles 67 and 68 of this Law, are in place.

**F. Note by the Secretariat on the finalization and adoption of the  
UNCITRAL Model Law on Public Procurement - compilation of  
comments by Governments and international organizations on the  
draft Model Law on Public Procurement**

**(A/CN.9/730 and Add.1-2)**

**[Original: English/Russian]**

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## **I. Introduction**

1. In preparation for the forty-fourth session of the Commission (Vienna, 27 June-8 July 2011), the text of the draft Model Law on Public Procurement, as it resulted from the nineteenth session of UNCITRAL Working Group I (Procurement) (Vienna, 1-5 November 2010) (contained in document A/CN.9/729 and its addenda), was circulated in accordance with the practice of UNCITRAL to all Governments and interested international organizations for comment.

2. The present document reproduces the comments received by the Secretariat on the draft text, in the form in which they were received by the Secretariat. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

## **II. Comments received from Governments and international organizations**

### **A. Comments received from Governments**

#### **Ukraine**

[Original: Russian]  
[Date: 19 April 2011]

#### **Article 11. Rules concerning evaluation criteria and procedures**

According to subparagraphs 2 (b) and (c), the evaluation criteria may include the environmental characteristics of the subject matter, and the experience, reliability and professional and managerial competence of the participant in procurement proceedings and of the personnel. Paragraph 4 states that evaluation criteria may

also include any of the criteria required by the legislation of the State concerned. We also propose setting a percentage ratio for price and non-price criteria.

#### **Article 15. Clarifications and modifications of solicitation documents**

Paragraph 1 of this article provides that the procuring entity shall respond to any request by a participant for clarification within a “reasonable time” prior to the deadline for presenting submissions. Paragraph 2 also provides that at any time prior to the deadline for presenting submissions, the procuring entity may modify the solicitation documents. We propose that the minimum time prior to the deadline for presenting submissions during which modifications may be introduced to the solicitation documents by the procuring entity should be defined since the indeterminacy of this time period could seriously hamper the work of the procuring entity and give rise to unfounded challenges of the entity’s further actions, which could in turn prolong the procurement proceedings without justification.

We believe that clearly defining a time period by the end of which the procuring entity has an obligation to inform the supplier regarding any of its decisions would significantly decrease the grounds for any further challenge of the procuring entity’s actions and decisions. We also propose replacing the phrase “reasonable time” with a more clearly defined time period.

#### **Article 19. Rejection of abnormally low submissions**

This article contains the provision that the procuring entity may reject a submission if the procuring entity believes that the participant’s submission proposes an “abnormally low price”. We would propose, however, that the concept of an “abnormally high price” should also be defined in this article and that a provision should be introduced allowing the procuring entity to reject a submission if the procuring entity believes that the participant’s submission proposes an abnormally high price.

#### **Article 20. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest**

We believe there is a need for clarification of the meaning of the concept “unfair competitive advantage”.

#### **Article 21. Acceptance of the successful submission and entry into force of the procurement contract**

Paragraph 5 of this article allows for procurement contracts to be concluded orally. It must be noted that under Ukrainian national legislation, a procurement contract must be concluded in written form. We propose that the provision allowing for the oral conclusion of a procurement contract should be deleted, in order to avoid possible abuses and unregulated modifications during the performance of the procurement contract.

**Article 26. Methods of procurement\***

Paragraph 1 of this article provides for 10 methods of procurement. It must be noted that this list is only partially in accordance with the methods established under Ukrainian law. National legislation does not provide for such procurement methods as restricted tendering, request for proposals without consecutive negotiations, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations or electronic reverse auction.

**Article 42. Examination and evaluation of tenders**

According to paragraph 2 (b) of this article, 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 out in the solicitation documents.

In order to ensure harmony with national standards, we believe it is necessary to clearly define what is meant by minor deviations. Examples should be provided on how this criterion is applicable in practice, since the establishment of such a criterion could lead to a prejudiced examination of tenders and to inconsistency regarding whether or not a tender meets the requirements set out in the solicitation documents.

**United States of America**

[Original: English]  
[Date: 15 April 2011]

Article 17(2): We recommend that the publication be identified in regulations rather than in the model law itself, in order to provide more flexibility in case domestic procedures change. The revised sentence might read:

“(2) If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in the publication identified in the procurement regulations.”

Article 20(bis): With regard to footnote 4 in WP.77/Add.6: We propose that a general provision along these lines be added to the text, perhaps as a new article 20(bis). The text of such a new article might read:

“The procuring entity may ask any supplier or contractor for clarification of its qualification data or proposal, as the case may be, to assist it in its analysis of such data, or evaluation of such proposal, as the case may be. Such clarification may not affect the substance of such data or proposal. The procuring entity shall promptly communicate to the supplier or contractor its acceptance of the clarification.”

The Guide to 20(bis) would cross-refer to article 42(1) which deals with such matters in greater detail with regard to tenders.

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\* *Translator's note*: This title was missing in the Russian text.

Article 21(3)(b): We recommend that the monetary threshold be set forth in regulations rather than in the model law itself, in order to provide more flexibility in light of inflation, fluctuating exchange rates, etc. The revised sentence might read:

“(b) Where the contract price is less than the threshold amount set out in the procurement regulations; or”

Article 22(2): We recommend that the monetary threshold be set forth in regulations rather than in the model law itself, in order to provide more flexibility in light of inflation, fluctuating exchange rates, etc. The revised sentence might read:

“(2) Paragraph (1) is not applicable to awards where the contract price is less than the threshold amount set out in the procurement regulations.”

Article 33(5): We recommend that the publication be identified in regulations rather than in the model law itself, in order to provide more flexibility in case domestic procedures change. The revised sentence might read:

“(5) Prior to direct solicitation in accordance with the provisions of paragraphs (1), (3) and (4) of this article, the procuring entity shall cause a notice of the procurement to be published in the publication identified in the procurement regulations.”

Article 33(6): This provision should also refer to article 29(4)(a), which also deals with cases of urgency.

## (A/CN.9/730/Add.1) (Original: English)

**Note by the Secretariat on the finalization and adoption of the UNCITRAL Model Law on Public Procurement - compilation of comments by Governments and international organizations on the draft Model Law on Public Procurement****ADDENDUM****CONTENTS**

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- A. Comments received from Governments . . . . .
- Austria . . . . .

**II. Comments received from Governments and international organizations****A. Comments received from Governments****Austria**

[Original: English]  
[21 April 2011]

The Republic of Austria would like to submit the following observations as regards the Draft Text of the Model Law on Procurement (A/CN.9/729 and addenda):

The Republic of Austria would like to point out, that — as a starting point — the text of the Model Law should contain all relevant provisions (and information) about a procurement process. The text should therefore be “self-explaining”; especially there should be (basically) no need to consult the Guide to Enactment (GtE) to understand the provisions of the Model Law (ML). In some places essential information about the application of the ML can only be found in the GtE (for example: art. 28, para. 3, and art. 29, para. 3, have the same conditions for use for two different procedures; the essential information concerning the difference can only be found in the GtE see Add.6, page 13). It is proposed that the text itself should contain all relevant information.

In the Preamble (see lit d) the term “equitable” is used. It is proposed that the term should be changed to “equal”. In the international context, the term “equal treatment” is well known. For example the European Court of Justice (ECJ) emphasizes that this principle requires “*that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified*” (see Case C-21703, Fabricom, para. 27, Case C-434/02, Arnold André, para. 68, and the case law cited there, and Case C-210/03, Swedish Match, para. 70, and the case law cited there). In this context it should be mentioned, that the example given in the draft GtE (see Add.1, para. 30) is not pertinent, because different situations are compared (paper based and electronic based communication). Furthermore the use of a different



terminology (equitable — equal) raises the question what the difference between those terms would be.

The term “preselection” used in article 2 (b) (and elsewhere in the ML) is not defined. A definition should be considered. Accordingly article 33 should contain a provision how the preselection should take place (especially ensuring transparency and non-discrimination).

In article 2 (e) it should read “... means a procedure conducted ...” (see for example art. 2 (e) (iv)).

In article 5, paragraph 1, the introductory part (“Except as provided for in paragraph (2)”) is misleading because there is no exception to public availability foreseen in paragraph 2.

A reference to article 8, paragraph 1, should be introduced in article 8, paragraph 2, to make clear that the exception must be spelled out in the laws of the Enacting State (and which should be an exception and not the general rule).

In article 8, paragraph 5 (and art. 17, para. 9, art. 48, para. 3 (e)), the term “any member of the public” and “general public” respectively could also be interpreted to include “members of the public in third countries”. It is suggested that “public availability” — for example via Internet — is sufficient. Furthermore the question should be avoided what the difference between “the public” and “the general public” might be (terminology should be aligned).

In article 9, paragraph 2 (e), the term “in this State” should be clarified. So far it would cover only the State where the procurement takes place. In the context of cross border participation this obligation would have no effect. It is suggested that the term reads “in their country of residence”.

In article 9, paragraph 8 (b), the term “may” indicates a margin of discretion of the procuring entity. It is questioned if this margin can be justified in these circumstances and if the term should not read “shall”.

In article 10, paragraph 1, it should read “detailed description of the subject matter” instead of “the description of the subject matter” (see already the wording of art. 29, para. 2 (a)).

In article 10, paragraph 3, the term “including concerning” should be reconsidered.

In article 10, paragraph 4, it should read “the description” instead of “any description” (same in para. 5 (a)). Furthermore the term “characteristics” should be changed to “aspects” (as well as in para. 5 (a)) thus aligning the terminology already used in other places. Furthermore it seems that paragraph 4 would allow procuring entities to use references to specific production methods as well. It is suggested, that this should not be admissible and paragraph 4 should be amended accordingly. It has to be pointed out though, that even with this proposed (new) language, requirement for example of green energy would be possible (only the requirement to procure green electricity produced for example through hydroelectric generators would not be permissible).

Article 11, paragraph 2 (b), seems to be extremely broad. According to this provision the evaluation criteria may include “the characteristics of the subject matter of the procurement” (the term “cost” obviously only refers to the operation,

maintenance and repair of goods a.s.o). What is meant by that? Would a reference to socio-economic criteria implementing the socio-economic policies (see art. 2 (m)) not suffice or be better?

In article 11, paragraph 3, the requirement that all non-price criteria shall (basically — “to the extent practical”) always be expressed in monetary terms (arg. “and”) seems burdensome. It is suggested to replace the term “and” by “and/or”.

In article 14, paragraph 1, a word (“in”) seems to be missing.

In article 14, paragraph 5, the following addition is suggested: “and shall be published in the same manner and place in which the original information regarding the invitation to prequalify or to preselect was published”.

In article 15, paragraph 1, third sentence, the term “as will” should read “as to” (same in art. 17, para. 6).

In article 16, paragraph 1 (c) (ii) seems to be superfluous because the introduction of (c) already contains a reference to (b) where domestic procurement is addressed.

In article 16, paragraph 1 (f) (i), the following drafting is proposed: “Withdrawal or modification of the submission before or after the deadline for presenting submissions, if so stipulated in the solicitation documents;”.

The requirement to the conduct of the supplier may — according to article 16, paragraph 1 (f) (ii) — only relate to the failure to sign a procurement contract. It is unclear how to understand/interpret this provision.

As regards article 16, paragraph 2, the following question arises: what happens to the tender security in an article 21, paragraph 7 — situation or if a similar situation has not been taken account of (for example in the tender documents)?

In article 17, paragraph 3 (b), it is suggested to use the term “envisaged timetable” at the end of the indent.

In article 19, paragraph 1, the situation should be covered as well in which only the price is abnormally low. To clarify this the 2nd line should read “... that the price or the price in combination with ...”. It is furthermore suggested that paragraph 1 (c) should become paragraph 2 (new) and old paragraph 2 should become paragraph 3 (new). It seems sufficient to have (a) and (b) as preconditions for the rejection. If this suggestion would be accepted, the term “has” in paragraph 2 (new) should read “shall”.

As regards article 20, paragraph 1 (a), it is suggested to introduce a “de minimis” — threshold. The current text could be interpreted that anything of any value (!!; in extremis: a pen with the value of less than 1 Euro) given to an officer/employee of the procuring entity might have the effect of excluding a supplier or contractor. Since in practice the intention with which a gratuity is presented (“so as to influence”) normally cannot be proven, evidential circumstances play an important role. It might be sufficient to clarify this issue in the GtE.

It should be considered to define and/or elaborate on the term “unfair competitive advantage”. It should be clarified that the term “provisions of this State” only relate to the aforementioned “conflict of interest”.

In article 21, paragraph 10, it should be clarified that the mentioned “other suppliers or contractors” are those “suppliers or contractors who have previously participated in the procurement procedure” (but have been excluded previously; all other suppliers participating till the end of the procedure must be informed of the outcome in any way). It must also be clarified that in this case the stand-still obligation does not apply.

It needs to be pointed out, that in practice the danger will arise, that the consent to disclose the information to other persons/parties will be a requirement to participate in the procurement procedure. Therefore the “permission” in the solicitation documents (without any possible chance to prohibit the disclosure by the suppliers or contractors) in article 23, paragraph 3, is really problematic and should be deleted.

In article 24, paragraph 1 (r), it should read “a written procurement contract”.

In article 24, paragraph 3, the situation of cancellation of a procedure should be taken into account as regards the disclosure of the record: in the third line (beginning) it should read “on request and if available”. At the end of this paragraph the following should be added: “and subject to the conditions of such an order”.

The relationship between article 24, paragraphs 2-4 (especially as regards the information according to para. 2 (s) and (t)) is unclear. According to paragraph 4, (for example) the procuring entity shall not disclose information relating to the examination and evaluation of submission and submission prices, but the latter shall be disclosed on request to suppliers and contractors according to paragraph 3.

It is suggested to delete the brackets (and the words within) in article 29, paragraph 2, because this prior approval has been deleted (with the exception of art. 29, para. 5 (e)) throughout the text.

In article 31, paragraph 1 (a), the term “repeated” should be used instead of “indefinite”.

It is proposed to delete the term “of the low value” in article 32, paragraph 4. This provision is misleading in the light of other “low value” provisions of the ML.

The information mentioned in article 38 (b) is partly already covered by article 36 (c).

In article 38 (v) the notice should also indicate the name and address of the authority in charge of challenge or appeal and provide for some information on deadlines (same goes for art. 46, para. 4 (h), art. 48, para. 5 (k), art. 52, para. 1 (t), and art. 61, para. 4 (b) (ix)).

Article 39, paragraph 2, introduction refers to a tender made in “writing”. Paragraph 2 refers to other means of communication as well but nevertheless this term might be misunderstood as requiring at all times a paper based submission. This ambiguity is confirmed by the use in different provisions of a paper based terminology (term “envelopes” for example). The draft GtE clarifies the situation but a clear wording of the text would avoid misinterpretations (same goes for art. 58, para. 1, and art. 61, para. 4).

The proposal in footnote 4 of Add.6 of the draft GtE is supported (additional provision in art. 46 concerning clarification).

The text of article 47, paragraph 4 (b), could be construed to be interpreted in a way, that the procuring entity may fundamentally change the relevant terms and conditions/subject matter of the contract. This would be contrary to the basic principles of the ML. A legal “safeguard” should be introduced to prevent that something like that is happening.

The text of article 48, paragraph 9, should be clarified insofar as to make clear what can be amended throughout the dialogue. So far “the procuring entity shall not modify the subject matter of the procurement ... nor any elements of the description of the subject matter ... that is not subject to the dialogue” (same goes for para. 5). A definition of the term “dialogue” would be very welcome (especially to show the difference between a dialogue, a clarification, discussion and negotiations — see art. 23, para. 3, terminology).

In article 52, paragraph 1 (c), the term “the contract form, if any, to be signed” is creating confusion. If a contract is to be signed by the parties than it must be in writing (paper/electronic form).

In article 52, paragraph 2 (which is in brackets), a reference to footnote 1 should be added.

The text of article 53, paragraph 1 (a), should be aligned with the text of article 52, paragraph 1 (g).

Article 59, paragraphs 3 (b) and (c) seem to contain the same provision.

It should be checked, if a reference to article 8 should be added to article 57 (normally there is one, see for example art. 59, para. 3 (e) (i)).

In article 59, paragraph 3, a reference to the remedy system (see for example art. 61, para. 4 (ix)) is missing.

In article 62 the heading and the text suggest a difference. According to the heading “no material change” might take place, whereas in the text “no change ... to the subject matter” is allowed at all.

In article 63, paragraph 1, the text refers to a non-compliance of a decision or action “with the provisions of this Law”. The right of challenge or appeal will be based on the non-compliance with national legislation enacting provisions of the Model Law but not with the Model Law per se.

The publication requirement under article 65, paragraph 3 (introduction), seems to be unnecessary since only interested parties may challenge or appeal and other participants are to be notified under paragraphs 3 (b) and (c).

Article 65, paragraphs 3 (a) and (c), contain the possibility for the procuring entity to decide on the (further?) suspension which according to article 64, paragraph 1, is automatic insofar as the conclusion of the contract/framework is concerned. The current wording (see below remarks to art. 66, paragraph 6 (a)) should be clarified. Same goes for article 66, paragraphs 3 and 5, and article 66, paragraph 9, which should be made coherent with the new (clarified) wording.

The contents of footnote 7 to article 66 should be incorporated in the GtE and not in the Model Law.

In article 66, paragraph 5 (c) the term “insert” should be deleted in the square brackets.

As regards article 66, paragraph 6 (a), the question arises, if the deadlines and the finding that an application is “manifestly without merit” are not checked by the independent body at the outset (= when the application is submitted). In this case the situation may never arise, that after the order of suspension the independent body finds that the application is manifestly without merits or not presented within the deadlines according to the ML. Therefore the second situation envisaged in the introductory sentence of paragraph 6 “shall lift the suspension” may never arise. If this wording should connect to the “automatic suspension” according to article 64, paragraph 1, the term “lift the suspension” is inappropriate (because it was not ordered), instead the term “lapse” (see wording in art. 64, para. 2) or “cease” could be used.

As regards article 66, paragraph 8, the ML should take care of the situation, that the files may be very extensive. Therefore it is proposed to change the text as follows: “the procuring entity shall provide the ... with all documents or grant access to all documents relating to the procurement proceedings ...”.

In article 66, paragraph 9, the reference to “a lawful decision” is questionable. The question if a decision of a procuring entity is lawful or not is decided ultimately by the court of last instance. Therefore the situation might arise that the independent body takes the view that a decision is lawful but it’s decision might subsequently be overturned by a court. In this context it is proposed to delete the term “lawful” and just to refer to the confirmation of “a decision by the procuring entity”.

The reference to “any governmental authority” in article 67, paragraph 1, needs to be clarified. Who might that be and why should they be entitled to participate?

Regarding article 67, paragraph 3, the question arises, if there should not be a provision as regards classified information. In this context the following provision might solve the problem: “The [name of independent body] shall guarantee an adequate level of confidentiality of classified information or other information contained in the files transmitted by the parties, and act in conformity with defence and/or security interests throughout the procedure.”

Furthermore open access to proceedings involving classified information is highly problematic; a restricted access (at the request of a party) must be possible.

Article 69 itself should reflect the basic requirements of a judicial review system (see footnote 14).

**(A/CN.9/730/Add.2) (Original: English/Spanish)**  
**Note by the Secretariat on the finalization and adoption of the**  
**UNCITRAL Model Law on Public Procurement — compilation of**  
**comments by Governments and international organizations on the**  
**draft Model Law on Public Procurement**

**ADDENDUM**

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**II. Comments received from Governments and international organizations**

**A. Comments received from Governments**

**El Salvador**

[Original: Spanish]

[Date: 2 June 2011]

1. We would highlight that the revised text of the Model Law takes a flexible and non-prescriptive approach so that States can adapt it to their local circumstances without jeopardizing the nature, principles and general rules of public procurement as set out in the preamble.

2. In El Salvador, public procurement is regulated by the infra-constitutional *Ley de Adquisiciones y Contrataciones de la Administración Pública* [Law on purchases and procurement by the public authorities] (LACAP), which is currently being amended. We note with satisfaction that both the revised Model Law and the LACAP are generally similar — in structure and in the procedures for ensuring that contractors are selected on the basis of objective, measurable or quantifiable evaluation criteria so that procurement is transparent, making good use of State funds.

3. In relation to the similarities between the two laws, one of the procurement methods proposed in the revised Model Law is “open tendering”, a method referred to in the LACAP as “tendering or bidding and tendering or bidding by invitation”. While not identical, the two methods show similarities in the procedures for the acceptance of tenders and selection of contractors, as both involve the solicitation of bidders who must meet certain requirements to be able to submit their proposals (tenders) and to be considered in the selection process. The evaluation criteria are defined in the “solicitation documents” or “solicitation or bidding conditions”, which are used to identify the winning bidder who is awarded the procurement.

Under both procedures, the procuring entity is to keep a file fully documenting the procurement process.

4. The Model Law also provides for the procurement methods “request for quotations” and “request for proposals without negotiation” (article 28). We believe that these methods to some extent resemble the “unrestricted management” process contained in the LACAP, because, as with the process provided for in the Model Law, quotations are requested from the suppliers. These quotations must contain certain elements, including the prices and other specifications provided by the procuring authority, and a single quotation must be submitted without entering into negotiations. Unrestricted management aims to speed up purchases and procurement at a lower cost. This method of procurement is used to obtain goods and services to meet the everyday needs of institutions.

5. The methods “restricted tendering” and “single-source procurement” are provided for in the revised Model Law. This is similar to the “direct procurement” method provided for in the LACAP, which is intended to be used for the procurement of such work, services or supplies as cannot be obtained from any other source, where industrial or intellectual property rights must be protected or where a high level of professional specialization is required. As a result, there is a limited number of suppliers or even a single supplier with an exclusive right to the subject matter of the contract.

6. El Salvador notes that the revised Model Law contains procurement methods that are not covered by its domestic legislation, such as two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and electronic reverse auction. The use of these methods would represent an advance in international economic development.

7. We believe that the Model Law on public procurement and its incorporation into our national legislation would entail the following benefits: (1) the use of electronic procurement methods; (2) the inclusion of framework agreements in proposed amendments; (3) with regard to challenges and appeals, the possibility of making an application for reconsideration to the procuring entity, an application for review to an independent body or, finally, a challenge or appeal. These matters have not been regulated in the past but would enhance the transparency, speed and efficiency of public procurement.

8. El Salvador hopes that the revised Model Law will be approved by the Commission as it contains new elements that respond to the need for modernization in a globalized world, where economic and commercial development on an international scale has filtered through to States’ contractual relations. Revisions to the LACAP are currently under discussion and awaiting approval, but this does not rule out the possibility that, in the future, these provisions will be reworked to fit in with the progress international economic development brings (as reflected in the Model Law). This would mean that we would have to incorporate new procurement methods into our legislation (such as those provided for in the revised Model Law), to facilitate and promote the participation of domestic and foreign bidders, which would also be conducive to better management of State funds.

## **G. Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement**

**(A/CN.9/731 and Add.1-9)**

**[Original: English]**

1. The Working Group completed its work on the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”)<sup>1</sup> at its nineteenth session (Vienna, 1-5 November 2010). At its twentieth session (New York, 14-18 March 2011), it began work on proposals for a revised Guide to Enactment. The Working Group noted its intention of submitting a working draft of the revised Guide emanating from the work of its twentieth session to the Commission, so as to assist the latter with its consideration of the draft revised Model Law at its forty-fourth session, in 2011 (A/CN.9/713, para. 138).
2. At its twentieth session, the Working Group had before it a working draft commentary to some sections of Part I (General remarks) of the Guide and to provisions of the Model Law on procurement methods in chapters IV and V (and related sections of chapter II) and on challenges and appeals in chapter VIII (A/CN.9/WG.I/WP.77 and addenda 1 to 9). The Working Group considered most of the text contained in those documents, but deferred the consideration of some elements of A/CN.9/WG.I/WP.77/Add.1 and those in A/CN.9/WG.I/WP.77/Add.2. The conclusions of the Working Group are reflected in the report of that session (A/CN.9/718).
3. The addenda (1 to 9) to this note set out a working draft commentary for the remaining provisions of the Model Law (chapters I, III, VI and VII and the remaining provisions of chapter II). Together with the contents of document A/CN.9/WG.I/WP.77 and the addenda 1 to 9, they thus provide a working draft commentary to all provisions of the revised Model Law.
4. The working draft was prepared in accordance with the following guidelines of the Working Group: (a) to produce an initial draft of the general introductory part of the revised Guide, which would ultimately be used by legislators in deciding whether the revised Model Law should be enacted in their jurisdictions; (b) in preparing that general part, to highlight changes that had been made to the Model Law and reasons therefor; (c) to issue a draft text for the revised Guide on a group of articles or a chapter at or about the same time, to facilitate the discussions on the form and structure of the revised Guide; (d) to ensure that the text of the revised Guide was user-friendly and easily understandable by parliamentarians who were not procurement experts; (e) to address sensitive policy issues, such as best value for money, with caution; and (f) to minimize to the extent possible repetitions between the general part of the revised Guide and article-by-article commentary; where they were unavoidable, consistency should be ensured. It was agreed that the relative emphasis of the general part and article-by-article commentary of the

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<sup>1</sup> For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in the *Yearbook of the United Nations Commission on International Trade Law*, vol. XXV: 1994) (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website: [www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf](http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf).



revised Guide should be carefully considered (A/CN.9/713, para. 140). Additional guidance was provided to the Secretariat at the Working Group's twentieth session (see, in particular, A/CN.9/718, paras. 17-19).

5. The approach to drafting two parts of the Guide reflects the understanding that: (i) the purpose of the general part of the Guide is to explain the main policy considerations arising when enacting national legislation on public procurement, and the recommendations made by the Working Group, so as to put the article-by-article remarks that will follow the general part of the Guide into context; while (ii) the main purpose of the article-by-article commentary of the Guide is to guide not only legislators in enacting the provisions of the revised Model Law into national legislation but also regulators and procuring entities in implementing the provisions of the revised Model Law.

6. The guidance to the provisions regulating the methods and techniques of procurement is presented by procurement method and technique. This is because the relevant provisions are found in several places of the Model Law. The guidance consolidates the related provisions of chapters II and IV to VII. This manner of presenting guidance is thus different from the presentation of the article-by-article commentary that was a feature of the 1994 text, and is also followed in the commentary to other provisions of the revised Model Law. This new approach has been followed both for ease of reference and to allow legislators and other policymakers to consider how to enact the provisions on various methods and techniques of procurement to suit local circumstances (in the light of both the conditions for use and procedures for each method).

7. The working draft is submitted to the Commission to assist it with its consideration of the draft revised Model Law. It is not expected that the Commission will provide detailed comments on the working draft Guide itself. Also, additional sections and parts may be needed in the final Guide. In particular, it is expected that the Guide will be accompanied by annexes setting out practical materials, such as a glossary of terms used in the Model Law (equating them to alternatives in current use where appropriate), timetables and flow-charts, to assist practitioners in particular. At its twentieth session, the Working Group also considered that a separate section may need to be added to the Guide describing the revisions made to the 1994 Model Law to assist users of that text in updating their legislation (A/CN.9/718, para. 50).

8. For ease of reference, the table below indicates the location of all current proposals for the Guide and their relation to the provisions of the Model Law.

Proposals for the Guide	Document	Reference to the consideration in the Working Group
PART I. GENERAL REMARKS	A/CN.9/WG.I/WP.77/Add.1-3  A/CN.9/731/Add.6, part A, and Add.8, part A	A/CN.9/718, paras. 21-27 and 116-136  -----

Proposals for the Guide	Document	Reference to the consideration in the Working Group
PART II. ARTICLE-BY-ARTICLE COMMENTARY		
Preamble	A/CN.9/731/Add.1	
Chapter I. GENERAL PROVISIONS		
Articles 1 to 7	A/CN.9/731/Add.1	-----
Articles 7 (continued) to 15	A/CN.9/731/Add.2	-----
Articles 16 to 22	A/CN.9/731/Add.3	-----
Articles 23 to 25	A/CN.9/731/Add.4	-----
Chapter II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE. SOLICITATION AND NOTICES OF THE PROCUREMENT		
Articles 26-27 (for articles 28 to 34, see below under guidance to alternative procurement methods and techniques)	A/CN.9/731/Add.4	-----
Chapter III. OPEN TENDERING		
Articles 35-43	A/CN.9/731/Add.5	-----
GUIDANCE TO ALTERNATIVE PROCUREMENT METHODS AND TECHNIQUES (the related provisions of chapters II, IV to VII)		
Restricted tendering (chapter II, articles 28(1) and 33 (1), (5) and (6), and chapter IV, article 44)	A/CN.9/WG.I/WP.77/Add.5, part A	A/CN.9/718, paras. 50-58
Request for quotations (chapter II, articles 28(2) and 33 (2), and chapter IV, article 45)	A/CN.9/WG.I/WP.77/Add.5, part B	A/CN.9/718, paras. 59-62
Request for proposals without negotiation (chapter II, articles 28 (3) and 34, and chapter IV, article 46)	A/CN.9/WG.I/WP.77/Add.6, part A	A/CN.9/718, paras. 63-77

Proposals for the Guide	Document	Reference to the consideration in the Working Group
Two-stage tendering (chapter II, articles 29 (1) and 32, and chapter V, article 47)	A/CN.9/WG.I/WP.77/Add.7	A/CN.9/718, paras. 82-96
Request for proposals with dialogue (chapter II, articles 29 (2) and 34, and chapter V, article 48)	A/CN.9/WG.I/WP.77/Add.8	A/CN.9/718, paras. 97-102
Request for proposals with consecutive negotiations (chapter II, articles 29 (3) and 34, and chapter V, article 49)	A/CN.9/WG.I/WP.77/Add.6, part B	A/CN.9/718, paras. 78-81
Competitive negotiations (chapter II, articles 29 (4) and 33 (3), (5) and (6), and chapter V, article 50)	A/CN.9/WG.I/WP.77/Add.9, part A	A/CN.9/718, paras. 103-106
Single-source procurement (chapter II, articles 29 (5) and 33 (4), (5) and (6), and chapter V, article 51)	A/CN.9/WG.I/WP.77/Add.9, part B	A/CN.9/718, paras. 107-115
Electronic reverse auctions (chapter II, articles 30 and 32, and chapter VI (articles 52-56))	A/CN.9/731/Add.6 and 7	-----
Framework agreement procedures (chapter II, article 31, and chapter VII (articles 57-62))	A/CN.9/731/Add.8 and 9	-----
CHAPTER VIII. CHALLENGES AND APPEALS		
Articles 63-69	A/CN.9/WG.I/WP.77/Add.4	A/CN.9/718, paras. 28-49

**(A/CN.9/731/Add.1) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany the preamble and articles 1 to 7 of chapter I (General provisions) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE  
UNCITRAL MODEL LAW ON  
PUBLIC PROCUREMENT**

...

**Part II. Article-by-article commentary****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 suppliers or contractors. 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. (For the explanation of concepts encompassed by the objectives listed in the preamble of the Model Law, see paragraphs ... of Part I of the Guide.)

**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 for the coverage of all types of public procurement, as that term is defined in article 2 of the Model Law. The broad variety of procedures available under the Model Law to deal with the different types of situations that may arise in public procurement makes it unnecessary to exclude the application of the Model Law to any sector of the economy of an enacting State. A number of articles throughout the Model Law contain provisions that intend to accommodate in particular procurement involving sensitive issues, such as procurement involving classified information. (See the commentary to articles ... of the Model Law, and also paragraphs ... of Part I for a general discussion of the issues relating to the scope of the Model Law and exemptions from its transparency provisions in these circumstances.)

2. [States in situations of economic and financial crisis may exempt the application of the Model Law through legislative measures (which would themselves receive the scrutiny of the legislature).]<sup>1</sup>

## Article 2. Definitions

1. The purpose of article 2 is to define at the outset of the Model Law terms used often in the Model Law, in order to facilitate the reading and understanding of the text. The commentary to this article is supplemented by a glossary, contained in [Annex ...] to the Guide, which includes terms that have different meaning under the Model Law as compared to the meaning under other international or regional instruments regulating public procurement.
2. The definition of “electronic reverse auction” (definition (d)) encompasses all the main features of a reverse auction, in particular its online character. This broad definition is designed to emphasize that the Model Law does not regulate other types of auctions, even though they may be used in public procurement practice in some jurisdictions. The decision not to provide for other types of auctions in the Model Law was based on concerns over improprieties and the high risk of collusion inherent in them, arising in the main because the participants are identified. The term “successively lowered bids” in the definition refers to successive reductions in the price or in overall costs to the procuring entity.
3. The reference to “acquisition” in the definition of “procurement” (definition (h)) is intended to encompass purchase, lease and rental or hire purchase, with or without an option to buy. The definition refers to goods, construction and services. A strict classification of what would constitute goods, construction and services often is not possible and is not required under the Model Law, which uses an all-encompassing term “subject matter of the procurement”, and which does not provide different procurement methods for goods, construction and services. Nevertheless, as explained in the commentary to articles ... of the Model Law, some procurement methods under the Model Law may be more appropriate for use in procurement of services than goods and construction. Enacting States may have a strict classification of items and general guidance, for example that “goods” usually mean objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves while “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 services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself. “Services” may be classified as any object of procurement other than goods or construction.
4. The references in the plural to “contracts” and “supplier(s) or contractor(s)” in the definition of “procurement contract(s)” (definition (i)) are intended to

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<sup>1</sup> The provision of guidance to the Secretariat is requested as regards the need to retain the text put in square brackets.

encompass, *inter alia*, split contracts awarded as a result of the same procurement proceedings. For example, article 38 (g) of the Model Law stipulates that suppliers or contractors may be permitted to present tenders for only a portion of the subject matter of the procurement. In such situations, the procurement proceedings will result not in a single contract concluded with a single supplier or contractor but in several contracts concluded with several suppliers or contractors. The wording “at the end of the procurement proceedings” in the same definition is intended to encompass procurement contracts concluded under a framework agreement procedure, but not the awarded framework agreements.

5. The term “classified information” in the definition “procurement involving classified information” (definition (j)) is intended to refer to information that is classified under the relevant national law in an enacting State. The term “classified information” is understood in many jurisdictions as information to which access is restricted under authority conferred by law to particular classes of persons. The need to deal with this type of information in procurement may arise not only in the sectors where “classified information” is most commonly encountered, such as national security and defence, but also in any other sector where protection of certain information from public disclosure may be permitted by law, such as in the health sector (for example, where sensitive medical research and experiments may be involved). The term is used in the Model Law in the provisions that envisage special measures for protection of this type of information, in particular exceptions from public disclosure and transparency requirements. Because of the risk of abuse of exceptions to these requirements, the Model Law does not confer any discretion on the procuring entity to expand the scope of “classified information” and it is recommended that the issues pertaining to the treatment of “classified information” should be regulated at the level of statutes in order to ensure appropriate scrutiny by the legislature. The definition, where it is used in the Model Law, is supplemented by the requirement in article 24 on the documentary record of procurement proceedings to include in the record the reasons and circumstances on which the procuring entity relied to justify the measures and requirements imposed during the procurement proceedings for protection of classified information.

6. With reference to the definition of “procuring entity” (definition (l)), the Model Law is intended primarily to cover procurement by governmental units and other entities and enterprises within the public sector. Which exactly those entities are will differ from State to State, reflecting differences in the allocation of legislative competence among different levels of government. Accordingly, subparagraph (l)(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. In subparagraph (l)(ii), the enacting State may extend the 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.

7. Procurement can be undertaken by groups or consortia of procuring entities, including from various States, and they can collectively be considered as a single “procuring entity”. The definition of “procuring entity”, with particular reference in the definition to a “multiplicity [of departments, agencies, organs and other units or subdivisions]” without indicating an association with any particular State, is therefore intended to accommodate participation by such groups or consortia, including in the transnational procurement context. In some jurisdictions, to ensure political accountability, even when procuring entities band together, one remains the lead procuring entity. In an international consortium, it is usual 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.<sup>2</sup>

8. The primary purpose of the definition of “public procurement” (definition (m)) is to highlight that the Model Law deals with public procurement rather than with procurement in the private sector. The definition is built on the definitions of “procurement” and “procuring entity” (definitions (h) and (l) explained in paragraphs ... above). The term “public procurement” is used only in the title, preamble and first two articles of the Model Law; thereafter the term “procurement” is used for simplicity.<sup>3</sup>

9. The definition of “socio-economic policies” (definition (n)) is not intended to be open-ended, but to encompass only those policies set out in the law of the enacting State, and those that are triggered by international regulation such as United Nations Security Council anti-terrorism measures or sanctions regimes. The aim of the provisions is to ensure that socio-economic policies (a) are not determined on an ad hoc basis by the procuring entity, and (b) are applied across all

<sup>2</sup> The provision of guidance to the Secretariat is requested as regards whether the preceding two sentences should be presented in the Guide as the best practice.

<sup>3</sup> The need for the definition in the Model Law is to be reconsidered. The alternative approach may be to provide necessary explanation in the Glossary.

government purchasing, so that their costs and benefits can be seen. Under authority of the law, there may be one or more organs in an enacting State with the power to promulgate socio-economic policies in an enacting State. Rules on the application of such policies should impose appropriate constraints on procuring entities, in particular by prohibiting the ad hoc adoption of policies at the discretion of the procuring entity; such policies are open to misuse and abuse, such as through favouritism.

10. At the end of the definition of “socio-economic policies”, the enacting State is given an option to expand it by providing an illustrative list of socio-economic policies applicable in the enacting State. Such policies are usually of social, economic and environmental nature (rarer of political nature) and may be dictated by consideration of specific industrial sector development, development of SMEs, minority enterprises, small social organizations, disadvantaged groups, persons with disabilities, regional and local development, environmental improvements, improvement in the rights of women, the young and the elderly, people who belong to indigenous and traditional groups, as well as economic factors, such as balance of payment position and foreign exchange reserves.<sup>4</sup> It should be noted that such policies evolve over time and even if the list is intended to be exhaustive, it will become outdated. It is therefore recommended that the list should remain illustrative to avoid the need to update the law every time the socio-economic policies of the enacting State change. It should also be noted that the pursuit of such policies can bring additional costs to procurement and therefore the pursuit of socio-economic policies through public procurement should be carefully weighed against the costs involved in both the short and long term.<sup>5</sup> Many of such policies are commonly considered to be appropriate only for the purposes of assisting development, such as capacity-building.

11. The definition of “solicitation” (definition (o)) is intended to differentiate “solicitation” from “the invitation to participate in the procurement proceedings”. The latter has a broader scope: it may encompass an invitation to pre-qualify (under article 17) or an invitation to preselection (under article 48). The meaning of “solicitation” in each procurement method is different: in tendering, solicitation involves the invitation to submit tenders (in open and two-stage tendering, the invitation is public, while in restricted tendering the invitation is addressed to a limited group); in request for proposals proceedings, solicitation involves an

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<sup>4</sup> The illustrative list of socio-economic policies is taken from A/64/17, para. 164. The illustrative list in article 34 (4)(c)(iii) of the 1994 Model Law referred to the balance of payments position and foreign exchange reserves of the enacting State, the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services 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 provision of guidance to the Secretariat as regards the list to be included in the Guide is requested.

<sup>5</sup> At the nineteenth session of the Working Group, concern was expressed about the latter statement. The issue was noted to be politically sensitive and thus more appropriate for consideration by the Commission (A/CN.9/713, para. 124). The appropriateness of such statement in the Guide is therefore to be considered and, if it is to be retained, whether additional guidance should be provided as regards costs and benefits of such policies.



invitation to present proposals (which may be public or addressed to a limited group); in competitive negotiations, solicitation involves an invitation to a limited group to take part in negotiations; in request for quotations, solicitation involves addressing the request to a limited group but a minimum of three must be invited; in electronic reverse auctions used as a stand-alone procurement method, where initial bids are requested for assessment of responsiveness or evaluation, solicitation starts with an invitation to present initial bids (the invitation is public, as in open tendering); in simpler electronic reverse auctions used as a stand-alone procurement method, not involving assessment or evaluation of initial bids, solicitation takes place after the opening of the auction, when those participating in the auction are requested to bid; in single-source procurement, solicitation involves a request to present either a quotation or proposal, addressed to one supplier or contractor.

12. The definition of “solicitation documents” (definition (p)) is generic and encompasses essential features of the documents soliciting participation in any procurement method. These documents are issued by the procuring entity and set out the terms and conditions of the given procurement. In some procurement methods, the term “solicitation documents” is used; in others, alternative terminology appears. For example, in the provisions of the Model Law regulating request for proposals proceedings, the reference is to a “request for proposals”, which contains the solicitation information. Regardless of the term used in each procurement method in the Model Law, the solicitation documents also encompass any amendments to the documents originally issued. Such amendments may be made in accordance with articles 14 and 15 of the Model Law; in two-stage tendering, additionally under the provisions of article 47 (4); and in request for proposals with dialogue proceedings, in accordance with article 48.

13. Although the Model Law refers to “tender security” (definition (t)), this reference does not imply that this type of security may be requested only in tendering proceedings. The definition does not intend to imply either that multiple tender securities can be requested by the procuring entity in any single procurement proceedings that involve presentation of revised proposals or bids.<sup>6</sup>

14. The expression “other provisions of law of this State”, as used in article 2 and in other provisions of the Model Law, refers not only to statutes, but also to implementing regulations as well as to the treaty obligations of the enacting State. In some States, a general reference to “law” would suffice to indicate that all of the above-mentioned sources of law were being referred to. In others, a more detailed reference to the various sources of law is warranted in order to make it clear that reference is made not merely to statutes.

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

1. The purpose of the article is to explain the effect of international treaties on national implementation of the Model Law. An enacting State may be subject to

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<sup>6</sup> The guidance reflects the suggestion made in the Working Group. Article 16 on tender securities does not itself prohibit multiple tender securities. The commentary to that article however reflects the similar point that UNCITRAL discourages multiple tender securities in any given procurement.

international agreements or obligations with respect to procurement. For example, a number of States are parties to the [WTO 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 their 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. The article thus establishes a general prevalence of international treaties over the provisions of the Model Law on the understanding, however, that more stringent requirements may be applicable under international treaties but international commitments should not be used as a pretext to avoid the safeguards of the Model Law.

2. The texts in parenthesis in this article are relevant to, and intended for consideration by, federal States. 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.

3. The provisions of the article need to be adapted to constitutional requirements of the enacting State. For example, reference in subparagraph (b) to “agreements entered into by this State” may need to be amended to clarify that agreements entered meant agreements that are not only signed but also ratified by the legislature, in order for them to be binding in an enacting State.

4. The enacting State may choose not to enact the provisions of the article if they conflict with its constitutional law.

#### **Article 4. Procurement regulations**

1. The purpose of article 4 is to highlight the need for procurement regulations to fulfil the objectives and to implement provisions of the Model Law. As noted in paragraphs ... of Part I of the Guide, the Model Law is a “framework law”, setting out 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” approach 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 (see below for the list of such provisions) expressly indicate that they should be supplemented 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 procurement regulations should not contradict the Model Law or undermine the

effectiveness of its provisions. (For the discussion on importance of taking a holistic approach in regulations, guidance and other implementing texts to ensure that the system envisaged under the Model Law works in practice, see ... of Part I of the Guide.)

2. Reference to the “procurement regulations” should be interpreted in accordance with the legal traditions of the enacting State; the notion may encompass any tool used in the enacting State to implement its statutes.

3. Examples of procedures for which the elaboration of more detailed rules in the procurement regulations may be useful include: the manner of publication of various types of information (articles 5, 6, 18 and 22); measures to secure authenticity, integrity and confidentiality of information communicated during the procurement proceedings (article 7 (5)); grounds for limiting participation in procurement (article 8); calculation of margins of preference and application of socio-economic criteria in evaluation of submissions (article 11); estimation of the value of the procurement (article 12); code of conduct (article 25); and limitation of the quantity of procurement carried out in cases of urgency using a competitive negotiations or single-source procurement method (that is, the quantity is limited to that required to deal with the urgent circumstances) (see the commentary to the relevant provisions of article 29 (4) and (5) in paragraphs ... below).

4. In addition to the use of regulations as a matter of best practice, failure to issue procurement regulations as envisaged 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 (article 8); authority and procedures for application of a margin of preference in favour of national suppliers or contractors (article 11); and use of the request-for-quotations method of procurement, since that method may be used only for procurement whose value is below threshold levels set out in the procurement regulations (article 28 (2)).

[A list of cross-references to all provisions of the Model Law containing references to the procurement regulations is to be inserted here or in an Annex to the Guide.]

#### **Article 5. Publication of legal texts**

1. The purpose of article 5 is to ensure transparency of all rules and regulations applicable to procurement in an enacting State. Any interested person should know which rules and regulations apply to procurement at any given time and where they can be found if necessary.

2. Paragraph (1) of this article is intended to promote transparency in the laws, regulations and other legal texts of general application relating to procurement by requiring that those legal texts be promptly made accessible and systematically maintained. Inclusion of this provision is considered to be particularly important in States in which such a requirement is not found in existing administrative law. It may also be considered useful even where such a requirement exists, as a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers or contractors on the requirement for adequate public disclosure of legal texts referred to in the paragraph.

3. In many countries, there exist official publications in which legal texts referred to in this paragraph are and can be routinely published. Otherwise, the texts should

be promptly made accessible to the public, including foreign suppliers or contractors, in another appropriate medium and in a manner that will ensure the required level of outreach of relevant information to intended recipients and the public at large. In order to ensure easy and prompt public access to the relevant legal texts, an enacting State may wish to specify the manner and medium of publication in procurement regulations or refer in those regulations to legal sources that address publicity of statutes, regulations and other public acts. This approach would also provide certainty to the public at large as regards the source of the relevant information, which is especially important in the light of the proliferation of media and sources of information as the use of traditional paper-based means of publishing information has declined. Transparency in practice may be considerably impeded if abundant information is available from many sources, whose authenticity and authority may not be certain.

4. The enacting State should envisage the provision of relevant information in a centralized manner at a common place (the “official gazette” or equivalent) and should establish rules to define the relationship of that single centralized medium with other media where such information may appear. Information posted in a single centralized medium should be authentic and authoritative and have primacy over information that may appear in other media. Regulations may explicitly prohibit publication in different media before information is published in the centralized medium, and require that the same information published in different media must contain the same data. The centralized medium should be readily and widely accessible. Ideally, no fees should be charged for access to laws, regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, because this will be against objectives of the Model Law to foster and encourage competition, to promote the integrity of and public confidence in the procurement process and to achieve transparency in the procurement procedures.

5. Regulations or other supporting guidance should also spell out what the requirements for “promptly made accessible” and “systematic maintenance” in the paragraph entail, including timely posting and updating of all relevant and essential information in a manner easy to use and understand by the average user. The importance of the former requirement (to make the texts promptly accessible to the public) should be highlighted in the light of the effect of public publicity on the effectiveness of laws, regulations and other legal texts of general application: it is the usual requirement in the constitutional law of States that this type of texts are entering into force only after certain number of days from their publication in the officially designated public source of information. The term “accessible” should be understood as in article 7 of the Model Law where the same term is used: information must be readable and capable of interpretation and retention (see ... below). The requirement “to make the texts promptly accessible to the public” is however different from the requirement in article 7 that provides, *inter alia*, that information must be in the form that is accessible so as to be usable for subsequent reference. The former implies proactive actions from designated States authorities (such as publication in the official media) to ensure that the intended information reaches the public.

6. Paragraph (2) of the article deals with a distinct category of legal texts — judicial decisions and administrative rulings with precedent value. The opening

phrase in paragraph (1) is included to make it clear that the more stringent publicity requirements in paragraph (1) — to make the texts promptly accessible to the public and to systematically maintain them — do not apply to the legal texts dealt with in paragraph (2). The texts covered by paragraph (2), unlike the texts referred to in paragraph (1) of the article, are not of the general application; they enter into force usually from the moment of their promulgation by the court or other designated organ. Special rules on access to them by the public usually apply. In addition, because of the static nature of these texts, the requirement of systematic maintenance does not apply to them. Paragraph (2) of the article therefore requires that these texts are to be made available to the public. This different requirement does not intend to replace the requirement of accessibility of these texts. While information in the texts covered by paragraph (2) must still be readable and capable of interpretation and retention (those are the elements of “accessibility” discussed in the preceding paragraph), the objective of paragraph (2) is to achieve the necessary level of publicity of these texts and accuracy of publicized texts with sufficient flexibility.

7. Depending on legal traditions and the procurement practices by various procuring entities in an enacting State, interpretative texts of legal value and importance to suppliers and contractors may already be covered by either paragraph (1) or (2) of the article. The enacting State may wish to consider making amendments to the article to ensure that they are covered. In addition, taking into account that non-paper means of publishing information reduce the costs, time and administrative burden of publishing and maintaining information, it may be considered to be the best practice to publish other texts of relevance and practical use and importance to suppliers and contractors, in order to achieve transparency and predictability, and to foster and encourage suppliers and contractors to compete. These additional legal texts may include, for example, procurement guidelines or manuals and other documents that provide information about important aspects of domestic procurement practices and procedures and may affect general rights and obligations of suppliers and contractors. The Model Law, while not explicitly addressing the publication of these texts, does not preclude an enacting State from expanding the list of texts covered by article 5 according to its domestic context. If such an option is exercised, an enacting State should consider which additional texts are to be made public and which conditions of publication should apply to them. Enacting States may in this regard assess costs and efforts to fulfil such conditions in proportion to benefits that potential recipients are expected to derive from published information. In the paper-based environment, costs may be disproportionately high if, for example, it would be required that information of marginal or occasional interest to suppliers or contractors is to be made promptly accessible to the public and systematically maintained. In the non-paper environment, although costs of publishing information may become insignificant, costs of maintaining such information, so as to ensure easy public access to the relevant and accurate information, may still be high.

8. Laws and regulations of the enacting State shall regulate which State organs are responsible for fulfilling the obligations under this article. In accordance with a number of provisions of the Model Law (such as article 38 (t)), the procuring entity will be required to include in the solicitation documents references to laws, regulations and other legal texts directly pertinent to the procurement proceedings.

### **Article 6. Information on possible forthcoming procurement**

1. The purpose of the article is to highlight the importance of proper procurement planning. The article recommends the publication of information on future procurement, which may contribute to transparency throughout the procurement process and eliminate any advantageous position of suppliers or contractors that might otherwise gain access to procurement planning phases in a non-transparent way. The procuring entity should assess whether such publication is appropriate and would further transparency in particular in the light of the requirements of the United Nations Convention against Corruption (its article 9, which addresses public procurement).
2. Paragraph (1) of the article enables and is intended to encourage the publication of information on forthcoming procurement opportunities and procurement plans. The reference in paragraph (1) is made to long-term general plans rather than information about short-term procurement opportunities or any particular forthcoming procurement opportunity (the latter is subject of paragraph (2) of the article). The enacting State may consider it appropriate to highlight the benefits of publishing such information for strategic and operational planning. For example, publication of such information may discipline procuring entities in procurement planning, and diminish cases of “ad hoc” and “emergency” procurements and, consequently, recourses to less competitive methods of procurement. It may also enhance competition as it would enable more suppliers and contractors to learn about procurement opportunities, assess their interest in participation and plan their participation in advance accordingly. Publication of such information may also have a positive impact in the broader governance context, in particular in opening up procurement to general public review and civil society and local community participation.
3. Enacting States may provide incentives for publication of such information, as is done in some jurisdictions, such as a possibility of shortening a period for presenting submissions in pre-advertised procurements. The enacting States may also refer to cases when publication of such information would in particular be desirable, such as when complex construction procurements are expected or when procurement value exceeds a certain threshold. They may also recommend the desirable content of information to be published and other conditions for publication, such as a time frame that such publication should cover, which may be a half-year or a year or other period.
4. Paragraph (2), unlike paragraph (1), refers to an advance notice of a particular forthcoming procurement opportunity. In practice, such advance notices may be useful, for example, to investigate whether the market could respond to the procuring entity’s needs before any procurement procedure is initiated. This type of market investigation may prove useful in rapidly evolving markets (such as in the information technology sector) to see whether there are recent or envisaged innovative solutions. Responses to the advance notice might reveal that it would not be feasible or desirable to carry out the procurement as planned by the procuring entity. On the basis of the data collected, the procuring entity may take a more informed decision as regards the most appropriate procurement method to be used in the forthcoming procurement. This advance notice should not be confused with a notice seeking expressions of interest that is usually published in conjunction with the request for proposals proceedings (the latter is further discussed in ...).

5. The optional publication referred to in paragraphs (1) and (2) is not intended to form part of any particular procurement proceeding. Publication under paragraph (1) is a step in a long or medium-term plan while publication under paragraph (2) may shortly precede the procurement proceedings. As stated in paragraph (3) of the article, when published either under paragraph (1) or (2), the publicised information does not bind the procuring entity in any way, including as regards future solicitations. Suppliers or contractors are not entitled to any remedy if the procurement as pre-publicised does not take place at all, or takes place on terms different from those pre-publicised.

6. The article is of general application: the procuring entity is encouraged to publish the information referred to in paragraphs (1) and (2) regardless of the type and method of procurement envisaged. Enacting States and procuring entities should be aware, however, that publication of this information is not advisable in all cases. Imposing a requirement to publish this type of information is likely to be burdensome; it may also interfere in the budgeting process and the procuring entity's necessary flexibility to handle its procurement needs. The publication of such information may also inadvertently facilitate collusion and lobbying. The position under the Model Law is therefore, as reflected in the article, that the procuring entity should have the discretion to decide on a case-by-case basis on whether such information should be published, but it is considered that the default position should be to publish, unless there are considerations indicating to the contrary.

7. The enacting State may wish to stipulate, in the procurement regulations, the place and means of publishing information referred to in the article. In regulating this issue, it may wish to take into account the commentary to article 5, which raises considerations relevant to article 6. Consistency in regulation of issues related to publication of all types of procurement-related information under the Model Law should be ensured (see in this context also commentary to articles 17, 18, 22 and 32-34 below).

### **Article 7. Communications in procurement**

1. The purpose of article 7 is to seek to provide certainty as regards (i) the form of information to be generated and communicated in the course of the procurement conducted under the Model Law, (ii) the means to be used to communicate such information, (iii) the means of satisfying all requirements for information to be in writing or for a signature, and of holding any meeting of suppliers or contractors (collectively referred to as "form and means of communications"), and (iv) requirements and measures taken to protect classified information in procurement involving such information.

2. As regards the forms and means of communication, the position under the Model Law is that, in relation to the procuring entity's interaction with suppliers and contractors and the public at large, the paramount objective should be to seek to foster and encourage participation in procurement proceedings by suppliers and contractors and at the same time not to obstruct the evolution of technology and processes. The provisions contained in the article therefore do not depend on or presuppose the use of particular types of technology. They set a legal regime that is open to technological developments. While they should be interpreted broadly, dealing with all communications in the course of procurement proceedings covered

by the Model Law, the provisions are not intended to regulate communications that may be subject to regulation by other branches of law, such as tender securities.

3. Paragraph (1) of the article requires that information is to be in a form that provides a record of the content of the information and is accessible so as to be usable for subsequent reference. The use of the word “accessible” in the paragraph is meant to imply that information should be readable and capable of interpretation and retention.<sup>7</sup> The word “usable” is intended to cover both human use and automatic processing. These provisions aim at providing, on the one hand, sufficient flexibility in the use of various forms of information as technology evolves and, on the other, sufficient safeguards that information in whatever form it is generated and communicated will be reliably usable, traceable and verifiable. Adequate reliability, traceability and verification are essential for the normal operation of the procurement process, for effective control and audit and in review proceedings. The wording found in the article is compatible with form requirements found in UNCITRAL texts regulating electronic commerce, such as article 9 (2) of the United Nations Convention on the Use of Electronic Communications in International Contracts. Like these latter documents, the Model Law does not confer permanence on one particular form of information, nor does it interfere with the operation of rules of law that may require a specific form. For the purposes of the Model Law, as long as a record of the content of the information is provided and information is accessible so as to be usable for subsequent reference, any form of information may be used. To ensure transparency and predictability, any specific requirements as to the form acceptable to the procuring entity have to be specified by the procuring entity at the beginning of the procurement proceedings, in accordance with paragraph 3 (a) of the article.

4. Paragraph (2) of the article contains an exception to the general form requirement contained in paragraph (1) of the article. It permits certain types of information to be communicated on a preliminary basis in a form that does not leave a record of the content of the information, for example if information is communicated orally by telephone or in a personal meeting, in order to allow the procuring entity and suppliers and contractors to avoid unnecessary delays. The paragraph enumerates, by cross-reference to the relevant provisions of the Model Law, the instances when this exception may be used. They involve communication of information to any single supplier or contractor participating in the procurement proceedings (for example, when the procuring entity asks suppliers or contractors for clarifications of their tenders). However, the use of the exception is conditional: immediately after information is so communicated, confirmation of the communication must be given to its recipient in a form prescribed in paragraph (1) of the article (i.e., that provides a record of the content of the information and that is accessible and usable). This requirement is essential to ensure transparency, integrity and the fair and equitable treatment of all suppliers and contractors in procurement proceedings. However, practical difficulties may exist in verifying and enforcing compliance with this requirement. Therefore, the enacting State may wish to limit the use of the exception under paragraph (2) to those situations that are

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<sup>7</sup> The need for using in paragraph (1) of article 7 of the Model Law the phrase “accessible and available” to capture both terms as used in article 5 of the Model Law is to be considered. See the relevant considerations raised in paragraphs 5 and 6 of the commentary to article 5 of this draft.



strictly necessary.<sup>8</sup> Overuse of this exception might create a risk of abuse, including corruption and favouritism.

5. Consistent with the general approach of the Model Law that the procuring entity is responsible for the design of the procurement proceedings, paragraph (3) of the article gives the right to the procuring entity to insist on the use of a particular form and means of communications or combination thereof in the course of the procurement, without having to justify its choice. No such right is given to suppliers or contractors but, in accordance with chapter VIII of the Model Law, they may challenge the procuring entity's decision in this respect. The exercise of this right by the procuring entity is subject to a number of conditions that aim at ensuring that procuring entities do not use technology and processes for discriminatory or otherwise exclusionary purposes, such as to prevent access by some suppliers and contractors to the procurement or create barriers for access.

6. To ensure predictability and proper review, control and audit, paragraph (3) of the article requires the procuring entity to specify, when first soliciting the participation of suppliers or contractors in the procurement proceedings, all requirements of form and the means of communications for a given procurement. These requirements may be changed by issuing an addendum to the originally published information, in accordance with article 15 of the Model Law. The procuring entity has to make it clear whether one or more than one form and means of communication can be used and, in the latter case, which form and means is/are to be used at which stage of the procurement proceedings and with respect to which types of information or classes of information or actions. For example, special arrangements may be justifiable for submission of complex technical drawings or samples or for a proper back-up when a risk exists that data may be lost if submitted only by one form or means. The procuring entity may, at the outset of a given procurement, envisage that a change in the form requirements and/or means of communications may be required. This situation might arise, for example, in procurement processes that will extend over a relatively lengthy period, such as procurement of highly complex items or procurement involving framework agreements. In such a case, the procuring entity, apart from reserving the possibility to amend form requirements or the means of communication when first soliciting the participation of suppliers or contractors in the procurement proceedings, will be required to ensure that the safeguards contained in article 7 (4) are complied with in any amended form and/or means of communications stipulated, and that all concerned are promptly notified about the change. Although theoretically possible, the use of several means of communication, or advising that the means may freely change during the procurement, will have negative implications both for the efficiency of the procurement procedure and the validity of the information regarding the means of communication, and therefore procuring entities should envisage the use of only those means of communication and changes to them that are both justifiable and anticipated to be appropriate for the procurement concerned.

7. To make the right of access to procurement proceedings under the Model Law a meaningful right, paragraph (4) of the article requires that means specified in

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<sup>8</sup> The provision of guidance to the Secretariat is requested on whether situations captured in cross-references in paragraph (2) of the article are all that are strictly necessary or can be further limited by the enacting State.

accordance with paragraph (3) of the article must be readily capable of being utilized with those in common use by suppliers or contractors in the relevant context. As regards the means to be used to hold meetings, it in addition requires ensuring that suppliers or contractors can fully and contemporaneously participate in the meeting. “Fully and contemporaneously” in this context means that suppliers and contractors participating in the meeting have the possibility, in real time, to follow all proceedings of the meeting and to interact with other participants when necessary. The requirement of “capable of being utilized with those in common use by suppliers or contractors” found in paragraph (4) of the article implies efficient and affordable connectivity and interoperability (i.e., capability effectively to operate together) so that to ensure unrestricted access to procurement. In other words, each and every potential supplier or contractor should be able to participate, with simple and commonly used equipment and basic technical know-how, in the procurement proceedings in question. This however should not be construed as implying that procuring entities’ information systems have to be interoperable with those of each single supplier or contractor. If, however, the means chosen by the procuring entity implies using information systems that are not generally available, easy to install (if need be) and reasonably easy to use and/or the costs of which are unreasonably high for the use envisaged, the means cannot be deemed to satisfy the requirement of “commonly used means” in the context of a specific procurement under paragraph (4) of the article. (The term “information system” or the “system” in this context is intended to address the entire range of technical means used for communications. Depending on the factual situation, it could refer to a communications network, applications and standards, and in other instances to technologies, equipment, mailboxes or tools.)

8. The paragraph does not purport to ensure readily available access to public procurement in general but rather to a specific procurement. The procuring entity has to decide, on a case-by-case basis, which means of communication might be appropriate in which type of procurement. For example, the level of penetration of certain technologies, applications and associated means of communication may vary from sector to sector of a given economy. In addition, the procuring entity has to take into account such factors as the intended geographic coverage of the procurement and coverage and capacity of the country’s information system infrastructure, the number of formalities and procedures needed to be fulfilled for communications to take place, the level of complexity of those formalities and procedures, the expected information technology literacy of potential suppliers or contractors, and the costs and time involved. In cases where no limitation is imposed on participation in procurement proceedings on the basis of nationality, the procuring entity has also to assess the impact of specified means on access to procurement by foreign suppliers or contractors. Any relevant requirements of international agreements would also have to be taken into account. A pragmatic approach, focusing on its obligation not to restrict access to the procurement in question by potential suppliers and contractors, will help the procuring entity to determine if the chosen means is indeed “commonly used” in the context of a specific procurement and thus whether it satisfies the requirement of the paragraph.

9. In a time of rapid technological advancement, new technologies may emerge that, for a period of time, may not be sufficiently accessible or usable (whether for technical reasons, reasons of cost or otherwise). The procuring entity must seek to avoid situations when the use of any particular means of communication in

procurement proceedings could result in discrimination among suppliers or contractors. For example, the exclusive choice of one means could benefit some suppliers or contractors who are more accustomed to use it to the detriment of others. Measures should be designed to prevent any possible discriminatory effect (e.g., by providing training or longer time limits for suppliers to become accustomed to new systems). The enacting State may consider that the old processes, such as paper-based ones, need to be retained initially when new processes are introduced, which can then be phased out, to allow a take-up of new processes.

10. The provisions of the Model Law do not distinguish between proprietary or non-proprietary information systems that may be used by procuring entities. As long as they are interoperable with those in common use, their use would comply with the conditions of paragraph (4). The enacting State may however wish to ensure that procuring entities should carefully consider to what extent proprietary systems, devised uniquely for the use by the procuring entity, may contain technical solutions different and incompatible with those in common use. Such systems may require suppliers or contractors to adopt or convert their data into a certain format. This can render access of potential suppliers and contractors, especially smaller companies, to procurement impossible or discourage their participation because of additional difficulties or increased costs. Effectively, suppliers or contractors not using the same information systems as the procuring entity would be excluded, with the risk of discrimination among suppliers and contractors, and higher risks of improprieties. The use of the systems that would have a significantly negative effect on participation of suppliers and contractors in procurement would be incompatible with the objectives, and article 7 (4), of the Model Law.

11. On the other hand, the recourse to off-the-shelf information systems, being readily available to the public, easy to install and reasonably easy to use and providing maximal choice, may foster and encourage participation by suppliers or contractors in the procurement process and reduce risks of discrimination among suppliers and contractors.<sup>9</sup> They are also more user-friendly for the public sector itself as they allow public purchasers to utilize information systems proven in day-to-day use in the commercial market, to harmonize their systems with a wider net of potential trading partners and to eliminate proprietary lock-in to particular third-party information system providers, which may involve inflexible licences or royalties. They are also easily adaptable to user profiles, which may be important for example in order to adapt systems to local languages or to accommodate multilingual solutions, and scalable through all government agencies' information systems at low cost. This latter consideration may be especially important in the broader context of public governance reforms involving integration of internal information systems of different government agencies.

[continued in A/CN.9/731/Add.2]

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<sup>9</sup> Some experts question appropriateness of this statement.

**(A/CN.9/731/Add.2) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany articles 7 (as continued from A/CN.9/731/Add.1) to 15 of chapter I (General provisions) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE  
UNCITRAL MODEL LAW ON  
PUBLIC PROCUREMENT**

...

**Part II. Article-by-article commentary**

...

**Article 7. Communications in procurement**

[continued from A/CN.9/731/Add.1]

12. The Model Law does not address the issue of charges for accessing and using the procuring entity's information systems. This issue is left to the enacting State to decide taking into account local circumstances. These circumstances may evolve over time with the effect on the enacting State's policy as regards charging fees. The enacting State should carefully assess the implications of charging fees for suppliers and contractors to access the procurement, in order to preserve the objectives of the Model Law, such as those of fostering and encouraging participation of suppliers and contractors in procurement proceedings, and promoting competition. Ideally, no fees should be charged for access to, and use of, the procuring entity's information systems. If charged, they should be transparent, justified, reasonable and proportionate and not discriminate or restrict access to the procurement proceedings.

13. The objective of paragraph (5) of the article (which requires appropriate measures to secure the authenticity, integrity and confidentiality of information) is to enhance the confidence of suppliers and contractors in reliability of procurement proceedings, including in relation to the treatment of commercial information. Confidence will be contingent upon users perceiving appropriate assurances of security of the information system used, of preserving authenticity and integrity of information transmitted through it, and of other factors, each of which is the subject of various regulations and technical solutions. Other aspects and relevant branches of law are relevant, in particular those related to electronic commerce, records management, court procedure, competition, data protection and confidentiality, intellectual property and copyright. The Model Law and procurement regulations that may be enacted in accordance with article 4 of the Model Law are therefore only a narrow part of the relevant legislative framework. In addition, reliability of procurement proceedings should be addressed as part of a comprehensive good

governance framework dealing with personnel, management and administration issues in the procuring entity and public sector as a whole.

14. Legal and technical solutions aimed at securing the authenticity, integrity and confidentiality may vary in accordance with prevailing circumstances and contexts. In designing them, consideration should be given both to their efficacy and to any possible discriminatory or anti-competitive effect, including in the cross-border context. The enacting State has to ensure at a minimum that the systems are set up in a way that leaves trails for independent scrutiny and audit and in particular verifies what information has been transmitted or made available, by whom, to whom, and when, including the duration of the communication, and that the system can reconstitute the sequence of events. The system should provide adequate protection against unauthorized actions aimed at disrupting normal operation of public procurement process. Technologies to mitigate the risk of human and other disruptions must be in place. So as to enhance confidence and transparency in the procurement process, any protective measures that might affect the rights and obligations of potential suppliers and contractors should be specified to suppliers and contractors at the outset of procurement proceedings or should be made generally known to public. The system has to guarantee to suppliers and contractors the integrity and security of the data that they submit to the procuring entity, the confidentiality of information that should be treated as confidential and that information that they submit will not be used in any inappropriate manner. A further issue in relation to confidence is that of systems' ownership and support. Any involvement of third parties needs to be carefully addressed to ensure that the arrangements concerned do not undermine the confidence of suppliers and contractors and the public at large in procurement proceedings. (Further aspects relevant to the provisions of article 7 on the form and means of communication are discussed in the commentary to articles 39 and 41 of this Guide.)<sup>1</sup>

15. In addition to imposing requirements on the form and means of communication, the article deals with measures and requirements that the procuring entity may impose in procurement involving classified information to ensure the protection of such information at the requisite level. Provisions to that effect are found in paragraph (3)(b). For example, it is common in procurement containing classified information, to include the classified information in an appendix to the solicitation documents, which is not made public. If such measure or any other exception to transparency requirements of the Model Law or any other measure for protection of classified information is taken, it is to be disclosed at the outset of the procurement in accordance with paragraph (3) of the article. (For the definition of "procuring involving classified information" and commentary thereto, see article 2(j).)

16. The requirements or measures referred to in paragraph (3)(b) are to be differentiated from the requirements and measures referred to in paragraph (5) of the article. While the latter referred to general requirements and measures applicable to any procurement, regardless of whether classified information is involved, paragraph (3)(b) refers to technical requirements and measures addressed to

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<sup>1</sup> The above and commentary to other relevant provisions of the Model Law may need to be amended to reflect the most recent developments in the e-commerce field, in particular on the identity management, as may be brought to the attention of UNCITRAL.

suppliers or contractors to ensure the integrity of classified information, such as encryption requirements. They would allow the procuring entity to stipulate, for example, the level of the officer tasked with receiving the information concerned. These requirements and measures would be authorized by the procurement regulations or other provisions of law of the enacting States only in procurement involving classified information and only with respect to that type of information, not any other information that the procuring entity may choose to protect at its own discretion.

[A list of all transparency requirements found in the Model Law, exception to which may be justified in the procurement involving classified information, is to be included.]

#### **Article 8. Participation by suppliers or contractors**

1. The purposes of article 8 are to specify the grounds upon which the procuring entity may restrict the participation of certain categories of suppliers or contractors in procurement proceedings (paragraphs (1) and (2)) and to provide procedural safeguards when any such restriction is imposed (paragraphs (3) to (5)). Any such restriction of participation of suppliers or contractors in procurement proceedings restricts trade and may violate commitments by States under relevant international instruments, such as [WTO GPA].
2. Both paragraphs (1) and (2) stipulate that the grounds for restricting the participation of suppliers and contractors in procurement proceedings are limited to those found in procurement regulations or other provisions of law of the enacting State. Whereas paragraph (1) refers to a restriction on the ground of nationality, paragraph (2) is open-ended as regards the nature of the grounds that may be found in the procurement regulations or other provisions of law of the enacting State. Although socio-economic policies of an enacting State may involve restrictions on the grounds set out in either of the paragraphs, the provisions are not themselves limited to socio-economic issues: other issues of concern to the State, such as safety and security, may justify these restrictions.
3. Paragraph (1) does not mean “domestic procurement” only in the sense that domestic suppliers or contractors alone, however they may be defined in the enacting State, are permitted to participate in the procurement proceedings (noting that domestic procurement removes the obligation of international solicitation under article 32). International procurement under paragraph (1) may involve the exclusion of only certain nationalities, for example in order to fulfil the enacting State’s obligations under international public law to avoid dealings with persons of a foreign State that is subject to international sanctions.
4. Paragraph (2) is intended to cover situations where restriction of participation in procurement proceedings is undertaken wholly or partly for other reasons, such as to implement set-aside programmes for SMEs or entities from disadvantaged areas). The paragraph may cover, as paragraph (1) does, domestic procurement (e.g. procurement with participation of only suppliers or contractors coming from

disadvantaged areas within the same State) or international procurement limited to certain groups of suppliers or contractors (e.g. persons with disabilities).<sup>2</sup>

5. When any of the grounds in the procurement regulations or other provisions of law is invoked by the procuring entity as a justification for restricting participation in procurement proceedings, paragraph (3) requires the procuring entity to make declaration to such effect at the outset of the procurement proceedings. This declaration is to be published in the same place and manner in which the original information about the procurement proceedings, such as the invitation to participate in the procurement proceedings (e.g. invitation to pre-qualification or to tender) or the notice of the procurement under article 33, is published, and simultaneously with such information. To ensure fair and equitable treatment of suppliers or contractors, the declaration cannot be later altered.

6. Paragraph (4) and (5) contain other procedural safeguards. Under paragraph (4), the procuring entity will be required to put on the record the reasons and circumstances on which it relied to justify its decision, indicating in particular the legal source where the ground invoked to restrict participation is found. The same information is required to be provided to any member of the public upon request under paragraph (5) of the article.

(See also paragraphs ... of Part I of the Guide.)

#### **Article 9. Qualifications of suppliers and contractors**

1. The purposes of the article are: to set out an exhaustive list of criteria that the procuring entity may use in the assessment of qualifications of suppliers or contractors at any stage of the procurement proceedings (paragraph (2)); to regulate other requirements and procedures that it may impose for this assessment (paragraphs (3) to (7)); and to list the grounds for disqualification (paragraph (8)). The provisions aim at restricting the ability of procuring entities to formulate excessively demanding qualification criteria or requirements and through their application, reducing the pool of participants for the purpose, among other things, of limiting their own workload.

2. The article is also intended to prevent the qualification procedure from being misused to restrict market access through the use of hidden barriers to the market (whether at the domestic or international level). Requirements for particular licences, obscure diploma requirements, certificates requiring in-person attendance or adequate past experience may be legitimate for a given procurement, or may be an indication of an attempt to distort participation in favour of a particular supplier or contractor or group of suppliers or contractors. The provisions are therefore permissive in scope, and the risk of misuse is mitigated through the transparency

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<sup>2</sup> The suggestion in the Working Group was that the Guide should highlight that the article deals with measures of a clearly discriminatory nature, authorized in the procurement regulations and other provisions of law of the enacting State, but some measures may be taken in practice that produce, albeit inadvertently, an equally discriminatory effect on suppliers or contractors, domestically and/or internationally (for example, stipulating the use of the language spoken only by the ruling minority in a State, or imposing technical requirements that reflect standards applied only in one domestic region or in one country in a geographical area) (see A/CN.9/WG.I/WP.75/Add.1, footnote 47). The location of such statement in the Guide is to be considered.

provisions of paragraph (2), which enable the relevance of particular requirements to be evaluated. Of particular concern would be unnecessary requirements that discriminate directly or indirectly against overseas suppliers, used as a non-transparent manner of limiting their participation (where, for example, the permitted restriction under article 8 is not explicitly invoked, as further discussed in the commentary to paragraphs (2)(e) and (6), below).

3. As stated in paragraph (1) of the article, the provisions of the article may be applied at any stage of the procurement proceedings. Assessment of qualifications may take place: (i) at the outset of the procurement through pre-qualification in accordance with article 17 or preselection in accordance with article 48(3); (ii) during the examination of submissions (see for example, that the grounds for rejection of a tender in article 42(3)(a) include that the supplier is unqualified); (iii) at any other time in the procurement proceedings when pre-qualified suppliers or contractors are requested to demonstrate again their qualifications (see paragraph (8)(d) of this article and the commentary in paragraph ... below); and/or (iv) at the end of the procurement proceedings when the qualifications of only the winning supplier or contractor are assessed (see article 56(2)) or when that supplier or contractor is requested to demonstrate again its qualifications (article 42(6)).

4. The assessment of qualifications at the outset of the procurement through pre-qualification or preselection, while appropriate in some procurement, may have the effect of limiting competition and should therefore be used by the procuring entity only when necessary: the Model Law promotes open competition unless there is a reason to limit participation. The provisions of the Model Law in chapter VIII allow challenges to decisions on disqualification made early in the procurement proceedings, but only where the challenge is submitted before the deadline for presenting submissions. This limited time frame, supported by stricter provisions on suspension of the procurement proceedings, ensures that the procurement proceedings will not be disrupted at later stages for reasons not related to those stages.

5. Paragraph (2) lists the qualification criteria that can be used in the process. The criteria must be relevant and appropriate in the light of the subject matter of the procurement. It is not necessary to apply all the criteria listed in paragraph (2); the procuring entity should use only those that are appropriate for the purposes of the specific procurement. The criteria to be used must be specified by the procuring entity in any pre-qualification or preselection documents, and in the solicitation documents; in addition to enabling the relevance of the criteria to be evaluated, such early disclosure allows a challenge to them to be made before the procurement is concluded.

6. The requirement in paragraph (2)(a) that suppliers or contractors must possess the “necessary equipment and other physical facilities” is not intended to restrict the participation of SMEs in public procurement. Often such enterprises would not themselves possess the required equipment and facilities; they can ensure nevertheless through their subcontractors or partners that the equipment and facilities are available for the implementation of the procurement contract.

7. The reference in paragraph (2)(b) to “other standards” is intended to indicate that the procuring entity should be entitled to satisfy itself, for example, that suppliers or contractors have all the required insurances, and to impose security



clearances or consider environmental aspects where necessary. Since environmental standards in particular may have the effect of excluding foreign suppliers (where regional environmental standards vary), the enacting State may wish to issue rules and/or guidance on the use of environmental standards to ensure that procuring entities may apply such standards without risk of disruptive challenge procedures. These standards relate to the standards and processes followed by suppliers or contractors generally, rather than to the environmental characteristics of the subject matter of the procurement (which are addressed in the commentary to articles 10 and 11 below).<sup>3</sup>

8. Paragraph (2)(e) should be implemented bearing its potentially discriminatory effect on foreign suppliers or contractors without any permanent presence (either through a branch, representative office or subsidiary) in the enacting State in mind. Foreign suppliers would generally not have any obligation to pay taxes or social security contributions in the enacting State; article 8 prohibits the procuring entity from imposing requirements other than those permitted in the procurement regulations or other provisions of law of the enacting State that would have the effect of deterring participation in the procurement proceedings by foreign suppliers or contractors.

9. Paragraph (2)(f) of article 9 refers to the disqualification of suppliers and contractors pursuant to administrative suspension or debarment proceedings. Such administrative proceedings — in which alleged wrongdoers should be accorded due process rights such as an opportunity to refute the charges — are commonly used to suspend or debar suppliers and contractors found guilty of wrongdoing such as issuing false or misleading accounting statements or committing 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 (2)(f) should disqualify a supplier or contractor from being considered for a procurement contract.<sup>4</sup>

10. Paragraph (3) allows the procuring entity to demand from suppliers or contractors appropriate documentary evidence or other information to prove their satisfaction of the qualification criteria specified by the procuring entity in any pre-qualification or preselection documents and in the solicitation documents. Such documentary evidence may comprise audited annual reports (to demonstrate financial resources), inventories of equipment and other physical facilities, licenses to engage in certain types of activities and certificates of compliance with applicable standards and confirming legal standing. Depending on the subject matter of the procurement and the stage of the procurement proceedings at which qualification criteria are assessed, a self-declaration from suppliers or contractors may or may not be sufficient. For example, it may be sufficient to rely on this type

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<sup>3</sup> The discussion of set-aside programs may need to be added in the commentary here, including that they are considered less effective than preferences since they do not encourage local development. The relevant considerations are raised in draft Part I of the Guide (see in particular paragraphs 97-103 of A/CN.9/WG.I/WP.77/Add.2).

<sup>4</sup> It was suggested at the seventeenth session of the Working Group that the accompanying Guide text should refer to the World Bank's guidelines on debarment procedures (A/CN.9/687, para. 50). This suggestion is to be considered in the light of the deliberations at the Working Group's twentieth session as regards the desirable extent and context of reference in the Guide to regulation by multilateral developments banks of various procurement-related matters.

of declaration at the opening of simple stand-alone electronic reverse auctions as long as it is envisaged that a proper verification of the winning supplier's compliance with the applicable qualification criteria will take place after the auction. Requirements imposed as regards the documentary evidence or other information must apply equally to all suppliers or contractors and must be objectively justifiable in the light of the subject matter of the procurement (see paragraphs (4) and (6) of the article).

11. Paragraph (4) requires all criteria and requirements as regards assessment of qualifications of suppliers or contractors to be set out in any pre-qualification or preselection document and in the solicitation documents. In some jurisdictions, standard qualification requirements are found in procurement regulations, and the pre-qualification/preselection/solicitation documents may simply cross-refer to those regulations. For reasons of transparency and equal treatment, the Model Law requires all requirements to be set out in the relevant documents; however, the requirements of paragraph (4) may be satisfied where the documents refer to the qualification requirements in legal sources that are transparent and readily available (such as by using hyperlinks).

12. Paragraph (6) prohibits any measures that may have a discriminatory effect in the assessment of qualifications or that are not objectively justified, unless they are expressly authorized under the law of the enacting State. Despite these prohibitions in the Model Law, some practical measures, such as a choice of the language, although objectively justifiable, may lead to discrimination against or among suppliers or contractors or against categories thereof.

13. In order to facilitate participation by foreign suppliers and contractors, paragraph (7) bars the imposition of any requirement for the legalization<sup>5</sup> of documentary evidence provided by suppliers and contractors as to their qualifications other than by the supplier or contractor presenting the successful submission. Those requirements must be 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 the winning supplier or contractor 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.

14. The purpose of paragraph (8)(d) is to provide for reconfirmation, at a later stage of the procurement proceedings, such as at the time of examination of submissions, of the qualifications of suppliers or contractors that have been pre-qualified. This intends 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 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. In most procurement (with the exception perhaps of complex and time-consuming multi-stage procurement), the application of these provisions should be limited to the supplier or contractor presenting the successful submission as envisaged in articles 42(6) and (7) and 56 (2) of the Model Law.

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<sup>5</sup> The need for adding here an explanation of the term "legalization" is to be considered.

**Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement<sup>6</sup>**

1. The purpose of article 10 is to emphasize the importance of the principle of clarity, sufficient precision, completeness and objectivity in the description of the subject matter of procurement in any pre-qualification or preselection documents and in the solicitation documents. Descriptions with those characteristics encourage participation by suppliers and contractors in procurement proceedings, enable suppliers and contractors to formulate and present submissions 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 or framework agreement to be concluded, and thus to offer their most advantageous prices and other terms and conditions. Furthermore, properly prepared descriptions of the subject matter of procurement 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. In addition, the application of the rule that the description of the subject matter should be set out so as not to favour particular contractors or suppliers will make it more likely that the procurement needs of the procuring entity may be met 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 use of single-source procurement).
2. The minimum requirements referred to in paragraph (1) are intended also to cover the thresholds referred to in the provisions regulating request for proposals proceedings. The reference in paragraph (4) to the relevant technical and quality characteristics or the performance characteristics may also cover characteristics relevant to environment protection or other socio-economic policies of the enacting State.<sup>7</sup>
3. In accordance with paragraph (4) of the article, a brand name should be called for in a solicitation only where absolutely necessary, and if a brand name is referred to, the solicitation should specify the salient features of the subject matter being sought, and should state specifically that the brand name item “or equivalent” may be offered.

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<sup>6</sup> The commentary to this article may need to be expanded, to include in particular discussion of the following issues: the term “or equivalent”; the use of performance specifications in request for proposals as opposed to technical specifications in tendering-based procurement methods, and their advantages and disadvantages; and how to achieve objective comparative evaluation for example when alternative designs are offered.

<sup>7</sup> In the Working Group, the suggestion was made that the accompanying Guide text should elaborate on the way the socio-economic factors can be taken into account in setting out the description of the subject matter of the procurement and the terms and conditions of the procurement contract or a framework agreement. The provision of guidance to the Secretariat is requested on the scope of the commentary which might include, for example, a consideration of the use of appropriate and relevant requirements by reference to national standards, to avoid an ad hoc and potential misuse of flexibility in this regard; to the interaction of socio-economic requirements as they may be applied in articles 9, 10 and 11, and the use of transparency mechanisms to ensure objectivity in the process. See, also, the guidance to articles 9 and 11.

4. In some jurisdictions, practices that require including in any pre-qualification or preselection documents and in the solicitation documents a reference source for technical terms used (such as the European Common Procurement Vocabulary) have proved to be useful.

#### **Article 11. Rules concerning evaluation criteria and procedures**

1. The purpose of the article is to set out the requirements governing the formulation, disclosure and application by the procuring entity of evaluation criteria. The main rules as reflected in paragraphs (1) and (6) of the article are that, with a few exceptions listed in paragraph (4) of the article, all evaluation criteria applied by the procuring entity must relate to the subject matter of the procurement (see paragraph (1)). This requirement is intended to ensure objectivity in the process, and to avoid the misuse of the procedure through invoking criteria intended to favour a particular supplier or contractor or group of suppliers or contractors. The provisions are permissive (they do not set out an exhaustive list of criteria),<sup>8</sup> to allow the procuring entity the flexibility to design the criteria to suit the circumstances of the given procurement. As was described above regarding qualification criteria, the transparency mechanisms that accompany the substantive requirement — that only those evaluation criteria and procedures that are set out in the solicitation documents may be applied in evaluating submissions and determining the successful submission — are designed to allow the objectivity of the process to be evaluated and, where necessary, challenged.<sup>9</sup>

2. The principle in paragraph (1) that evaluation criteria must relate to the subject matter of the procurement is a cornerstone to ensure best value for money and to curb abuse. This principle also assists in differentiating criteria that are to be applied under paragraph (2) of the article from the exceptional criteria that may be applied only in accordance with paragraph (4) of the article, as explained in paragraph ... below.

3. Paragraph (2) sets out an illustrative list of evaluation criteria on the understanding that not all evaluation criteria listed would be applicable in all situations and it would not be possible to provide for an exhaustive list of evaluation criteria for all types of procurement, regardless of how broadly they are drafted. The procuring entity can apply evaluation criteria even if they do not fall under the broad categories listed in paragraph (2) as long as the evaluation criteria meet the requirement set out in paragraph (1) of the article — they must relate to the subject matter of the procurement. The enacting State may wish to provide further rules and/or guidance to assist procuring entities in designing appropriate and relevant evaluation criteria.

4. Depending on the circumstances of the given procurement, evaluation criteria may vary from the very straightforward, such as price and closely related criteria (“near-price criteria”, for example, quantities, warranty period or time of delivery) to very complex (including socio-economic considerations, such as characteristics of the subject matter of procurement relevant to environment protection). Although

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<sup>8</sup> The section of the Guide that will explain revisions made to the 1994 text will need to reflect the departure from the approach to provide for the exhaustive list of evaluation criteria in the Model Law (see article 34 (4) of the 1994 Model Law).

<sup>9</sup> The paragraph may need to be expanded, in particular by providing examples.

ascertaining the successful submission on the basis of the price alone provides the greatest objectivity and predictability, in some proceedings the procuring entity cannot select a successful submission purely on the basis of the price factor, or so doing may not be the appropriate course. Accordingly, the Model Law enables the procuring entity to select the “most advantageous submission”, i.e., one that is selected on the basis of criteria in addition to price. Paragraph (2)(b) and (c) provides illustrations for such additional criteria. (Other permissible criteria that do not relate to the subject matter of the procurement are to be found in paragraph (4), as further discussed in paragraph ... below.) The criteria set out in paragraph (2)(c) (the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel involved in providing the subject matter of the procurement) would be applicable only in request for proposals proceedings. This is because request for proposals proceedings have traditionally been used for procurement of “intellectual type of services” (such as architectural, legal, medical, engineering) where experience, reliability and professional and managerial competence of persons delivering the service is of the essence. It is important to note that these criteria are evaluation criteria and not qualification criteria — while the same types of characteristics may be described as both qualification and evaluation criteria, qualification criteria represent minimum standards. Evaluation criteria describe the advantages that the procuring entity will assess on a competitive basis in awarding the contract.

5. Requiring in paragraph (3) that the non-price criteria must, to the extent practicable, be objective, quantifiable and expressed in quantifiable terms is aimed at enabling submissions to be evaluated objectively and compared on a common basis. This reduces the scope for arbitrary decisions. The wording “to the extent practicable” has been included in recognition that in some procurement proceedings, such as in the request for proposals with dialogue proceedings (article 48 of the Model Law), expressing all non-price evaluation criteria in monetary terms would not be practicable or appropriate. The enacting State may wish to spell out in the procurement regulations how factors are to be quantified in monetary terms where practicable.

6. A special group of non-price criteria comprise those in paragraph (4). Through them the enacting State pursues its socio-economic policies (see the relevant definition in article 2(n) of the Model Law and commentary thereto in ... above). Since paragraph (4) refers to criteria arising from general policies of the State, there may be no discretion on the part of the procuring entity in deciding whether or not to consider them. The wording in paragraph (4) (authorized or required) intends therefore to encompass two situations: when the procurement regulations or other provisions of law of the enacting State provide for the discretionary power to consider the relevant criteria and when such sources mandate the procuring entity to do so. These criteria are of general application and are unlikely to be permitted as evaluation criteria under paragraph (2) in that they will ordinarily not relate to the subject matter of the procurement. Examples may include the manner in which the procuring entity may dispose of by-products of a manufacturing process, may offset carbon emissions from the production of the goods or services at issue, and so on.<sup>10</sup>

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<sup>10</sup> The guidance may need to be expanded to elaborate in particular on differentiating the use of socio-economic policies as evaluation criteria from their use in imposing restrictions on

7. The criteria are therefore listed separately from the criteria set out in paragraph (2). They will be less objective and more discretionary than those referred to in paragraph (2) (although some of them, such as a margin of preference referred to in paragraph (4)(b), may be quantifiable and expressed in monetary terms as required under paragraph (3) of the article). For these reasons, these criteria should be treated as exceptional, as recognized by the requirement that their application be subject to a distinct requirement — that they must be authorized or required for application under the procurement regulations or other provisions of law of the enacting State. In addition, in the case of margins of preference, the procurement regulations must provide for a method of their calculation. [That method of calculation may envisage applying a margin of preference to price or the quality factors alone or to the overall ranking of the submission when applicable.]<sup>11</sup> The envisaged procurement regulations setting out rules concerning the calculation and application of a margin of preference could also establish criteria for identifying a “domestic” supplier or contractor and for qualifying goods as “domestically produced” (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 different subject matters of procurement (goods, construction and services). As to the mechanics of applying the margin of preference, this may be done, for example, by deducting from the submission prices of all submissions import duties and taxes levied in connection with the supply of the goods or construction, and adding to the resulting submission 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.<sup>12</sup>

8. The use of the criteria of the type envisaged in paragraph (4)(a) and margins of preference referred to in paragraph (4)(b) in evaluating submissions should be considered exceptional since it could impair competition and economy in procurement, and reduce confidence in the procurement process. Caution is advisable in providing a broad list of non-price criteria in paragraph (4)(a) or circumstances in which a margin of preference referred in paragraph (4)(b) may be applied, in view of the risk that such other criteria may pose to the objectives of good procurement practice. In specifying such criteria references to broad categories, such as environmental considerations, should be avoided. For example,

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participation in the procurement proceedings article 8 or their use as qualifications criteria under article 9 or their use as responsiveness criteria under article 10 (in all of the latter cases, ability to meet socio-economic policies will be assessed on a pass/fail basis rather than by assigning points in comparative analysis of submissions). The provision of examples to the Secretariat is requested. Another point that may need to be elaborated is the achievement of the longer-term competition policy through evaluation criteria, and how framework agreements in particular might compromise it through concentrating the market (for example, the fact of the award of the last contract under the framework could become an evaluation criterion as a result).

<sup>11</sup> The text in square brackets may need to be reworded depending on the final wording of the relevant provisions in the Model Law. For example, if the margin of preference is applied to the entire submission, including price, its effect on quality is lower than if it is applied to the quality “basket”.

<sup>12</sup> Further discussion is to be added on: (i) how a margin of preference is generally applied in practice, and the merits and demerits of the possible alternative approaches; and the link between the provisions on margins of preference in subparagraph (b) and those on socio-economic policies in subparagraph (a), and in particular their possible cumulative effect (A/CN.9/713, paragraph 131). The provision of guidance to the Secretariat is requested.

as already envisaged in paragraph (2)(b) of the article, some environmental considerations, such as the level of carbon emissions of the subject matter of procurement (e.g. cars), are linked to the subject matter of the procurement and the procuring entity could therefore consider them under paragraph (2)(b) even though such considerations may not be specifically authorized or required to be taken into account under procurement regulations or other provisions of law of the enacting State. When however they are not so linked, they could still be considered but under the conditions of paragraph (4) of the article. The procurement regulations or other rules or guidance should not only provide for the criteria but also regulate or guide how the criteria under paragraph (4) should be applied in individual procurements to ensure that they are applied in an objective and transparent manner.

9. As with any other evaluation criteria, the use of any criteria in accordance with paragraph (4)(a) or the margin of preference in accordance with paragraph (4)(b) and the manner of their application are required to be pre-disclosed in the solicitation documents under paragraphs (5) and (6) of the article. In addition, the use of any socio-economic criterion or margins of preference is to be reflected in the record of the procurement proceedings together with the manner in which they were applied (see article 24(1)(i) and (t)). These transparency provisions are essential to allow the appropriate use of the flexibility conferred in these articles to be evaluated; another benefit is that the overall costs of pursuing socio-economic considerations can potentially be compared with their benefits. (See paragraph ... of Part 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. See further paragraphs ... of Part I of the Guide on restrictions imposed by some international and regional treaties on States parties to such treaties as regards application of socio-economic criteria in the procurement proceedings, in particular with the aim to accord preferential treatment.)

10. Paragraph (5) sets out information about the evaluation criteria and procedures that must be specified, at a minimum, in the solicitation documents. This minimum information comprises: (i) the basis for selecting the successful submission (the lowest priced submission (where the award is to the lowest priced submission) or the most advantageous submission (where price in combination with other criteria are to be evaluated in selecting the successful submission)); (ii) the evaluation criteria themselves; and (iii) the manner of application of each criterion, including a relative weight given to each criterion, or where that is not possible or relevant (such as in request for proposals with dialogue proceedings under article 48 where it is often not possible to establish the relative weight of evaluation criteria at the outset of the procurement), descending order of importance of the evaluation criteria. This provision is intended to ensure full transparency, so that suppliers or contractors will be able to see how their submissions will be evaluated. A basket of non-price criteria will normally include some quantifiable and objective criteria (such as maintenance costs) and some subjective elements (for example, the relative value that the procuring entity places on speedy delivery or green production lines), amalgamated into an overall quality ranking. Thus for procurement not involving negotiations, the procuring entity has to disclose both how the non-price basket factors will weigh, and how the basket will weigh against price. The importance of setting out the appropriate level of detail of the evaluation criteria is reiterated by the corresponding provisions in the articles regulating the contents of solicitation documents in the context of each procurement method (see articles 38, 46 and 48).

## **Article 12. Rules concerning estimation of the value of procurement**

1. The purpose of the article is to prevent manipulation by the procuring entity in estimation of the value of procurement by artificially reducing the value of procurement for the purpose of limiting competition and avoiding other obligations under the Model Law. For example, article 21(3)(b) exempts the procuring entity from the obligation to apply a standstill period in procurement where the contract price is less than the threshold established by the enacting State (i.e. low-value procurement). Under article 22, the procuring entity will not be obliged to publish an individual public notice of award in this type of procurement. Articles 17(2) and 32(4) allow the procuring entity not to issue an international advertisement of the invitation to participate in procurement proceedings where it decides, in view of the low value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in presenting submissions. In addition, under some provisions of the Model Law, the value of procurement may have a direct impact on the selection of a method of procurement. For example, one of the grounds justifying the use of restricted tendering as opposed to open tendering is that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement (see article 28(1)(b)). The use of request for quotations under article 28(2) is justified in procurement of readily available goods or services where their value is below the threshold amount set out in the procurement regulations. In all such cases, the method selected by the procuring entity for estimation of the value of procurement will determine the value of the procurement, which may turn out to be below or above the established threshold. Without such provisions, the procuring entity might alternatively choose to divide the procurement into lots instead of consolidating purchases, with the aim of avoiding transparency requirements or the obligation to use more competitive methods of procurement.

2. To avoid subjectivity in the calculation of the value of procurement and anti-competitive and non-transparent behaviour on the part of the procuring entity, paragraph (1) sets out the basic principle that neither division of the procurement can take place nor any valuation method can be used for the purpose of limiting competition or avoiding obligations under the Law. The prohibition is therefore directed at both (i) any division of a procurement contract that is not justified by objective considerations, and (ii) any valuation method that artificially reduces the value of procurement.

3. Paragraph (2) requires the inclusion in the estimated value of the maximum total value of the procurement contract over its entire duration whether awarded to one or more suppliers or contractors, and of taking into account all forms of remuneration (including premiums, fees, commissions and interest receivable). In case of framework agreements, one would therefore refer to the maximum total value of all procurement contracts envisaged under a framework agreement. In procurement that provides for the possibility of option clauses, the estimated value under the article will refer to the estimated maximum total value of the procurement, inclusive of optional purchases.

4. Estimates are to be used primarily for internal purposes of the procuring entity. The procuring entity should exercise caution in revealing this information to potential suppliers or contractors because it runs the risk of not obtaining the best



price (if the estimate is higher than market prices, suppliers or contractors might tend to price submissions as close to the estimated value of the procurement as possible and so competition is compromised; if the estimate is below market prices, good suppliers may choose not to compete, and quality may be compromised). A blanket prohibition of revealing such estimates to suppliers or contractors may, however, be unjustifiable. For example, providing an estimated value of procurement during the entire duration of the framework agreement may be necessary to allow suppliers or contractors parties to the framework agreement to stock the subject matter of the framework agreement accordingly to ensure security of supply.

### **Article 13. Rules concerning the language of documents**

1. The purpose of the article is to establish certainty as regards the language of documents and communication in procurement proceedings in the enacting State. This provision is especially valuable for foreign suppliers or contractors that by reading the procurement law of the enacting State would be able to determine which additional costs (translation and interpretation) may be involved if they decide to participate in procurement proceedings in the enacting State.
2. Paragraph (1) provides for the general rule that documents issued by the procuring entity in the procurement proceedings are to be in the official language(s) of the enacting State. An enacting State whose official language is not the one customarily used in international trade has the option to require, by retaining in the article the words in the second set of brackets, that the documents in addition be issued as a general rule in a language customarily used in international trade. This requirement would facilitate the participation of foreign suppliers or contractors in procurement proceedings by helping to make the documents issued by the procuring entity understandable to them. If this wording is retained, the procuring entity would be able to lift the additional requirement only in the case of domestic procurement or where it decides, in view of the low value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in participating in the procurement proceedings.
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 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 or all language versions are of equal weight.
4. The basic rule, as reflected in paragraph (2) of the article, is that the language of documents presented by suppliers or contractors in response to the documents issued by the procuring entity during any given procurement must correspond to the language or any of the languages of such latter documents. However, the provisions do not exclude situations where the documents issued by the procuring entity may permit presenting the documents in another language specified in those documents.

**Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for preselection or for presenting submissions**

1. The purpose of the article is to ensure certainty as regards the manner, place and deadline for the submission of the main documents in the procurement process by suppliers and contractors. The significant legal consequences may arise out of non-compliance by suppliers or contractors with the procuring entity's requirements (such as the obligation on the procuring entity to return a submission presented late or that otherwise do not comply with the manner or place requirements (see for example article 39(3)). The article in paragraph (1) therefore provides important safeguards that ensure that equal requirements on the manner, place and deadline for submission of documents to the procuring entity apply to all suppliers or contractors, and that they are specified at the outset of the procurement proceedings in the pre-qualification, preselection or solicitation documents, as applicable. If such information is to be changed subsequently, changes must be brought to the attention of suppliers or contractors to which the documents affected by changes were originally provided. If such documents were provided to an unknown group of suppliers or contractors (e.g. through a download from a website), information on the changes made must at a minimum appear in the same place where the download was made possible.
2. An important element in fostering participation and competition is granting to suppliers and contractors a sufficient period of time to prepare their applications or submissions. Paragraph (2) 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 procurement, the extent of subcontracting anticipated, and the time needed for transmitting applications or submissions. Thus, it is left up to the procuring entity to fix the deadline by which applications or submissions must be presented, 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 presenting applications or submissions (particularly where its international commitments require it to do so). These minimum periods should be established in the light of each procurement method, means of communication used and whether procurement domestic or international. Such a period must be sufficiently long in international and complex procurement, especially those not envisaging the use of electronic means of communication for transmission of information, to allow suppliers or contractors reasonable time to prepare their submissions.
3. In order to promote competition and fairness, paragraph (3) requires the procuring entity to extend the deadline in certain circumstances: first, where clarifications or modifications, or minutes of a meeting of suppliers or contractors are provided shortly before the submission deadline, so that it is necessary to extend the deadline in order to allow suppliers or contractors to take the relevant information into account in their applications or submissions; and secondly, in the cases stipulated in article 15(3) when a material change in the information originally published occurred. Changes as regards the manner, place and deadline for submission of documents will always constitute material changes, which would oblige the procuring entity to extend the originally specified deadline.

4. Paragraph (4) permits, but does not compel, the procuring entity to extend the deadline for presenting submissions in other cases, i.e., when one or more suppliers or contractors is or are unable to present their submissions on time due to any circumstances beyond their control.<sup>13</sup> This is designed to protect the level of competition when a potentially important element of that competition would otherwise be precluded from participation.

5. The Model Law does not address the issue of potential liability of a procuring entity should its automatic systems fail. Failures in automatic systems inevitably occur; where a failure occurs, the procuring entity will have to determine whether the system can be re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for presenting submissions is necessary. Paragraphs (3) and (4) of the article give sufficient flexibility to procuring entities to extend the deadlines in such cases. Alternatively, the procuring entity may determine that a failure in the system is of such a nature that it will be prevented from proceeding with the procurement and the procurement proceedings will therefore need to be cancelled. The procurement regulations or other rules and guidance may provide further details on the issues of failures in electronic presentation of submissions and the allocation of risks. The procuring entity should bear in mind that failures occurring due to reckless or intentional actions by the procuring entity, as well as decisions taken by the procuring entity to address issues arising from failures of its automatic systems, including on an extension of the applicable deadline, could give rise to a right of challenge by aggrieved suppliers and contractors under chapter VIII of the Model Law.

#### **Article 15. Clarifications and modifications of solicitation documents**

1. The purpose of article 15 is to establish procedures for clarification and modification of the solicitation documents in a manner that will foster the efficient, fair and successful conduct of procurement proceedings. The right of the procuring entity to modify the solicitation documents is important in order to enable the procuring entity effectively to ensure that its needs will be met through procurement. Article 15 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 the 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 discovering that a clarification had been made. If, however, the solicitation documents were provided to an unidentified group of suppliers or contractors (e.g. through the download of documents from a publicly available website), the clarifications and modification must at a minimum appear in the place where the download was facilitated. An obligation of the procuring entity to inform individual suppliers or contractors would arise to the extent that the identities of the suppliers or contractors are known to the procuring entity.

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<sup>13</sup> The provision of guidance to the Secretariat is requested on how to avoid abuse of this discretion, in particular favouritism.

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 presentation of submissions. Prompt communication of clarifications and modifications also enables suppliers or contractors to exercise their right, for example under article 40(3), to modify or withdraw their tenders prior to the deadline for presenting submissions, unless that right has been removed 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 submissions.

3. Paragraph (3) deals with the situations in which, as a result of clarifications and modifications of the originally issued solicitation documents, the originally published information becomes materially inaccurate. The provisions oblige the procuring entity in such cases promptly to publish the amended information in the same place where the original information appeared. This publication requirement is in addition to the requirement contained in paragraph (2) to notify of the changes individually each supplier or contractor to which the original set of solicitation documents was provided, where applicable. The provisions of paragraph (3) also reiterate the obligation on the procuring entity in such cases to extend the deadline for presentation of submissions (see article 14(3)).

4. Situations in which as a result of clarifications and modifications of the solicitation documents the original information becomes materially inaccurate should be differentiated from situations in which a material change in the procurement takes place. For example, as stated in the commentary to article 14, changes as regards the manner, place and the deadline for presenting submissions would always make the original information materially inaccurate without necessarily causing a material change in the procurement. However, if as a result of such changes, the pool of potential suppliers or contractors is affected (for example, as a result of changing the manner of presenting submissions from paper to electronic in societies where electronic means of communication are not widespread), it may be concluded that a “material change” has taken place in the procurement. In such a case, the measures envisaged in paragraph (3) of the article would not be sufficient — the procuring entity would be required to cancel the procurement and commence new procurement proceedings. A “material change” is also highly likely to arise when, as a result of clarifications and modifications of the original solicitation documents, the subject matter of the procurement has changed so significantly that the original documents no longer put prospective suppliers or contractors fairly on notice of the true requirements of the procuring entity.

5. Although, in paragraph (4), a reference is made to “requests submitted at the meeting”, nothing under the Model Law prevents the procuring entity from also reflecting during a meeting of suppliers or contractors any requests for clarification of the solicitation documents submitted to it before the meeting, and its responses thereto. The obligation to preserve the anonymity of the source of the request will also apply to such requests.

**(A/CN.9/731/Add.3) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany articles 16 to 22 of chapter I (General provisions) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE  
UNCITRAL MODEL LAW ON  
PUBLIC PROCUREMENT**

...

**Part II. Article-by-article commentary**

...

**Article 16. Tender securities<sup>1</sup>**

1. The purpose of the article is to set out requirements as regards tender securities as defined in article 2 (t), in particular as to their acceptability by the procuring entity, the conditions that must be present for the procuring entity to be able to claim the amount of the tender security, and the conditions under which the procuring entity must return or procure the return of the security document. As stated in the commentary to the definition of “tender security” in article 2, the Model Law refers to “tender security” as the commonly-used term in the relevant context, without implying that this type of security may be requested only in tendering proceedings. The definition also excludes from the scope of the term any security that the procuring entity may require for performance of the procurement contract (under article 38 (k) for example). The latter may be required to be provided by the supplier or contractor that enters into the procurement contract while the requirement to provide a tender security, when it is imposed by the procuring entity, applies to all suppliers or contractors presenting submissions (see paragraph (1) of the article).

2. The procuring entity may suffer losses if suppliers or contractors withdraw their submissions or if a procurement contract with the supplier or contractor whose submission had been accepted is not concluded due to fault on the part of that supplier or contractor (e.g., the costs of new procurement proceedings and losses due to delays in procurement). Article 16 authorizes the procuring entity to require suppliers or contractors participating in the procurement proceedings to post a tender security so as to cover such potential losses and to discourage them from defaulting.

3. Procuring entities are not required to impose tender security requirements in all procurement proceedings. Tender securities are usually important when the

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<sup>1</sup> The provision of guidance to the Secretariat is requested on whether practice in some jurisdictions as regards the use of securities issued in electronic form will affect the content of the commentary to this article as set out below.

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. Requesting the provision of securities in the context of framework agreements, because of the nature of the latter, should be regarded as an exceptional measure.<sup>2</sup> Although practices might continue to evolve, at the time of preparing this Guide, little experience on the use of tender securities in electronic reverse auctions has been accumulated and existing practices were highly diverse. It might be problematic to obtain one in the context of electronic reverse auctions, as banks generally require a fixed price for the security documents. There also may be situations not justifying demanding tender securities, for example in request for proposals with dialogue proceedings since tender securities would not provide a workable solution to the issue of ensuring sufficient participation in dialogue or binding suppliers or contractors as regards their evolving proposals during the dialogue phase (unlike BAFOs). (See the relevant discussion in the commentary to the relevant provisions of article 48.) Even if in both cases referred to above (electronic reverse auctions and request for proposals with dialogue proceedings), tender securities are requested, as the commentary to the definition of “tender security” in article 2 states, multiple tender securities cannot be requested by the procuring entity in any single procurement proceedings that involve presentation of revised proposals or bids.<sup>3</sup>

4. 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 submissions they have presented and to post a security for performance of the procurement contract, if required to do so.

5. 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, the language in subparagraphs (i) and (ii) provides flexibility on this point: first, for procuring entities in States in which acceptance of tender securities not issued in the enacting State would be a violation of law; and secondly, in domestic procurement where the procuring entity stipulated in the solicitation documents in accordance with paragraph (1)(b) that a tender security must be issued by an issuer in the enacting State.

6. The reference to confirmation of the tender security in paragraph (1)(d) 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 procurement proceedings (e.g., difficulties in obtaining the local

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<sup>2</sup> The provision of guidance to the Secretariat is requested on whether it would be at all practically possible to obtain tender security unless the potential obligation to compete under the framework agreement is defined. The similar considerations arise in the context of ERAs and pre-BAFO stages of the request for proposals with dialogue proceedings.

<sup>3</sup> As noted in the commentary to the relevant provisions of article 2, article 16 does not include such prohibition.

confirmation prior to the deadline for presenting submissions and added costs for foreign suppliers and contractors).

7. 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 article 40 (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 presenting submissions is not subject to forfeiture of the tender security.<sup>4</sup>

8. In the light of the cost of providing a tender security, which will normally be reflected in the contract price, the use of alternatives to a tender security should be considered and encouraged where appropriate. In some jurisdictions, a bid securing declaration is used in lieu of tender securities. Under this type of declaration, the supplier or contractor agrees to submit to sanctions, such as disqualification from subsequent procurement, for contingencies that normally are secured by a tender security. (Sanctions do not include debarment since the latter should not be concerned with commercial failures (see the relevant commentary to article 9 in ... above).) These alternatives aim at promoting more competition in procurement, by increasing participation in particular of SMEs that otherwise might be prevented from participation because of formalities and expenses involved in connection with presentation of a tender security.<sup>5</sup>

### **Article 17. Pre-qualification proceedings**

1. The purpose of the article is to set out procedures for pre-qualification proceedings. Pre-qualification proceedings are intended to identify, at an early stage, those suppliers or contractors that are suitably qualified to perform the contract. Such a procedure may be particularly useful for the purchase of complex or high-value goods, construction or services, and may even be advisable for purchases that are of a relatively low value but of a highly specialized nature. The reason in each case is that the evaluation of submissions in those cases is much more complicated, costly and time-consuming than for other procurement. Competent suppliers and contractors are sometimes reluctant to participate in procurement proceedings for high-value contracts, where the cost of preparing the

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<sup>4</sup> The provision of guidance to the Secretariat is requested on whether there is a need of adding discussion on issues of extension of the period of effectiveness of tender securities in the commentary to this article in addition to the commentary to article 40.

<sup>5</sup> The need for further discussion on the potentially onerous nature of securities is to be considered. If so, the provision of the guidance to the Secretariat is requested in particular as regards the following issues suggested in the Working Group: the further negative effects of requiring suppliers or contractors to present tender securities, the issues of mutual recognition and the right of the procuring entity to reject securities in certain cases.

submission may be high, if the competitive field is too large and where they run the risk of having to compete with submissions presented by unqualified suppliers or contractors. The use of pre-qualification proceedings may narrow down the number of submissions that the procuring entity will evaluate to those from qualified suppliers or contractors. It is thus a tool to facilitate the effective procurement of relatively complex subject matter.

2. Pre-qualification under paragraph (1) of the article is optional and may be used regardless of the method of procurement used. Because of an additional step and delays in the procurement caused by pre-qualification and because some suppliers or contractors may be reluctant to participate in procurement involving pre-qualification, given the expense of so doing, pre-qualification should be used only when strictly necessary, in situations described in the immediately preceding paragraph.

3. The pre-qualification procedures set out in article 17 are made subject to a number of important safeguards. These safeguards include the limitations in article 9 (in particular on the assessment of qualifications, applicable equally to pre-qualification procedures) and the procedures found in paragraphs (2) to (10) inclusive of article 17. This set of procedural safeguards is included to ensure that pre-qualification procedures are conducted using objective terms and conditions that are fully disclosed to participating suppliers or contractors; they are also designed to ensure a minimum level of transparency and to facilitate the exercise by a supplier or contractor that has not been pre-qualified of its right to challenge its disqualification.

4. The reference to the official gazette in paragraph (2) is to be interpreted according to the principle of functional equivalence between paper- and non-paper means and media of information; and thus includes any official gazette used in an enacting State or group of States, such as the electronic Official Journal of the European Union. Issues raised in the commentary to article 5 on publication of legal texts and to article 32 (4) are relevant in the context of paragraph (2) as well.

5. The term “address” found in paragraph (3)(a) is intended to refer to the physical registered location as well as any other pertinent contact details (telephone numbers, e-mail address, etc. as appropriate). This term should be interpreted so consistently throughout the Model Law notwithstanding whether reference is to the address of the procuring entity or the address of a supplier or contractor.

6. As in similar provisions found elsewhere in the Model Law, references to the currency of payment and languages appearing in paragraph (3) may be omitted in the invitation to pre-qualification and in the pre-qualification documents issued by the procuring entity in domestic procurement, if it would be unnecessary in the circumstances. An indication of the language or languages may still be important in some multilingual countries.

7. While the provisions of the article allow for charges for the pre-qualification documents, development costs (including consultancy fees and advertising costs) are not to be recovered through those provisions. It is understood, as stated in paragraph (4) of the article, that the costs should be limited to the minimal charges of providing the documents (and printing them, where appropriate). In addition,



enacting States should note that best practice is not to charge for the provision of such documents.<sup>6</sup>

8. The reference to the “place” found in paragraph (5)(d) includes not the physical location but rather an official publication, portal, etc. where authoritative and up-to-date texts of laws and regulations of the enacting State are made available to the public. The issues raised in the commentary to article 5 on ensuring appropriate access to up-to-date legal texts are therefore also relevant in the context of paragraph (5)(d) of article 17.

9. The references to “promptly” in paragraphs (9) and (10) should be interpreted to mean that the notification required must be given to suppliers and contractors prior to solicitation. This is an essential safeguard to ensure that there can be an effective review of decisions made by the procuring entity in the pre-qualification proceedings. For the same reason, article 10 requires the procuring entity to notify each supplier or contractor that has not been pre-qualified of the reasons therefor.

10. The provisions of the article on disclosure of information to suppliers or contractors or the public are subject to article 23 on confidentiality (which contains limited exceptions to public disclosure).

11. Pre-qualification should be differentiated from preselection, envisaged under the Model Law only in the context of request for proposals with dialogue proceedings under article 48. In pre-qualification, all pre-qualified suppliers or contractors may end up presenting submissions. In the case of preselection, the number of pre-qualified suppliers or contractors that will be permitted to present submissions is expressly limited at the outset of the procurement proceedings, and the maximum number of participants is made known in the invitation to preselection. The identification of qualified suppliers or contractors in the pre-qualification proceedings is on the basis of whether applicants pass or fail pre-established qualification criteria while preselection involves additional, most likely competitive, selection procedures when the established maximum of pre-qualified suppliers or contractors permitted to present submissions has been exceeded (e.g. the preselection may involve, after the pass/fail examination, ranking against the qualification criteria and selecting the best few according to the established maximum). This measure is taken even though the drafting of stringent pre-qualification requirements might in fact limit the numbers of pre-qualified suppliers or contractors.

### **Article 18. Cancellation of the procurement**

1. The purpose of article 18 is to enable the procuring entity to cancel the procurement. It has the unconditional right to do so prior to the acceptance of the successful submission. After that point, it can do so only if the supplier or contractor whose submission was accepted fails to sign the procurement contract as required or fails to provide any required contract performance security (see paragraph (1) of article 18 and article 21 (8)). [Reasons for this difference are to be articulated.]

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<sup>6</sup> The last sentence reflects the view of some commentators, as a statement of principle, but others consider that this is not a practical proposition. The provision of guidance to the Secretariat is requested as regards guidance to be provided on charging for the provision of this type of documents (and also on filing fees).

2. Inclusion of this provision is important because a procuring entity may need to cancel the procurement for reasons of public interest, such as where there appears to have been a lack of competition or to have been collusion in the procurement proceedings, where the procuring entity's need for the subject matter of procurement ceases, or where the procurement can no longer take place due to a change in Government policy or a withdrawal of funding or because all the submissions have turned out to be unresponsive, or the proposed prices substantially exceeded the available budget. The provisions of the article thus recognize that the public interest may be best served by allowing the procuring entity to cancel undesirable procurement rather than requiring it to proceed.
3. In the light of the unconditional right given to the procuring entity to cancel the procurement up to acceptance of the successful submission, the article provides for safeguards against any abuse of this right. The first safeguard is contained in the notification requirements in paragraph (2), which are designed to foster transparency and accountability and effective review. Under that paragraph, the decision on cancellation together with reasons therefor should be promptly communicated to all suppliers or contractors that presented submissions so that they could challenge the decision on cancellation if they wish to do so. Although the provisions do not require the procuring entity to provide a justification for its decision (on the understanding that, as a general rule, the procuring entity should be free to abandon procurement proceedings on economic, social or political grounds which it need not justify), the procuring entity must provide a short statement of the reasons for that decision, in a manner that must be sufficient to enable a meaningful review of the decision. [An example illustrating differences between reasons and justifications is to be added.] The procuring entity need not but is not prevented from providing justifications when it decides that it would be appropriate to do so (for instance, when it wishes to demonstrate that the decision was neither irresponsible nor as a result of dilatory conduct). It may also decide to engage in debriefing (see paragraphs ... above).
4. An additional safeguard is in the requirement for the procuring entity to cause a notice of its decision on cancellation to be published in the same place and manner in which the original information about procurement was published. This measure is important to enable the oversight by the public of the procuring entities' practices in the enacting State.
5. Some provisions in paragraphs (1) and (2) of the article are designed for treating submissions presented but not yet opened by the procuring entity (for example, when the decision on cancellation is made before the deadline for presenting tenders). After the decision on cancellation is taken, any unopened submission must remain unopened and returned to suppliers or contractors presenting them. This requirement avoids the risk that information supplied by suppliers or contractors in their submissions will be used improperly, for example by revealing it to competitors. This provision is also aimed at preventing abuse of discretion to cancel the procurements for improper or illegal reasons, such as after the desired information about market conditions was obtained or after the procuring entity learned that a favoured supplier or contractor will not win.
6. In many jurisdictions, decisions to cancel the procurement would not normally be amenable to review, in particular by administrative bodies, unless abusive practices were involved. The Model Law however does not exempt any decision or

action taken by the procuring entity in the procurement proceedings from challenge or appeal proceedings under chapter VIII (although some cautious language is included in article 66 to reflect that in some jurisdictions the administrative body would not have jurisdiction over this type of claims). What the Model Law purports to do in paragraph (3) of article 18 is to limit liability of the procuring entity for its decision to cancel the procurement to exceptional circumstances. Under paragraph (3), the liability is limited towards suppliers or contractors having presented submissions when cancellation was a consequence of irresponsible or dilatory conduct on the part of the procuring entity.

7. Under the Model Law, the right to challenge the decision of the procuring entity to cancel the procurement proceedings would therefore exist and could be exercised but whether liability on the part of the procuring entity would arise would depend on the factual circumstances of each case. Paragraph (3) is considered important in this respect because it provides protection to the procuring entity from unjustifiable protests and, at the same time, safeguards against an unjustifiable cancellation of the procurement proceedings by the procuring entity. It is however recognized that, despite the limitations of liability under paragraph (3), the procuring entity may face liability for cancelling the procurement under other branches of law. In particular, although suppliers or contractors present their submissions at their own risk, and bear the related expenses, cancellation may give rise to liability towards suppliers or contractors whose submissions have been opened even in circumstances not covered by paragraph (3).

8. Administrative law in some countries may restrict the exercise of the right to cancel the procurement, e.g., by prohibiting actions constituting an abuse of discretion or a violation of fundamental principles of justice. Administrative law in some other countries may, on the contrary, provide for an unconditional right to cancel the procurement at any stage of the procurement proceedings, even when the successful submission was accepted, regardless of the provisions of the Model Law. Law may also provide for other remedies against abusive administrative decisions taken by public officials. The enacting State may need therefore to align the provisions of the article with the relevant provisions of its other applicable law.

9. The cancellation of the procurement by the procuring entity under article 18 should be differentiated from termination of the procurement proceedings under article 66 (9)(f) of the Model Law. The consequences of both are the same — no further actions and decisions are taken by the procuring entity in the context of the cancelled or terminated procurement after the decision on cancellation is taken by the procuring entity or the termination of the procurement proceedings is ordered by the administrative body. The termination of the procurement proceedings however is ordered by the administrative body as a remedy as a result of the challenge or appeal proceedings.

#### **Article 19. Rejection of abnormally low submissions**

1. The purpose of the article is to enable the procuring entity to reject a submission whose abnormally low price gives rise to concerns as to the ability of the supplier or contractor presenting such submission to perform the procurement contract. The article does not oblige the procuring entity to reject an abnormally low

submission.<sup>7</sup> The article applies to any procurement proceedings under the Model Law, including one involving an electronic reverse auction, where risks of abnormally low bids may be considered higher than in other procurement, particularly where the technique is new to the system concerned.<sup>8</sup>

2. The article provides safeguards that aim to protect the legitimate interests of both parties (procuring entities, and suppliers and contractors). On the one hand, it enables the procuring entity to address possible abnormally low submissions before a procurement contract has been concluded. From the perspective of the procuring entity, an abnormally low submission involves a risk that the contract cannot be performed, or performed at the price submitted, and additional costs and delays to the project may ensue leading to higher prices and disruption to the procurement concerned. The procuring entity should therefore take steps to avoid running such a performance risk.

3. On the other hand, the procuring entity cannot automatically reject a submission simply on the basis that the submission price appears to be abnormally low. Conferring such a right on a procuring entity would introduce the possibility of abuse, as submissions could be rejected for being abnormally low without justification, or on the basis of a purely subjective criterion. Such a risk would be acute in international procurement, where an abnormally low price in one country might be perfectly normal in another. In addition, some prices may seem to be abnormally low if they are below cost; however, selling old stock below cost, or engaging in below cost pricing to keep a workforce occupied, subject to applicable competition regulations, might be legitimate.<sup>9</sup>

4. For these reasons, the article protects suppliers and contractors against the possibility of arbitrary decisions and abusive practices by procuring entities by allowing the rejection of an abnormally low submission only when the procuring entity has taken steps to substantiate its concerns as to the ability of the supplier or contractor to perform the procurement contract. This, however, is without prejudice to any other applicable law that may require the procuring entity to reject the submission, for example, if criminal acts (such as money-laundering) or illegal practices (such as non-compliance with minimum wage or social security obligations) are involved.

5. Accordingly, subparagraphs 1 (a) to (c) of the article specify the steps that the procuring entity has to take before the abnormally low submission may be rejected, to ensure due process is followed and to ensure that the rights of the supplier or contractor concerned are preserved.

6. First, a written request for clarification must be made to the supplier or contractor concerned seeking details of constituent elements of the submission presented that the procuring entity considers relevant to justify the price submitted.

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<sup>7</sup> The provision of guidance to the Secretariat is requested on reasons for the absence of the obligation in the Model Law to reject an abnormally low submission, for inclusion in the commentary.

<sup>8</sup> The provision of guidance to the Secretariat is requested on desirability of retaining this statement in the commentary to this article as opposed to chapter VI.

<sup>9</sup> The provision of guidance to the Secretariat is requested on appropriateness of the examples given in this paragraph in the light of the objectives of the Model Law, in particular to promote competition.

Those details may include: information, samples, etc. proving the quality of the offered subject matter of the procurement; the methods and economics of the manufacturing process for the goods, of the construction or of the provision of the services concerned; the technical solutions chosen and/or any exceptionally favourable conditions available to the supplier or contractor for the execution of the construction or for the supply of the goods or services; or the originality of the construction, supplies or services proposed by the supplier or contractor. The submitted price is therefore always analysed in the context of other constituent elements of the submission concerned.<sup>10</sup>

7. The enacting State may choose to regulate which type of information the procuring entity may require for this price justification procedure. It should be noted in this context that the assessment is whether the price is realistic (by reference to the constituent elements of the submission, such as those discussed in the preceding paragraph), and using such factors as pre-procurement estimates, market prices or prices of previous contracts, where available. It might not be appropriate to request information about the underlying costs that will have been used by suppliers and contractors to determine the price itself. Since cost assessment can be cumbersome and complicated, and is also not possible in all cases, the ability of the procuring entities to assess prices on the basis of cost may be limited. In some jurisdictions, procuring entities may be barred by law from demanding information relating to cost structure, because of risks that such information could be misused.

8. Secondly, the procuring entity should take account of the response supplied by the supplier or contractor in the price assessment. If a supplier or contractor refuses to provide information requested by the procuring entity, the refusal will not give an automatic right to the procuring entity to reject the abnormally low submission; it is one element to take into consideration when considering whether a submission is abnormally low.

9. Thirdly, and if after the price justification procedure the procuring entity continues to hold concerns about the ability of the supplier or contractor to perform the procurement contract, it must record those concerns and its reasons for holding them in the record of procurement proceedings pursuant to subparagraph (1)(c) of the article. This provision is included to ensure that any decision to reject the abnormally low submission is made on an objective basis, and before that step is taken, all information relevant to the decision is properly recorded for the sake of accountability, transparency and objectivity in the process.

10. Only after the steps outlined in subparagraphs 1 (a) to (c) have been fulfilled may the procuring entity reject the abnormally low submission. The decision on the rejection of the abnormally low submission must be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned, under paragraph (2) of the article. The decision may be challenged in accordance with chapter VIII of the Model Law.

11. Enacting States should be aware that, apart from the measures envisaged in this article, other measures can effectively prevent the performance risks resulting from abnormally low submissions. Thoroughly assessing suppliers or contractors'

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<sup>10</sup> The provision of guidance to the Secretariat is requested on consistency between this and the immediately following paragraph as regards cost assessment.

qualifications and examining and evaluating their submissions can play a particularly important role in this context. These steps in turn depend on the proper formulation of qualification requirements and the precise drafting of the description of the subject matter of the procurement. Procuring entities should be appropriately instructed to that end, and should be aware of the needs to compile accurate and comprehensive information about the qualifications of suppliers or contractors, including information about their past performance, and to pay due attention in evaluation to all aspects of presented submissions, not only to price (such as to maintenance and replacement costs where appropriate). These steps can effectively identify performance risks.

12. Additional measures may include: (i) promotion of awareness of the adverse effects of abnormally low submissions; (ii) provision of training, adequate resources and information to procurement officers, including reference or market prices; and (iii) allowing for sufficient time for each stage of the procurement process. To deter the submission of abnormally low submissions and promote responsible behaviour on the part of suppliers and contractors, it may be desirable for procuring entities to specify in the solicitation documents or other equivalent documents that submissions may be rejected if they are abnormally low and raise concerns with the procuring entity as to the ability of the supplier or contractor to perform the procurement contract.

**Article 20. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest**

1. The purpose of the article is to provide an exhaustive list of grounds for the exclusion of a supplier or contractor from the procurement proceedings for the reasons not linked to the content of a submission presented or the qualifications of the supplier or contractor. Those reasons are inducements from the supplier or contractor, an unfair competitive advantage and conflicts of interest. The provisions of the article do not use the term “corruption” (which is not a term that has an accepted international definition) and refer to situations (inducement, unfair competitive advantage and conflicts of interest) requiring the exclusion of the relevant supplier or contractor from the procurement proceedings. These situations are commonly cited examples of corrupt behaviour, and the article is therefore an important anti-corruption measure in public procurement.

2. The article is intended to be consistent with international standards against corrupt practices and to outlaw any corrupt practices regardless of their form and how they were defined. Such standards may be found in international instruments, such as the United Nations Convention against Corruption, or documents issued by international organizations, such as the Organization on Economic Cooperation and Development (OECD) and multilateral development banks. They may evolve over time. In the light of article 3 of the Model Law that gives prominence to international commitments of enacting States, enacting States are encouraged to consider international standards against corrupt practices applicable at the time of the enactment of the Model Law. Some of them may be binding on the enacting State if it is the party to the relevant international instrument.

3. Nevertheless, the article, as the entire Model Law, should not be regarded as providing exhaustive measures to combat corruption in public procurement.

Although the procedures and safeguards in the Model Law are designed to promote transparency and objectivity in the procurement proceedings and thereby to reduce corruption, a procurement law alone cannot be expected to eradicate completely corrupt practices in public procurement in an enacting State. Procuring entities are not equipped and should not be expected to deal with all issues of corruption in public procurement. 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.<sup>11</sup>

4. The term “inducement” is spelled out in paragraph (1)(a) of the article and can be generally described as any attempt by suppliers or contractors improperly to influence the procuring entity. What would constitute an unfair competitive advantage or a conflict of interest for the purpose of applying paragraph (1)(b) is left to determination by the enacting State. The provisions intend to address conflicts of interest only on the side of the supplier or contractor. Conflicts of interest on the side of the procuring entity are subject to separate regulation, such as under article 25 on the code of conduct of procuring officials. To avoid an unfair competitive advantage and conflicts of interests, the applicable standards of the enacting State should, for example, prohibit consultants involved in drafting the solicitation documents from participating in the procurement proceedings where those documents are used. They should also regulate participation of subsidiaries in the same procurement proceedings. It is expected however that some aspects related to these concepts may be regulated in other breaches of law of the enacting State, such as anti-monopoly legislation.

5. Although the concepts of “an unfair competitive advantage” and a “conflict of interest” appear in the same subparagraph, those two concepts could arise independently of each other. An unfair competitive advantage might be expected to arise from a conflict of interest (for example, where the same lawyer represented both sides in the case). However, this would not necessarily always be the case and an unfair competitive advantage might be gained under unrelated circumstances.<sup>12</sup>

6. The provisions of the article are without prejudice to any other sanctions, such as debarment (see paragraphs ... above), that may be applied to the supplier or contractor. However, application of sanctions under other applicable branches of law, such as for example a criminal conviction, is not a pre-requisite for exclusion of the supplier or contractor under this article. To guard against abusive application of article 20, the decision on exclusion and reasons therefor are to be reflected in the

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<sup>11</sup> In the Working Group, a suggestion was made that the Guide should reflect that, in the context of public procurement, it may be impossible to establish the fact of corruption as opposed to a bribe as the former might consist of a chain of actions over time rather than a single action. The provision of guidance to the Secretariat is requested on desirability of including this or other statements in the Guide in attempt to describe relevant examples.

<sup>12</sup> The provision of guidance to the Secretariat is requested on examples of what will constitute an unfair competitive advantage, for inclusion in the Guide. The suggestion in the Working Group was to refer in this context to consolidation of business or a prior business relationship, which might be excessively broad.

record of procurement proceedings and to be promptly communicated to the alleged wrongdoer to enable where necessary the effective challenge.<sup>13</sup>

7. As noted above, the implementation of the article is subject to other branches of law of an enacting State where anti-corruption policies of the State are spelled out. The alignment is necessary in order to avoid unnecessary confusion, inconsistencies and incorrect perceptions about anti-corruption policies of the enacting State.

(For further discussion of the relevant issues, see the commentary to article 25 on codes of conduct.)

#### **Article 21. Acceptance of the successful submission and entry into force of the procurement contract**

1. The purpose of article 21 is to set out detailed rules applicable to: (i) the acceptance of the successful submission; (ii) the safeguard in the form of a standstill period to enable suppliers or contractors to challenge the decision of the procuring entity to award the procurement contract or framework agreement before the contract or framework agreement enters into force; and (iii) the entry into force of the procurement contract. The article is supplemented by requirements in the Model Law that information on these matters be provided to suppliers and contractors at the outset of the procurement proceedings. For example, from the standpoint of transparency, it is important for suppliers and contractors to know in advance the manner of entry into force of the procurement contract. Article 38 therefore requires (in subparagraph (v)) the solicitation documents to provide information about the duration of the standstill period and if none will apply, a statement to that effect and reasons therefor. Article 38 in addition requires (in subparagraph (w)) specifying in the solicitation documents any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force. Such formalities, in accordance with article 21, may include the execution of a written procurement contract and approval by another authority.

2. Paragraph (1) provides that the successful submission, as a general rule, is to be accepted by the procuring entity, meaning that the procurement contract or framework agreement must be awarded to the supplier or contractor presenting that successful submission, reflecting the terms and conditions of the submission. (There is no single definition of the successful submission. Articles regulating procedures of various procurement methods define the term in the context of each procurement method.) The exceptions to the general rule set out in paragraph (1) are listed in subparagraphs (a) to (d) (disqualification of the supplier or contractor presenting the successful submission, cancellation of the procurement, rejection of the successful submission on the ground that it is abnormally low in accordance with article 19, or exclusion of the supplier or contractor presenting the successful submission on the

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<sup>13</sup> The suggestion was made in the Working Group that the Guide should explain that risks of unjustified rejection might be mitigated by encouraging a dialogue between the procuring entity and an affected supplier or contractor to discuss potential conflicts of interest, drawing on the provisions of article 19 regulating procedures for investigating abnormally low submissions. The provision of relevant guidance to the Secretariat is requested in the light of possible abusive practices and results that such dialogue may facilitate to avoid the application of this article.



grounds of inducement from its side, unfair competitive advantage or conflict of interest in accordance with article 20).

3. The ground for not accepting the successful submission set out in subparagraph (a) (disqualification) should be understood in the light of the provisions in article 9 (1) that allow the qualifications of suppliers or contractors to be assessed at any stage of the procurement proceedings, article 9 (8)(d) allowing the procuring entity to require any pre-qualified supplier or contractor to demonstrate its qualifications again, and article 42 (6) and (7) and 56 (2) that specifically regulate the assessment of the qualifications of the supplier or contractor presenting the successful tender or bid.

4. It is understood that the list of exceptions in paragraph (1)(a) to (d) is not exhaustive: it refers only to the grounds that may be invoked by the procuring entity. Additional grounds may appear as a result of challenge and appeal proceedings, for example when the administrative body, under article 66, orders the termination of the procurement proceedings or requires the procuring entity to reconsider its decision or prohibits the procuring entity from deciding unlawfully. These grounds should also not be confused with the grounds that justify the award of the procurement contract to the next successful submission under article 21 (8): the latter grounds would appear after the successful submission was accepted, and not at the stage when the procuring entity decides whether the successful submission should be accepted.

5. Paragraph (2) regulates the application of the standstill period, defined in article (2)(q) as “the period starting from the dispatch of a notice as required by article 21 (2) of this Law, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge, under chapter VIII of this Law, the decision so notified”. The primary purpose of the standstill period is therefore to provide an opportunity to rectify any improprieties discovered prior to the entry into force of the procurement contract or the conclusion of the framework agreement, and thus to avoid the need for an annulment of a contract or framework agreement that has entered into force.

6. The notification of the standstill period is served to all suppliers or contractors that presented submissions, including the one(s) to which the procurement contract or framework agreement is intended to be awarded. This notification should not be confused with the notice of acceptance of the successful submission that is served only to the supplier or contractor that presented that submission under paragraph (4) of the article. The information notified under paragraph (2) includes that listed in its subparagraphs (a) to (c). The provisions of article 23 on confidentiality will indicate if any information about the successful submission under subparagraph (b) should be withheld for confidentiality reasons. Although the need to preserve confidentiality of commercially sensitive information may arise in setting out the characteristics and relative advantages of the successful submission, it is essential for suppliers or contractors participating in the procurement to receive sufficient information about the evaluation process to make meaningful use of the standstill period.

7. Because the standstill period starts running from the time of dispatch of the notification, to ensure transparency, integrity, and the fair and equitable treatment of all suppliers and contractors in procurement proceedings, the provisions require

simultaneous dispatch of the notification to each supplier or contractor concerned (this obligation is conveyed in the requirement “promptly [to] notify each supplier or contractor”). The provisions require sending notification individually to each supplier or contractor concerned. Putting, for example, a notice on the website would be insufficient.

8. The provisions do not include any requirement for the procuring entity to notify unsuccessful suppliers or contractors of the grounds why they were not successful. Providing a full statement of the grounds to each supplier or contractor might be burdensome. Nor do they provide for mandatory debriefing since debriefing procedures vary significantly not only from jurisdiction to jurisdiction but also from procurement to procurement and provisions on debriefing are not easily enforceable. Nevertheless, debriefing upon request of the supplier or contractor concerned, represents best practice and should be encouraged by the enacting State. (On debriefing generally, see paragraphs ... of Part I of the Guide.)

9. The provisions of paragraph (2) also require the procuring entity specifying in the notification the duration of the standstill period. The duration will be the same as that specified in the solicitation documents at the outset of the procurement proceedings. Providing this information at the outset of the procurement is important given its potential impact on the decision by suppliers or contractors to participate in the procurement proceedings. Providing this information in the notification under paragraph (2) is important not only as a reminder but also for precision — since the standstill period runs from the notice of the dispatch, the notification will specify the starting and ending dates of the standstill period reflecting the entire duration of the standstill period indicated in the solicitation documents.

10. Certainty for suppliers and contractors on the one hand and the procuring entity on the other hand as to the beginning and end of the standstill period is critical for ensuring both that the suppliers and contractors can take such action as is warranted and that the procuring entity can award the contract without risking an upset. The date of dispatch creates the highest level of certainty and is specified in the Model Law as the starting point for the standstill period. The same approach is taken as regards other types of notifications served under this article (see paragraphs ... below). Paragraph (9) of the article explains the meaning of the “dispatch.”

11. The Model Law leaves it to the procuring entity to determine the exact duration of the standstill period on a procurement-by-procurement basis, depending on the circumstances of the given procurement, in particular the means of communication used and whether procurement is domestic or international. To ensure equality of treatment, the additional time may need to be allowed for example for a notification sent by traditional mail to reach overseas suppliers or contractors.

12. The discretion of the procuring entity to fix the duration of the standstill period is not unlimited. It is subject to the minimum to be established by the enacting State [in the law] [as may be further modified by the procurement regulations] [or the procurement regulations].<sup>14</sup> A number of considerations should

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<sup>14</sup> The wording depends on the final wording of paragraph (2)(c) of the Model Law.

be taken into account in establishing the minimum duration of the standstill period, including the impact that the duration of the standstill period would have on overall objectives of the Model Law as regards transparency, accountability, efficiency and equitable treatment of suppliers or contractors. Although the impact of a lengthy standstill period on costs would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate, the period should be sufficiently long to enable any challenge to the proceedings to be filed. The enacting States should however note that excessively long periods of time may be inappropriate in the context of some procurement methods and procedures, such as electronic reverse auctions and open framework agreements, that pre-suppose speedy awards and in which the number and complexity of issues that can be challenged are limited.<sup>15</sup> It should be borne in mind that the primary aim of the standstill period is to allow suppliers or contractors sufficient time to decide whether to protest the procuring entity's intended decision to accept the successful submission. The standstill period is, therefore, supposed to be relatively short. Once the challenge has been submitted, the provisions on challenge and appeal proceedings of chapter VIII of the Model Law would address a suspension of the procurement procedure and other appropriate remedies.

13. Paragraph (3) sets out exemptions from the application of the standstill period. The first exemption refers to contracts awarded under framework agreements without second-stage competition.<sup>16</sup> It should be emphasized that the exemption is not applicable to the conclusion of a framework agreement itself: regardless of the type of the framework agreement awarded, the standstill period will apply. Neither will an exemption apply to contracts awarded under framework agreements involving second-stage competition, including under open framework agreements.

14. The second exemption applies to low-value procurement. [The enacting State should consider aligning the threshold in paragraph (3)(b) with the thresholds found in other provisions of the Model Law referring to low-value procurement, such as those justifying an exemption from the requirement of public notice of the procurement contract award (article 22 (2) of the current draft) and recourse to request for quotations proceedings (article 28 (2)).]<sup>17</sup>

15. The third exemption is justified on the ground of urgent public interest considerations. It should be noted that urgent public interest considerations may also be invoked by the procuring entity under article 64 (3) of the Model Law as a justification to appropriate authorities to lift a prohibition against entering into the procurement contract or framework agreement while the challenge or appeal is pending.<sup>18</sup>

<sup>15</sup> The general point is to be reflected in the appropriate place in the Guide that enacting States in establishing periods of time of a short duration should indicate them in working days; in other cases, it may indicate them in calendar days.

<sup>16</sup> The provision of guidance to the Secretariat is requested as regards reasons for this exemption. The records of the Working Group's deliberations (see A/CN.9/687, para. 96) are not conclusive on this point.

<sup>17</sup> The text in square brackets may need to be reconsidered if the decision is made that all the threshold amounts will be set out in the procurement regulations rather than in the Model Law itself.

<sup>18</sup> The provision of guidance to the Secretariat is requested as regards the appropriate considerations, which may differ, to justify an exemption under this provision and under article 64 (3).

16. The purpose of paragraph (4) is to specify when the notice of acceptance of the successful submission is to be sent to the supplier or contractor presenting that submission. There may be various scenarios, as reflected in the paragraph. First, a standstill period was applied and no challenge or appeal is outstanding upon expiry of the standstill period. In such a case, the notice is dispatched by the procuring entity promptly upon the expiry of the standstill period. Second, the standstill period was applied and a challenge or appeal is still outstanding upon the expiry of the standstill period. In such a case, the procuring entity (under article 64 of the Model Law) is prohibited from dispatching the notice of acceptance until it receives notification from appropriate authorities ordering or authorizing it to do so. Third, when no standstill period was applied, the procuring entity must dispatch the notice of acceptance promptly after it ascertained the successful submission, unless it receives an order not to do so from a court or another authority designated by the enacting State in the Law.

17. The Model Law provides for different methods of entry into force of the procurement contract, recognizing 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.

18. Under one method (set out in paragraph (5)), 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 presented the successful submission. 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 procurement proceedings. In order to bind the supplier or contractor to a procurement contract, including obligating it to sign any written procurement contract, the procuring entity has to give notice of acceptance while the submission 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 submission, 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 submission that the submission 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.

19. The second method of entry into force of the procurement contract (set out in paragraph (6)) ties the entry into force of the procurement contract to the signature by the supplier or contractor presenting the successful submission of a written procurement contract conforming to the submission. This is possible only if the solicitation documents included such a requirement. Requiring a written contract should not be considered the norm in all procurement proceedings. Enacting States are encouraged to indicate in the procurement regulations the type of circumstances in which a written procurement contract may be required, taking into account that the requirement for execution of a written contract may be particularly burdensome for foreign suppliers or contractors, and where the enacting State imposes measures for proving the authority for the relevant signature.

20. The third method of entry into force (set out in paragraph (7)) provides for entry into force upon approval of the procurement contract by another 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). Paragraph (7) reiterates the role of the solicitation documents in giving notice to suppliers or contractors of formalities required for entry into force of the procurement contract at the outset of the procurement proceedings. 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 submission 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.

21. In order to promote the objectives of good procurement practice, paragraph (8) makes it clear that, in the event that the supplier or contractor whose submission was accepted fails to sign a procurement contract in accordance with paragraph (6), the procuring entity may choose to cancel the procurement or to award the contract or framework agreement to the next successful submission. That submission will be identified in accordance with the provisions normally applicable to the selection of the successful submission in the context of a particular procurement method or technique. The discretion given to the procuring entity to cancel the procurement in such cases is intended to mitigate the risk of collusion among suppliers or contractors. [More guidance on the utility of this provision in the Model Law is to be added.]

#### **Article 22. Public notice of awards of procurement contract and framework agreement**

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 22 requires prompt publication of a notice of award of the procurement contract and framework agreement. This obligation is separate from the notice of the procurement contract (or framework agreement as applicable) required to be given pursuant to article 21 (10) to suppliers and contractors that presented submissions in the given procurement proceedings, and independent from the requirement that information of that nature in the record should be made available to the general public under article 24 (2). The Model Law does not specify the manner of publication of the notice, which is left to the enacting State and which paragraph (3) suggests may be dealt with in the procurement regulations. For the minimum standards for publication of this type of information, see the guidance to article 5 (see paragraphs ... above), which is relevant in this context.

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 (2) of setting a monetary value threshold below which the publication requirement would not apply. However, since the monetary value

threshold might be subject to periodic changes, for example, due to inflation, it might be preferable to set out the threshold in the procurement regulations, the amendment of which would presumably be less complicated than an amendment of the statute.]<sup>19</sup> Paragraph (2) requires periodic publication of cumulative notices of such awards, which must take place at least once a year.

3. While the exemption from publication in paragraph (2) covers low-value procurement contracts awarded under a framework agreement, it is most unlikely to cover framework agreements themselves, as the cumulative value of procurement contracts envisaged to be awarded under a framework agreement would most probably exceed the low-value threshold.

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<sup>19</sup> The text in square brackets may need to be redrafted depending on the decision of the Commission as regards the place where thresholds should be specified.

**(A/CN.9/731/Add.4) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany articles 23 to 25 of chapter I (General provisions) and articles 26 and 27 of chapter II (Methods of procurement and their conditions for use. Solicitation and notices of the procurement) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE  
UNCITRAL MODEL LAW ON  
PUBLIC PROCUREMENT**

...

**Part II. Article-by-article commentary**

...

**Article 23. Confidentiality**

1. The purpose of article 23 is to protect confidential information belonging to all parties to the procurement proceedings. The article imposes different types of confidentiality requirements on different groups of persons, depending on which type of information is in question. It is supplemented by article 68 of the Model Law, which addresses the protection of confidential information in challenge and appeal proceedings.
2. Paragraph (1) refers to information that the procuring entity is prohibited from disclosing to suppliers or contractors and to the public. This type of information encompasses, first, information that may not be disclosed so as to protect the essential security interests of the enacting State. These security interests could relate to procurement indispensable for national security or for national defence purposes and to the procurement of arms, ammunition, or war materials but also to procurement involving medical research experiment or procurement of vaccines during pandemics.<sup>1</sup> This type of information would probably be identified as classified information in the law of the enacting State. The commentary to the definition in article 2 of “procurement involving classified information” is therefore relevant in this context (see ... above).
3. Paragraph (1) also encompasses information whose disclosure would be contrary to law, would impede law enforcement or fair competition or would prejudice the legitimate commercial interests of the suppliers or contractors. The phrase “impede fair competition” should be interpreted broadly, referring not only to the procurement proceedings in question but also to subsequent procurement. Because of the broad scope of the provision and possibility of abuse if excess discretion in its application is left to the procuring entity, it is essential for the enacting State to enumerate in the procurement regulations, if not for an

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<sup>1</sup> Some experts question the appropriateness of reference to “procurement of vaccines during pandemics” in this context. The provision of the guidance to the Secretariat is requested.

exhaustive list of such information, for at least the legal sources of such information. Paragraph (1) also provides that such information may be disclosed only by order of the court or other relevant organ designated by the enacting State (which can be, for example, the independent body referred to in article 66 of the Model Law). The identity of any organ with such power is to be specified in the law; the order issued by the court or other designated organ will regulate the extent to which this type of information can be disclosed and disclosure procedures.

4. Paragraph (2) deals with information from suppliers or contractors contained in applications to pre-qualify or for preselection, or in submissions. By their nature, these types of documents contain commercially sensitive information; their disclosure to competing suppliers or contractors or to an unauthorized person could impede fair competition and would prejudice the legitimate commercial interests of the suppliers or contractors. Such disclosure is therefore generally prohibited. The term “unauthorized person” in this context refers to any third party outside the procuring entity (including a member of a bid committee), other than any oversight, review or other competent body authorized under the applicable provisions of law of the enacting State to have access to the information in question. The Model Law, however, recognizes that disclosure of some information from applications to pre-qualify or for preselection and from submissions — whether to competing suppliers or contractors or to the public in general — is important to ensure transparency and integrity in the procurement proceedings, meaningful challenge and appeal by aggrieved suppliers or contractors and proper public oversight. To ensure consistency with the relevant provisions of the Model Law addressing such permissible disclosure, paragraph (2) of the article sets out exceptions to the general prohibition. It cross-refers to the following requirements: under article 21 (2) and (10), to notify the results of evaluation and the procurement contract to suppliers or contractors that presented submissions; under article 22, to identify the winner and the winning price in the public notice of awards of public contracts; under article 24, to disclose certain information from applications and submissions through providing public access and access by relevant suppliers and contractors to certain parts of the documentary record of procurement proceedings; and under article 41 (3) of the Model Law, to announce certain information from submitted tenders during the opening of tenders.

5. Whereas paragraphs (1) and (2) have general application, regardless of the method of procurement used, paragraph (3) is restricted to procurement proceedings under articles 47 (3) and 48 to 50. Those procurement proceedings envisage discussion, dialogue or negotiations between the procuring entity and suppliers or contractors. Unlike paragraphs (1) and (2) that impose confidentiality obligations on the procuring entity, paragraph (3) broadens the obligation to any party, and the obligation encompasses information related to discussions, communications, dialogue or negotiations in the context of these procurement proceedings. Disclosure of any such information is permissible only with the consent of the other party, or when required by law or ordered by the court or other relevant organ designated by the enacting State, or when permitted in the solicitation documents. Reference to orders by the court or other relevant organ designated by the enacting State is identical to the one found in paragraph (1) of the article. The enacting State in designating the relevant organ should ensure consistency between paragraphs (1) and (3) of the article. Reference to permission for disclosure in the solicitation documents should be interpreted narrowly. Envisaging a blanket permission in the



solicitation documents to disclose all types of information would violate the provisions of the Model Law, such as paragraphs (1) and (2) of the article. The solicitation documents should request suppliers or contractors to identify in their submissions information they consider confidential.

6. Paragraph (4) is also of restricted application, applying only to procurement involving classified information (for the definition of “procurement involving classified information”, see article 2 (j) and the relevant commentary in ... above). It envisages that the procuring entity, in addition to measures that may be required to be taken by the procuring entity under law of the enacting State to protect classified information (such measures include a general prohibition of public disclosure covered by paragraph (1) of the article), may take additional measures to protect classified information in the context of a specific procurement. Such additional measures may concern only suppliers or contractors or may be extended through them to their subcontractors. They might be justified by the sensitive nature of the subject matter of the procurement or by the existence of classified information even if the subject matter itself is not sensitive (for example, when the need arises to ensure confidentiality of information about a delivery schedule or the location of delivery), or both.

#### **Article 24. Documentary record of procurement proceedings**

1. The purpose of the article is to promote transparency and accountability in procurement by requiring the procuring entity to maintain an exhaustive documentary record of the procurement proceedings and providing access thereto by interested and authorized persons. This record summarizes key information concerning the procurement proceedings; ensuring timely access thereto by interested and authorized persons is essential for any challenges and appeals by aggrieved suppliers and contractors to be meaningful and effective. This supporting measure in turn helps to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, observing robust record requirements in the procurement law facilitates the work of oversight bodies exercising an audit or control function and promotes the accountability of procuring entities to the public at large as regards the disbursement of public funds.

2. The article does not prescribe the form and means in which the record must be maintained. These issues are subject to article 7 regulating the form and means of communications in procurement, in particular the standards set out in paragraphs (1) and (4) of that article (see the commentary to the relevant provisions of that article in ... above).

3. The list of information to be included in the record under paragraph (1) of the article is not intended to be exhaustive as the chapeau provisions of paragraph (1) (the word “includes”) and paragraph (1)(w) indicate. The latter is intended to be a “catch-all” provision in the end of the list, which should ensure that all significant decisions in the course of the procurement proceedings and reasons therefor have to be put on the record. Some such decisions, although not listed in paragraph (1) of the article, are to be included in the record under other provisions of the Model Law. For example, article 34 (3) requires the decision and reasons to resort to direct solicitation as opposed to open solicitation in request for proposals proceedings to be recorded. Articles 52 (2) and 59 (7) require the decision and reasons for limiting participation in the auctions and open framework agreements, respectively, on the

ground of technological constraints to be recorded. Paragraph (1)(w) refers also to information that the procurement regulations may require to be recorded.

4. The reference in the chapeau of paragraph (1) to maintaining the record should be interpreted as requiring the record to be updated once information is provided. Information is therefore included to the extent it is known to the procuring entity. For example, in procurement proceedings in which not all proposals were fully developed or finalized by the proponents, in particular where some of the proposals did not survive to the final stages of the procurement proceedings, the procuring entity under paragraph (1)(s) would be able to include a summary of all terms and conditions of each submission as they are known to the procuring entity at the relevant time in the procurement proceedings. The reference in the same paragraph to “a basis for determining the price” is meant to reflect the possibility that in some instances, particularly in procurement of services, the submissions would contain a formula by which the price could be determined rather than an actual price quotation.

5. 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 full 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 challenge; and the need to protect the confidential commercial information of suppliers and contractors. In view of these considerations, article 24 provides two levels of disclosure. It mandates in paragraph (2) disclosure to any member of the general public of the information referred to in paragraph (1)(a) to (k) of the article — 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 under paragraph (3) of the article for the benefit of suppliers and contractors that presented submissions, 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.

6. The pool of suppliers or contractors under paragraph (3) is limited to those that presented submissions because suppliers or contractors that were disqualified as a result of pre-qualification or preselection should not have access to information relevant to the examination and evaluation of submissions. The reasons for their disqualification will be communicated to them in accordance with articles 17 (10) and 48 (3)(e) and this should give them sufficient information to consider whether to challenge under chapter VIII of the Model Law their exclusion.

7. The purpose of the provision in paragraph (3) allowing disclosure to the suppliers or contractors of the relevant parts of the record at the time when the decision to accept a particular submission (or the decision to cancel the procurement proceedings) has become known to them is to give efficacy to the right to challenge under article 63 (which falls within chapter VIII of the Model Law). In order to make this provision effective, the procuring entity must permit prompt access by the

suppliers or contractors concerned to the relevant parts of the record.<sup>2</sup> Delaying disclosure until, for example, the entry into force of the procurement contract might deprive aggrieved suppliers and contractors of a meaningful remedy. The provisions also intend to capture two situations when the decision to accept a particular submission becomes known to the relevant suppliers or contractors: one is when it becomes known through a standstill period notification under article 21 (2), and the second when it may become known under other circumstances,<sup>3</sup> including when no such notification has been served.

8. The disclosure of information either to the public or to relevant suppliers or contractors is without prejudice to paragraph (4)(a) of this article, which sets out grounds that would allow the procuring entity to exempt information from disclosure, and to paragraph (4)(b) listing information that cannot be disclosed. (See the commentary to article 22 in ... above addressing issues relevant to paragraph (4)(a).) As regards paragraph (4)(b), as mentioned in the commentary to article 22 and to this article above, among the necessary objectives of these provisions is avoiding the disclosure to suppliers and contractors confidential commercial information; the need is particularly acute with respect to what is disclosed concerning the evaluation of submissions, as the information may naturally involve commercially sensitive information, which suppliers and contractors have a legitimate interest in protecting. Accordingly, the information referred to in paragraph (1)(t) involves only a summary of the evaluation of submissions, while paragraph (4)(b) restricts the disclosure of more detailed information that exceeds what can be disclosed in such a summary.

9. The limited disclosure scheme in paragraphs (2) and (3) does not preclude the application of other statutes in the enacting State, conferring on the public at large a general right to obtain access to Government records, to certain parts of the record. For example, the disclosure of the information in the record to oversight bodies may be mandated as a matter of law in the enacting State.

10. Paragraph (5) of the article reflects a requirement in the United Nations Convention against Corruption that States parties must “take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of [their] domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents” (article 9 (3) of the Convention). The requirement to preserve documents related to the procurement proceedings and applicable rules on documentary records and archiving, including the period of time during which the record and all the relevant documents pertaining to a particular procurement should be retained, should be stipulated in other provisions of law of the enacting State. If the enacting State considers that applicable internal rules and guidance should also be stored with the record and documents for a particular procurement, the procurement regulations may so require.

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<sup>2</sup> The relevant provisions of the Model Law do not require that the portions of the record be made promptly available. The Commission may consider the need for amending paragraph (3) in this respect.

<sup>3</sup> A more detailed explanation of such possible circumstances may be required, in particular whether they intend to refer only to the public notice of the contract award or something broader (rumours, media reports, etc.). The provision of guidance to the Secretariat is requested.

### Article 25. Code of conduct

1. The purpose of the article is to emphasize the need for States to enact a code of conduct for officers and employees of the procuring entities, which should address actual and perceived conflicts of interest, and increased risks of impropriety on the part of officers and employees of the procuring entities in such situations, as well as measures to mitigate such risks, including by filing declarations of interest. Enacting such a code should be considered as a measure to implement certain requirements of the United Nations Convention against Corruption. Although the Convention is of general rather than procurement-specific application, as mentioned in paragraphs ... of Part I of the Guide, some of its provisions, such as those found in articles 8 and 9, have direct relevance to public procurement, and to measures to regulate matters regarding personnel responsible for procurement (the “procurement personnel”). Enacting States may ensure that gaps in regulation and in enacting measures for the effective implementation of the relevant provisions of the Convention are eliminated through such codes of conduct.
2. Depending on the legal traditions of enacting States, codes of conduct may be enacted as part of the administrative law framework of the State, either at the level of statutory law or regulations, such as the procurement regulations. They may be of general application to all public officials regardless of the sector of economy or may be enacted specifically for the procurement personnel, and some may be part of the procurement laws and regulations. When a general code of conduct for public officials is enacted, it is expected that some provisions will nevertheless contain provisions addressing specifically the conduct of the procurement personnel. The enacting State, in considering enacting or modernizing a code of conduct for its public officials or specifically for the procurement personnel, may wish to consult the relevant documents of international organizations, such as the Organization on Economic Cooperation and Development.
3. The provisions of article 25 focus on the conflicts of interest situations in procurement, in the light of particularly negative effects of conflicts of interest on transparency, objectivity and accountability in public procurement. Without intending to be exhaustive, the provisions list only some measures to regulate the conduct of the procurement personnel in conflicts of interest situations, such as requiring them to file declarations of interest, undertake screening procedures and be involved in training. This is in line with article 8 (5) of the United Nations Convention against Corruption, referring to: “measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result”. The Model Law provides only general principles, recognizing that setting out in the Model Law exhaustive provisions on conflict of interest situations, including measures to mitigate the risks of impropriety in such situations, would be impossible in the light of varying ways of addressing conflicts of interest in different jurisdictions.
4. In addition to conflicts of interest situations and measures explicitly identified in the article to mitigate risks of impropriety in such situations, a code of conduct should address other matters, such as the concerns raised by the concept of the “revolving door” (i.e. that public officials seek or are offered employment in the private sector by entities or individuals that are potential participants in procurement proceedings). Although the provisions do not purport to mandate the

enacting State to enact a code of conduct for suppliers or contractors in their relations with the procuring entity, some provisions of the code of conduct, such as those related to the concept of the “revolving door”, should indirectly establish boundaries for the behaviour of private sector entities or individuals with public officials.

5. The provisions of the article requiring the code of conduct to be promptly made accessible to the public and systematically maintained are to be read together with article 5 (1) of the Model Law, in which a similar requirement applies to legal texts of general application. The commentary to article 5 (1) is therefore relevant in the context of the relevant provisions of article 25 (see ... above).

### **Article 26. Methods of procurement**

1. The purpose of article 26 is to list all methods and techniques available for procurement procedures provided for in the Model Law. These methods and techniques are included to provide for the variety of circumstances that may arise in practice. They are designed to allow the procuring entity, when considering how to conduct a procurement procedure, to take account of what it is that is to be procured (the subject matter), the market situation (the number of potential suppliers, degree of concentration in the market, the extent to which the market is competitive, and any degree of urgency) and the appropriate level of procurement technology (such as whether electronic means of procurement are appropriate).

2. Paragraph (1) lists these available methods of procurement. The first such method is open tendering. It is considered under the Model Law to be the method of the first resort (the default procurement method). This is because its procedures most closely support the achievement of the goals and objectives of the Model Law, through implementing the principles of competition, objectivity and transparency (as further discussed in ...). The procuring entity must therefore use this method unless the use of alternative methods of procurement is justified. As further elaborated in the commentary to article 27, the main mechanism for justifying the use of alternative methods is through satisfying conditions for use of these alternative methods.

3. The alternative procurement methods comprise all other methods listed in paragraph (1). They are designed to accommodate procurement of various subject matter, from off-the-shelf items to highly complex products, for which the use of open tendering may not be appropriate. Some of them are tendering-based methods (restricted tendering, two-stage tendering [and open framework agreements]) that require a description of the subject matter based on technical specifications and in which the procuring entity retains control of, and responsibility for, the technical solution. Some are request for proposals methods (request for proposals without negotiation, request for proposals with dialogue and request for proposals with consecutive negotiations) by means of which the procuring entity seeks proposals from suppliers or contractors to meet its needs, formulated in the form of minimum technical requirements and standards, and in which the suppliers or contractors are responsible for ensuring that their proposed solutions in fact meet the procuring entity's needs. Some methods are less structured or regulated (request for quotations, competitive negotiations and single-source procurement) in the light of particular circumstances in which they can be used (very low-value procurement, urgency, emergency, etc.) that make the use of more structured and regulated

methods less appropriate or inappropriate. Although listed in paragraph (1)(i) as a stand-alone procurement method, electronic reverse auctions may also be used as a technique (similarly to [closed] framework agreements referred to in paragraph (2)), as the final phase preceding the award of the procurement contract in any method of procurement listed in paragraph (1), as well as in the award of procurement contracts under framework agreements.<sup>4</sup>

4. Paragraph (2) refers to [closed] framework agreement procedures. The [closed] framework agreement procedure is not a method of procurement as such but a procurement technique consisting of the award of a [closed] framework agreement by means of the methods of procurement listed in paragraph (1) and of the subsequent placement of purchase orders under the awarded agreement.<sup>5</sup>

5. The available methods and techniques can be considered together as a toolbox, from which the procuring entity should select the appropriate tool for the procurement concerned. It is however recognized that conditions for use and the functionality of certain methods will overlap, as explained further in the commentary to article 27 below. For example, it may be considered that the circumstances envisaged for the use of request for proposals procedures can be accommodated by the use of output-based or performance specifications in tendering proceedings.<sup>6</sup> The procedures for restricted tendering under article 28 (1)(a) can be effectively accommodated through open tendering. (Restricted tendering involves the publication of a notice at the outset, and the invitation to participate must be provided to all those that wish to participate; they may participate unless they are assessed to be unqualified. From this perspective, the procedural benefits of restricted over open tendering may not be significant (and from an institutional perspective, there will be an additional overhead cost in ensuring that the rules on solicitation in restricted tendering procedures are properly understood and applied). It is also likely that where the conditions for use for restricted tendering on the basis of article 28 (1) (b) apply, a low-value or simple procurement method such as request for quotations or ERA will also be available and appropriate.)

6. Further guidance on selection among alternative procurement methods is provided in the commentary to article 27 below, and in the commentary to each procurement method. The guidance presupposes adequate professional judgement and experience on the part of procuring entities to select the appropriate procurement method and to operate it successfully.

7. As the footnote to article 26 records, enacting States may choose not to incorporate all the methods provided for in the Model Law into their national legislation. However, as it is also noted, enacting States should always provide for open tendering which, as noted above, is the default procurement method.

8. In deciding which of the other methods to provide for, enacting States should provide for sufficient options to address the normal situations in which it engages in procurement, by reference to the circumstances described above and others that may

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<sup>4</sup> The paragraph may need to be amended if it is decided that open framework agreements are to be listed as procurement methods in paragraph (1) of the article.

<sup>5</sup> Ibid.

<sup>6</sup> The provision of guidance to the Secretariat is requested as regards the need for further detail of this point and, if so, the content thereof.

be relevant in their jurisdiction. At a minimum, enacting States should provide (in addition to open tendering) a method that can be used for low-value and simple procurement, a method that can be used for emergency and other urgent procurement, and a method that can be used for more specialized or complex procurement. Where the enacting State is introducing procurement legislation for the first time, it may be appropriate to base the system on a more limited number of methods than the full range available under the Model Law, and it may be considered that they should include tendering methods for all other than urgent and very low-value procurement (for which less structured or regulated methods are presented in the Model Law); the capacity acquired in operating these procedures will allow the introduction of methods including request for proposals procedures involving negotiations or dialogue, at a later stage.

9. Where enacting States consider that further capacity to choose among procurement methods may be required, a hierarchy of procurement methods may be set out in the procurement regulations, supported by detailed guidance on the identification of the appropriate procurement method. The rules and guidance should focus in particular on how to select the appropriate procurement method where the conditions for use for several methods and/or techniques may apply.

10. As some methods may be considered to be more vulnerable to abuse and corruption than others, and some methods require greater levels of capacity to function successfully, the guidance to each procurement method in [...] is designed to assist enacting States in considering which methods are appropriate for their jurisdictions, to highlight issues that may arise in their use and capacity issues that they raise, and to be a resource for those that draft regulations and guidance. Finally, enacting States will wish to consider whether any international agreements to which they are party, or donor requirements, require the adaptation of the conditions for use and use of the procurement methods set out in the Model Law, as further discussed in particular in the guidance to request for proposals procurement methods.

#### **Article 27. General rules applicable to the selection of a procurement method**

1. The purpose of article 27 is to guide the procuring entity in selection of the procurement method appropriate in the circumstances of any given procurement.

2. Paragraph (1) provides for the basic rule that open tendering is the default procurement method. There are no conditions for its use: it is always available. The implication of open tendering as the default procurement method is that the use of any other procurement method requires justification, through a consideration of whether the conditions for its use are satisfied. Paragraph (1) sets out therefore the general requirement that these other methods can be used only where the conditions for their use set out in articles 28-[31] of the Model Law so permit. Thus the procuring entity does not have an unfettered discretion to choose which tool alternative to open tendering it wishes, but is required, as a first step, to see whether it is available in the circumstances of the procurement at hand — that is, whether the conditions for use of the tool(s) under consideration are satisfied. The conditions for use contain safeguards in particular against abusive resort to less structured and regulated methods of procurement in avoidance of open tendering or other methods of procurement that, although involving lengthier procedures, ensure more transparency, objectivity and competition.

3. As noted above, the conditions for use are intended to reflect the distinct and commonly encountered circumstances that may justify use of one or other of the alternative procurement methods. For example, one of the conditions justifying use of restricted tendering (article 28 (1)(a)) refers to the procurement of highly complex products where there are limited sources of supply. Where it is not feasible or appropriate to formulate a full description (including technical specifications) of the subject matter of the procurement at the outset of the procurement proceedings, two-stage tendering or request for proposals with dialogue may be appropriate. Where quality aspects may be highly significant (which is commonly the case in procurement of non-quantifiable, intellectual types of services), request for proposals without negotiations or with consecutive negotiations may be used. Competitive negotiations are intended for procurement involving national security issues and under situations of urgency, while resort to single-source procurement can be justified only on the listed and objective grounds (apart from situations of emergency, they include that there is only a single supplier in a given market capable of meeting the needs of the procuring entity).<sup>7</sup>

4. Guidance on the conditions for use for each alternative procurement method under the Model Law is set out in [...], including, in each case, an explanation of the conditions for use for the method concerned. The guidance also considers some of the specific circumstances in which each method is appropriate, and details of the procedures for each method (which themselves can have a bearing on the choice of procurement method). The conditions for use set out whether a particular procurement method or technique is available for a given procurement procedure, but such conditions alone will not answer the question of whether the method is appropriate for the procurement procedure under consideration.

5. The main reason why conditions for use do not provide a complete guide to choice of procurement method is that the conditions for use for more than one method may apply in the circumstances (in addition to open tendering, which is always available). A possible overlap of conditions for use under the Model Law is illustrated in the example provided in [Annex [...] to this Guide]. What is the appropriate, or the most appropriate, procurement method can only be determined through a consideration of all the circumstances of the procurement. This is reflected in paragraph (2) of the article, which requires the procuring entity to select an alternative method of procurement to accommodate the circumstances of the given procurement. Such circumstances will differ from procurement to procurement and, as noted above in the commentary to article 26, the procuring entity will need to possess appropriate professional knowledge, experience and skills to select the procurement method most suitable for the circumstances of the given procurement from among the full range of procurement methods available under the Model Law.

6. For example, in deciding whether to use open tendering or two-stage tendering or request for proposals with dialogue, the procuring entity must assess whether it wishes to retain control of the technical solution in the procurement of relatively

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<sup>7</sup> The commentary to the use of these procurement methods (competitive negotiations and single-source procurement) will state that enacting States may consider that certain circumstances envisaged for the use of competitive negotiations and single-source procurement are unlikely to arise in their current systems, and so conclude that not all the conditions require inclusion.



complex subject matter. Where it wishes to retain such control but also to refine the description and technical specifications issued at the outset of the procedure through discussions with suppliers during the procurement process to achieve the best solution, a two-stage tendering procedure, rather than an open tendering procedure, may be the appropriate approach. (A consultancy may precede the two-stage tendering procedure, to produce the design of the initial description and technical specifications.) Where the procuring entity is incapable or considers it undesirable to retain such control, the request for proposals with dialogue will be appropriate. The capacity required to operate request for proposals with dialogue, which involves the ability to assess and monitor different solutions, and to engage in dialogue on technical and commercial terms including price, is generally considered to be in excess of that required to operate two-stage tendering (particularly where a design consultancy has preceded the two-stage tendering procedure).

7. Paragraph (2) of the article requires in addition to “seek to maximize competition to the extent practicable” when selecting the procurement method. Competition in this context means, first, a preference for open solicitation to maximize the potential pool of participating suppliers, and, secondly, ensuring that the procedure does not restrict the number of participants below the number required to ensure that they in fact compete (and do not collude).

8. The requirement to maximize competition will determine the most appropriate method among those available in some situations. For example, in cases of urgency following a natural disaster or similar catastrophe, two methods are available under the Model Law: competitive negotiations and single-source procurement. The conditions for use of these methods are almost identical: they refer respectively to “an urgent” and “an extremely urgent” need for the subject matter of the procurement as a result of the catastrophe, in each case subject to the caveat that the urgency renders it impractical to use open tendering proceedings or any other method of procurement because of the time involved in using them. Although both competitive negotiations and single-source procurement are considered to provide less competition (as well as objectivity and transparency) than other procurement methods, it is clear that competition is to some degree present in competitive negotiations, and is essentially absent in single-source procurement. For this reason, only where there is an extreme degree of urgency can single-source procurement be used: such as for the needs that arise in the immediate aftermath of the catastrophe (for example, for clean water, emergency food and shelter or immediate medical needs). Other needs, which still arise as a direct result of the catastrophe, including these same items needed several weeks or months after the event, involve a time-frame that allows the use of competitive negotiations rather than single-source procurement (and, the further in time from the catastrophe, the less likely it is that either of these methods remains available because there will be time to use other methods). The guidance to both methods discusses this issue, and other steps that can be taken to mitigate the risks that they pose; the guidance to framework agreements also highlights the use of that technique as a manner of planning for emergencies.

9. Paragraph (3) of the article reinforces the need for justification for resort to alternative procurement methods by requiring that the statement of reasons and circumstances for such resort be included in the record of the procurement proceedings. The same requirement is repeated in article 24 (1)(e).

**Annex [...]****The purchase of laptop computers**

1. The conditions for use of request for quotations, ERA, restricted tendering, single-source procurement and framework agreements that may apply to this type of purchase are repeated below, and the following discussion of how the methods and techniques may be available and appropriate for the procurement of laptops reflects those conditions; the discussion also draws on the guidance to each of these methods and techniques contained at [...].

<i>Method</i>	<i>Condition for use</i>
Request for quotations	Procurement of readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the threshold amount set out in the procurement regulations
ERA (stand-alone)	Where it is feasible for the procuring entity to formulate a detailed and precise description of the subject matter of the procurement; AND Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction, such that effective competition is ensured; AND Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms
Restricted tendering (article 28 (1)(a))	The subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors
Restricted tendering (article 28 (1)(b))	The time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement
Single-source procurement	The procuring entity, having procured goods, equipment, technology or services 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, technology or services, 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 or services in question OR The subject matter of the procurement is available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible
ERA (phase in a procurement method)	Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.
Framework agreements (in conjunction with procurement methods)	The need for the subject matter of the procurement is expected to arise on an indefinite basis during a given period of time.

2. If the laptops needed are available as standard items in the market, without the need for any particular design for the procuring entity (such as specialized software), and the estimated value of the procurement falls below the threshold

established in the procurement regulations, request for quotations is available. Where the time and cost required to examine and evaluate the likely number of tenders may be disproportionate to the value, whether or not it exceeds the request for quotations threshold, restricted tendering is also available. In addition, it will normally be feasible for the procuring entity to formulate a description in the manner required for ERAs, the market will presumably be competitive, and the evaluation criteria will be quantifiable, so a stand-alone ERA will also be available. An ERA is likely also to be available as a phase in request for quotations or restricted tendering, because the evaluation criteria are quantifiable as its conditions for use require. The laptops may not be a one-off purchase — if so, a framework agreement will be available. Less commonly, the laptops may require highly specialized software used by the procuring entity concerned, which may be available from one developer or a limited number of developers under licence; restricted tendering or even single-source procurement may then be indicated.

3. Assuming no specialized customization is required, the requirement to maximize competition in article 27(2) indicates that the stand-alone ERA, which is an open procedure, may be considered to maximize competition. However, if sufficient numbers are invited to participate in restricted tendering, an equivalent level of competition may be assured; the nature of the market may be such that even the numbers invited to participate in a request for quotations procedure will also ensure equivalent competition.

4. The procuring entity will additionally wish to consider the administrative efficacy of the procedure itself to determine the appropriate method (an issue implied in the condition for use of restricted tendering under article 28 (1) (b)). Relevant issues may include the fact that the overheads of running an ERA (even if ERAs systems are well established) may exceed those of running other methods, particularly the procedurally simple request for quotations. On the other hand, the qualifications and responsiveness of the successful supplier alone can be assessed under an ERA. Choosing between restricted tendering and request for quotations, for example, includes a consideration as to whether any specialized software or other customization requirements or offers would be enhanced by the issue of a “particular design” by the procuring entity, and the estimated value of the procurement. The appropriate procurement method, therefore, will be determined by the facts of the case at hand.

**(A/CN.9/731/Add.5) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany chapter III (Open tendering) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE  
UNCITRAL MODEL LAW ON  
PUBLIC PROCUREMENT**

...

**Part II. Article-by-article commentary**

...

**CHAPTER III. OPEN TENDERING**

The provisions on open tendering, with few exceptions, are applicable under the Model Law to two-stage tendering and restricted tendering proceedings. The guidance provided to this chapter is therefore applicable to those procurement methods as appropriate.

**Article 35. Procedures for soliciting tenders**

Article 35 cross-refers to the provisions of article 32, which regulate the solicitation in open tendering, two-stage tendering and electronic reverse auctions used as a stand-alone procurement method. That article provides for open international solicitation as the default rule. The exceptions to international solicitation referred to in article 32 (4), and as explained in the guidance to that article, are designed to accommodate domestic and low-value procurements.

**Article 36. Contents of invitation to tender**

In order to promote efficiency and transparency, article 36 requires that invitations to tender should contain all information required for suppliers or contractors to be able to ascertain whether the subject matter being procured is of a type that they can provide and, if so, how they can participate in the open tendering proceedings. The specified information requirements are the required minimum, and so do not preclude the procuring entity from including additional information that it considers appropriate. The procuring entity may decide not to include references to the currency of payment and the language or languages of solicitation documents in domestic procurement, if it would be unnecessary in the circumstances; however, an indication of the language or languages may still be important in some multilingual countries.

**Article 37. Provision of solicitation documents**

1. The 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 open tendering proceedings will be conducted. Article 37 has been included in order to ensure that all suppliers or contractors that have expressed an interest in participating in the open tendering proceedings and that comply with the procedures set out by the procuring entity are provided with the solicitation documents. These procedures are to be set out in the invitation to tender in accordance with article 36 and may concern such matters as the means of obtaining the solicitation documents, the place where they may be obtained, the price to be paid for the solicitation documents, the means and currency of payment as well as a more substantive matter referred to in subparagraph (d) of article 36 that the participation in the given procurement proceedings may be limited in accordance with article 8 (with the consequence that suppliers or contractors excluded from participation in the procurement proceedings will not be able to obtain the solicitation documents).

2. 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, for example, printing and providing those documents, but to avoid excessively high charges that could inhibit qualified suppliers or contractors from participating in open tendering proceedings. Development costs (including consultancy fees and advertising costs) are not to be recovered through this provision. The costs should be limited to the charges incurred in fact in providing the documents.

#### **Article 38. Contents of solicitation documents**

1. Article 38 contains a listing of the minimum information required to be included in the solicitation documents. This minimum information enables suppliers and contractors to submit tenders that meet the needs of the procuring entity and to verify that the procuring entity can compare tenders in an objective and fair manner. Many of the items listed in article 38 are regulated or dealt with in other provisions of the Model Law, such as article 9 on qualifications, article 10 on the description of the subject matter of the procurement and terms and conditions of the procurement contract (or framework agreement) and article 11 on evaluation criteria. The enumeration in this article of 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. The need for all information listed is however to be assessed by the procuring entity on a case-by-case basis: some information listed (such as in subparagraphs (i), (j) and (s)) may be irrelevant in domestic procurement or, as in the case with information in subparagraph (g), where presentation of partial tenders is not permitted.

2. One category of items listed in article 38 concerns the subject matter of the procurement and terms and conditions of the procurement contract (subparagraphs (b)-(f) and (w)). The purpose of including these provisions is to provide all potential suppliers or contractors with sufficient information about the procuring entity’s requirements as regards suppliers or contractors, the subject matter of the procurement, terms and conditions of delivery and other terms and conditions of the procurement contract (or framework agreement). This information is essential for suppliers or contractors to determine their qualifications, ability and capacity to perform the procurement contract in question. Although the specification of the exact quantity of the goods is generally required under subparagraph (d),

where tendering proceedings are used for the award of framework agreements the procuring entity will be in the position to specify at the outset of the procurement only an estimated quantity and will be permitted to do so under provisions of chapter VII of the Model Law (for further guidance, see paragraphs ... below). The reference to “contract form” in subparagraph (e) is linked to the formalities referred to in subparagraph (w) of this article: whereas under subparagraph (w) the procuring entity may specify that a procurement contract is to be concluded in writing, under subparagraph (e) the procuring entity will be required to specify in addition, where applicable, whether a contract in standard form is to be signed (which itself may provide, for example, standard terms and conditions of delivery, a standard warranty period, and a standard schedule of payments, etc.).

3. The second category of items listed concerns instructions for preparing and submitting tenders (subparagraphs (a), (g) through (p) and (u), such as the manner, place and deadline for presenting 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 their tenders even rejected due to lack of clarity as to how the tenders should be prepared. As is the case with the same type of information under article 36, the procuring entity may decide not to include references to the currency of payment and the language or languages of solicitation documents in domestic procurement, if it would be unnecessary in the circumstances; however, an indication of the language or languages may still be important in some multilingual countries.

4. The Model Law recognizes that, for procurement actions 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 procurement 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 SMEs, who may have the capacity to submit tenders only for certain portions of the procurement. Article 38 (g) is therefore included to allow such partial tenders and 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 procurement into separate contracts merely as it sees fit after tenders are submitted.

5. Some other items in article 38 (subparagraphs (b), (c) and (q)-(s)) concern in particular the manner in which qualifications of suppliers and contractors will be ascertained and the tenders will be examined and evaluated and the applicable criteria; their disclosure is required to achieve transparency and fairness in the tendering proceedings. The relevance of information listed in subparagraph (s) should however be assessed in domestic procurement.

6. Information referred to in subparagraphs (t) and (v) is an application of the general principle of transparency underpinning the Model Law: it informs suppliers and contractors about the legal framework applicable to public procurement in the enacting States in general and specific rules that may be applicable to the particular procurement proceedings (for example, if any classified information is involved); it

also informs suppliers about the possibility of challenging and appealing the procuring entity's decisions or actions, alerting them in particular whether a specifically dedicated and defined time frame (standstill period) will be provided enabling them to challenge the procuring entity's decisions and actions as regards examination and evaluation of tenders before the procurement contract enters into force. The place where applicable laws and regulations may be found, referred to in subparagraph (t), intends to refer not to the physical location but rather to an official publication or portal where authoritative texts of laws and regulations of the enacting State are made accessible to the public and systematically maintained (see the relevant guidance to article 5 of the Mode Law in paragraphs ... above).

7. The article lists only the minimum information that must be provided. The procuring entity may decide to include additional information, for example the manner in which arithmetical errors under article 42 (1) would be corrected if necessary.<sup>1</sup>

8. All categories of items listed in article 38, supplemented by items listed in article 36 (contents of invitation to tender) comprise terms and conditions of solicitation. Any or all of them may be challenged by suppliers or contractors under chapter VIII of the Model Law before the deadline for presenting submissions.

## SECTION II. PRESENTATION OF TENDERS

### Article 39. Presentation of tenders

1. Paragraph (1) ensures equitable treatment of all suppliers and contractors by requiring that the manner, place and the deadline for submission of tenders be specified in the solicitation documents (under article 2, the solicitation documents are defined as encompassing any amendments thereto). This requirement is further elaborated in article 14 on the rules concerning the manner, place and deadline for presenting application to pre-qualify or applications for preselection or for presenting submissions. Particular safeguards are included in that article, as well as in article 15 (3), to address situations in which changes are made to the information originally issued about the procurement procedure concerned. Where those changes make the originally published information materially inaccurate, the amended information is to be published in the same manner and place in which the original information about procurement was published. Under article 14 (5), notice of any extension of the deadline is also to be given to each supplier or contractor to which the procuring entity provided the solicitation documents. (For the guidance to the relevant provisions of articles 14 and 15, see paragraphs ... above.)

2. Paragraph (2) contains specific requirements as regards the form and manner of presentation of tenders that complement the general requirements of form and means of communication found in article 7 (see the commentary to article 7 in

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<sup>1</sup> At its nineteenth session, the Working Group was requested to consider (A/CN.9/WG.I/WP.75/Add.3, footnote 49) whether the article should require the solicitation documents to specify the manner in which arithmetical errors would be corrected. The attention in this regard was drawn to the relevant discussion and query raised at the Working Group's seventeenth session (A/CN.9/687, para. 151). The Working Group did not address this issue. Further guidance on this point may need to be included here as well in the commentary to the relevant provisions of article 42.

paragraphs ... of this Guide). The article provides that tenders have to be presented in writing and signed, and that their authenticity, security, integrity and confidentiality have to be preserved. The requirement for “writing” seeks to ensure the compliance with the form requirement found in article 7 (1) (tenders have to be presented in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference). The requirement for a “signature” seeks to ensure that suppliers or contractors presenting a tender identify themselves and confirm their approval of the content of their presented tenders, with sufficient credibility. The requirement of “authenticity” is intended to provide the appropriate level of assurance that a tender presented by a supplier or contractor to the procuring entity is final and authoritative, cannot be repudiated and is traceable to the supplier or contractor submitting it. Together with the requirements of “writing” and “signature”, it thus is aimed at ensuring that there would be tangible evidence of the existence and nature of the intent on the part of the suppliers or contractors presenting the tenders to be bound by the information contained in their tenders. Additionally, that evidence would be preserved for record-keeping, control and audit. The requirements for “security”, “integrity” and “confidentiality” of tenders are intended to ensure that the information in presented tenders cannot be altered, added to or manipulated (“security” and “integrity”), and that it cannot be accessed until the time specified for public opening and thereafter only by authorized persons and only for prescribed purposes, and according to the rules (“confidentiality”).

3. In the paper-based environment, all the requirements described in the preceding paragraph of this Guide are met by suppliers or contractors presenting to the procuring entity, in a sealed envelope, tenders or parts thereof presumed to be duly signed and authenticated (at a risk of being rejected at the time of the opening of tenders if otherwise), and by the procuring entity keeping the sealed envelopes unopened until the time of their public opening. In the non-paper environment, the same requirements may be fulfilled by various standards and methods as long as such standards and methods provide at least a similar degree of assurances that tenders presented are indeed in writing, signed and authenticated and that their security, integrity and confidentiality are preserved. The procurement or other appropriate regulations should establish clear rules as regards the relevant requirements, and when necessary develop functional equivalents for the non-paper-based environment. Caution should be exercised not to tie legal requirements to a given state of technological development. The system, at a minimum, has to guarantee that no person can have access to the content of tenders after their receipt by the procuring entity prior to the time set up for formal opening of tenders. It must also guarantee that only authorized persons clearly identified to the system will have the right to open tenders at the time of formal opening of tenders and will have access to the content of tenders at subsequent stages of the procurement proceedings. The system must also be set up in a way that allows traceability of all operations in relation to presented tenders, including the exact time and date of receipt of tenders, verification of who accessed tenders and when, and whether tenders supposed to be inaccessible have been compromised or tampered with. Appropriate measures should be in place to verify that tenders would not be deleted or damaged or affected in other unauthorized ways when they are opened and subsequently used. Standards and methods used should be commensurate with risk. A strong level of authentication and security can be achieved by various commercial



software that is available at any given time but this will not be appropriate for low risk small value procurement. The choice should therefore be based on the cost-benefit analysis. Caution should also be exercised not to impose higher security measures than otherwise would be applicable in paper-based environment since these measures can discourage the participation of suppliers or contractors in non-paper-based procurement. These and other issues will have to be addressed in the procurement or other appropriate regulations. (For the general discussion of issues arising from the use of e-procurement, see paragraphs ... of Part I of the Guide.)

4. Paragraph (2) (b) requires the procuring entity to provide to the suppliers or contractors a receipt showing the date and time when their tender was received. In the paper-based environment, this usually is achieved through the procuring entity's written confirmation on a paper that the tender has been received with a stamp indicating day, time and place of receipt. In the non-paper-based environment, this should be done automatically. In situations where the system of receipt of tenders makes it impossible to establish the time of receipt with precision, the procuring entity may need to have an element of discretion to establish the degree of precision to which the time of receipt of tenders presented would be recorded. However, this element of discretion should be regulated by reference to the applicable legal norms in electronic commerce, in order to prevent abuse and ensure objectivity. Whatever the method of recording the date and time will be used in any given procurement, it must be disclosed at the outset of the procurement proceedings in the solicitation documents. With these safeguards, the certification of receipt provided by the procuring entity should be conclusive. When the submission of a tender fails, particularly arising from the protective measures taken by the procuring entity to prevent the system from being damaged as a result of a receipt of a tender, it shall be considered that no submission was made, as an application of the general rule that the submission of tenders is at the risk of the suppliers or contractors. Suppliers or contractors whose tenders cannot be received by the procuring entity's system should be instantaneously informed about the event in order to allow them where possible to re-submit tenders before the deadline for submission has expired. No re-submission after the expiry of the deadline shall be allowed.

5. Paragraph (2) (c) raises issues of security, integrity and confidentiality of presented tenders, discussed above. Unlike subparagraph 2 (a)(ii), it does not include a requirement for authenticity of tenders (such issues are relevant at the presentation of tenders only). It is presumed that, upon receipt of a tender by the procuring entity at the date and time recorded in accordance with paragraph 2 (b) of the article, adequate authenticity has already been assured.

6. It is recognized that failures in automatic systems, which may prevent suppliers or contractors from presenting their tenders before the deadline, may inevitably occur. The Model Law leaves the issue to be addressed by procurement or other appropriate regulations. Under the provisions of article 14 (4), the procuring entity may, in its absolute discretion, prior to the deadline for presenting tenders, extend the deadline if it is not possible for one or more suppliers or contractors to present their tenders by the deadline owing to any circumstance beyond their control. In such a case, it would have to give notice of any extension of the deadline promptly to each supplier or contractor to which the procuring entity provided the solicitation documents (see article 14 (5) of the Model Law). Thus, where a failure occurs, the procuring entity has to determine whether the system can be

re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for presenting tenders would be necessary. If, however, the procuring entity determines that a failure in the system will prevent it from proceeding with the procurement, the procuring entity can cancel the procurement and announce new procurement proceedings. Failures in automatic systems occurring due to reckless or intentional actions by the procuring entity, as well as decisions taken by the procuring entity to address issues arising from failures of automatic systems, can give rise to a challenge by aggrieved suppliers and contractors under article 63 of the Model Law.

7. The rule in paragraph (3) 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 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. The provisions therefore require that any late tenders would be returned unopened to suppliers or contractors submitting them. Enacting States may require recording the submission of late tenders in the documentary record of procurement proceedings under article 24 (1) (w).

#### **Article 40. Period of effectiveness of tenders; modification and withdrawal of tenders**

1. Article 40 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 and lengthy period of effectiveness, with the aim of covering the needs of most if not all tendering proceedings. So doing would be inefficient since for many cases the period would be longer than necessary. Excessively lengthy periods 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) has been included to enable the procuring entity to deal with delays in tendering proceedings following requests for 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 also to prolong, where necessary, 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. In such a case, the effectiveness of the tender of the supplier or contractor will

terminate upon the expiry of the original period of effectiveness specified in the solicitation documents.

4. Paragraph (3) is an essential companion of the provisions in article 15 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 relevant comments to article 47 in paragraphs ... below.)

### **SECTION III. EVALUATION OF TENDERS**

#### **Article 41. 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.<sup>2</sup>

2. Paragraph (2) sets out a rule that the procuring entity must permit all suppliers or contractors that have presented tenders, or their representatives, to be present at the opening of tenders. The modalities for the opening of tenders established by the procuring entity (the place, manner, time and procedures for the opening of tenders) should allow for the presence of suppliers or contractors, taking into account such factors as time difference, the need to supplement any physical location for opening of tenders with any means of ensuring presence of those who cannot be present at the physical location or opting for a virtual location. The presence may be in person or otherwise by any means that complies with requirements of article 7 of the Model Law (for a discussion of the relevant requirements, see paragraphs ... of this Guide). The second sentence of paragraph (2) supplements those requirements of article 7 (4) clarifying that, in the context of the opening of tenders, suppliers or contractors are deemed to have been permitted to be present at the opening of the tenders if they have been given opportunity to be fully and contemporaneously apprised of the opening of the tenders. This provision is consistent with other international instruments addressing the same matter.<sup>3</sup>

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<sup>2</sup> Explanation of further risks of departing from the requirements of the Model Law that tenders must be opened at the time specified in the solicitation documents as the deadline for presenting tenders, and practical considerations that should be taken into account in implementing that requirement, may need to be added (A/CN.9/687, para. 150).

<sup>3</sup> Sufficiency of the discussion of “deemed” present or “virtual” presence of suppliers or contractors at the opening of tenders in the presented draft is to be considered.

3. The term “fully and contemporaneously” in this context means that suppliers or contractors must be given the opportunity to observe (either by hearing or reading) all and the same information given out during the opening. This opportunity must be given at the same time as any person physically present at the opening of tenders would observe or hear the information concerned, subject to the time taken to upload it where it is to be read. The information concerned includes the announcements made in accordance with article 41 (3).

4. Suppliers must also be able to intervene where any improprieties take place, to the extent that they would be able to do so if they were physically present. The system in place therefore has to be capable of receiving and acknowledging or responding to suppliers’ feedback without delay. Different methods may exist to satisfy the requirement for full and contemporaneous appraisal using information technology systems. Regardless of the method used, sufficient information about them must be communicated to suppliers or contractors well in advance to enable them to take all measures required to connect themselves to the system in order to observe opening of tenders.

5. The rule requiring the procuring entity to permit all suppliers or contractors that have presented tenders, 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 or contractors that have presented 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.

6. Where automated opening of tenders takes place, the enacting State should be aware of additional safeguards that must be in place to ensure transparency and integrity of the process of the opening of tenders. The system must guarantee that only authorized persons clearly identified to the system will have the right to set or change in the system the time for opening tenders in accordance with paragraph (1) of the article, without compromising the security, integrity and confidentiality of tenders. Only such persons will have the right to open tenders at the set time. The enacting State may require that at least two authorized persons should by simultaneous action perform opening of tenders. “Simultaneous action” in this context means that the designated authorized persons within almost the same time span shall open the same components of a tender and produce logs of what components have been opened and when. It is advisable that before the tenders are opened, the system should confirm the security of tenders by verifying that no authorized access has been detected. The authorized persons should be required to verify the authenticity and integrity of tenders and their timely presentation.

7. Measures should be in place to prevent the integrity of tenders from being compromised, to prevent their deletion or to prevent the destruction of the system when the system opens them, such as through virus or similar infection. The system must also be set up in a way that provides for the traceability of all operations during the opening of tenders, including the identification of the individual that opened each tender and its components, and the date and time each was opened. It

must also guarantee that the tenders opened will remain accessible only to persons authorized to acquaint themselves with their contents and data (such as to members of an evaluation committee or auditors at subsequent stages of the procurement proceedings). These and related technical issues should be addressed in procurement and other regulations to be adopted by the enacting State.

#### **Article 42. Examination and evaluation of tenders**

1. Paragraph (1) to (3) regulate examination of tenders, which encompasses ascertainment of qualifications of suppliers and contractors presenting tenders, assessment of responsiveness of tenders of qualified suppliers or contractors and determination whether any ground for rejection of tenders in accordance with paragraph (3) of the article is present. As required by various provisions of the Model Law, including article 10 and 38, all examination criteria and procedure are to be disclosed to suppliers or contractors at the outset of the procurement proceedings.

2. 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 and evaluation 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.<sup>4</sup>

3. 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.<sup>5</sup>

4. Paragraph (3) lists grounds for rejection of tenders. The list is exhaustive and refers only to the grounds that explicitly provided for in the Model Law. The ground listed in subparagraph (a) — the absence of qualifications — is to be implemented in the light of article 9 listing permissible qualification requirements and grounds for disqualification. The ground listed in subparagraph (b) — refusal by the supplier or contractor to accept the correction of the arithmetical error and unresponsiveness of the tender — is to be read together with provisions of paragraph (1) (b) that permit the procuring entity to correct purely arithmetical errors and require it in such case to give notice of such correction to the supplier or contractor that submitted the relevant tender. No further discussion between the procuring entity and supplier or contractor on the corrected arithmetical error should be permitted: the supplier or contractor concerned can either accept the correction made

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<sup>4</sup> Further elaboration on the rules and principles applicable to the correction by the procuring entity of arithmetical errors and the role of the solicitation documents in this regard may be needed.

<sup>5</sup> Further elaboration on what would constitute “minor deviations” may be needed.

or its tender will be rejected. The ground listed in subparagraph (1) (c) — unresponsiveness of the tender — is to be understood in the light of article 10 and paragraphs (1) and (2) of article 42 that set out the legal framework for the procuring entity to apply in deciding on responsiveness or unresponsiveness of tenders. The grounds listed in subparagraph (d) originate from article 19 that permit the procuring entity to reject an abnormally low submission and from article 20 that require the procuring entity to exclude a supplier or contractor from the procurement proceedings on the grounds of inducement from that supplier or contractor, an unfair competitive advantage or conflicts of interest.

5. Paragraphs (4) to (7) regulate the evaluation of tenders, i.e. comparison of all tenders that have not been rejected as a result of examination. As required under various provisions of the Model Law, such as articles 11 and 38 and paragraph (4) (a) of this article, responsive tenders are evaluated against the pre-disclosed evaluation criteria and in accordance with the pre-disclosed evaluation procedures. The successful tender, as reiterated in paragraph (4) (b) of the article, may be the tender with the lowest tender price or the most advantageous tender.<sup>6</sup> In accordance with article 11 (5) (a) of the Model Law, whether the successful submission will be ascertained on the basis of only price or of price and other criteria is to be defined in the solicitation documents at the outset of the procurement and cannot be subsequently varied.

6. 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. That single currency is to be defined in the solicitation documents, as required under article 38 (s), together with any applicable exchange rate or the method to be used for determination of the applicable exchange rate. These provisions may be irrelevant in domestic procurement.

7. 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.

8. 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 its qualifications, and establishes the procedures to be followed by the procuring entity to select a successful tender in such a case. That paragraph also reiterates the right of the procuring entity to cancel the procurement in such cases, which is an essential safeguard against risks of collusive behaviour by suppliers or contractors.

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<sup>6</sup> Explanation on evolution of procurement practices since 1994 that justified the replacement of the term the “lowest evaluated tender” used in this context in the 1994 Model Law with the term the “most advantageous tender” is needed. Since the point is relevant to other provisions of the Model Law where reference to “most advantageous” is found, to avoid the repetitive discussion, the appropriate location of such explanation in the Guide is still to be considered.

**Article 43. Prohibition of negotiations  
with suppliers or contractors**

Article 43 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, they raise their tender prices in anticipation of the negotiations. The prohibition of negotiations does not intend to cover discussions that may take place between the procuring entity and a supplier or contractor for the purpose of clarifying its tender in accordance with article 42 (1) of the Model Law, or for concluding the procurement contract.

**(A/CN.9/731/Add.6) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement****ADDENDUM**

This addendum sets out a proposal for a section in the Guide that would discuss general issues arising from the use of electronic reverse auctions and a proposal for the Guide text to accompany article 30 on conditions for use of an electronic reverse auction and articles 52 and 53 of chapter VI (Electronic reverse auctions) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE  
UNCITRAL MODEL LAW ON  
PUBLIC PROCUREMENT****A. Provisions on electronic reverse auctions to be included in Part I of the Guide, preceding the article-by-article commentary, or in the article-by-article commentary as an introduction to chapter VI**

1. An electronic reverse auction (“auction,” or “ERA”), as defined in article 2 of the Model Law, is an online, real-time purchasing technique utilized by a procuring entity to select the successful submission. It involves the presentation by suppliers or contractors (“bidders”) of successively lowered bids during a scheduled period of time and the automatic evaluation of those bids.

2. It has been observed that ERAs have many potential benefits. First, they can improve value for money through successive competition among bidders, using dynamic and real-time trading. The use of the Internet as the medium for holding the auction can also encourage wider participation and hence increased competition. Secondly, auctions can reduce the time required to conduct each procurement[, and enhance the efficient allocation of resources and reduce the administrative costs by comparison with the traditional open tendering procedure)].<sup>1</sup> Thirdly, they can enhance transparency in the procurement process as information on the successive results of the evaluation of bids at every stage of the auction and the final result of the auction are made known to all bidders instantaneously and simultaneously; the auction setting allows information on other bids to be made available and the outcome of the procedure to be visible to participants. Fourthly, the enhanced transparency and a fully automated evaluation process that limits human intervention assist in the prevention of abuse and corruption.

3. On the other hand, ERAs encourage a focus on price, rather than quality considerations. Whether this focus is appropriate will depend on the subject matter of the procurement. ERAs may also have an anti-competitive impact in the medium and longer-term, as they may be more vulnerable than other procurement processes

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<sup>1</sup> The text in square brackets reflects the points raised at the Working Group’s sessions. It is to be reconsidered in the light of the statements made in paragraph 5 of this section below, to ensure consistency throughout the Guide. The provision of guidance to the Secretariat is requested.



to collusive behaviour by bidders because of the opportunity to present successive bids. Collusion occurs when two or more bidders work in tandem to manipulate and influence the price of an auction keeping it artificially high or share the market by artificially inflating bid prices or not presenting bids. Collusion will be a heightened risk particularly in projects characterized by a small number of bidders, or in repeated bidding in which the same group of bidders participates, or in any other auction where the anonymity of bidders is compromised. Issues of dumping can also arise: it has been reported that dumping is common in jurisdictions where the procuring entity is obligated by law to award the procurement contract to the winning bidder.<sup>2</sup> (For more discussion on these matters, see paragraphs ... of this Guide.)

4. It is common for third-party agencies to set up and administer auctions for procuring entities. This means that the relative ease of operation so far as procuring entities are concerned can lead to overuse and use of auctions in inappropriate situations. Procuring entities should also be aware of the possible issues arising from outsourcing<sup>3</sup> decision-making beyond government, such as to third-party software and service providers.<sup>4</sup> They should also be aware of issues arising in situations where third parties advise on procurement strategies. Such third parties may represent and have access to both procuring entities and bidders. The organizational conflicts of interest may pose a serious threat to competition in that the third parties will wish to maximize their returns by promoting ERAs, without necessarily considering whether they are the appropriate procurement technique.<sup>5</sup> These issues arise also in other procurement techniques, such as framework agreements, and generally where outsourcing is concerned. Furthermore, in the ERA setting, the risk of bidders' gaining unauthorized access to competitors' commercially sensitive information may be elevated.<sup>6</sup>

5. The above factors may negatively affect the confidence of suppliers or contractors in procurement proceedings involving ERAs; if so, they may be less willing to participate. Procuring entities may therefore need to budget for overhead costs in training and facilitating suppliers or contractors in participating in ERAs. Otherwise, the procuring entity may face opportunity costs should suppliers or contractors abandon the government procurement market when operated through

<sup>2</sup> It is to be considered whether the risks of collusion should be so highlighted only in the ERA context or whether the guidance should proceed on the basis that ERAs under the Model Law pose no greater risk of collusion than other methods. Collusion can only occur where the anonymity of bidders is not preserved. It is therefore to be considered whether the Guide should elaborate on how anonymity can be compromised and how to prevent this from happening. The provision of guidance to the Secretariat is requested.

<sup>3</sup> It is to be considered whether concerns about outsourcing of government functions should be so highlighted only in the ERA context or in the context of public procurement generally in Part I of the Guide. The provision of guidance to the Secretariat is requested.

<sup>4</sup> The text reflects the results of experts' consultations. However, concerns raised in the sentence may require further explanation in the Guide, especially in the light of automated evaluation processes during the auction. The provision of guidance to the Secretariat is requested.

<sup>5</sup> The text reflects the results of experts' consultations. However, concern about organizational conflicts of interest may require elaboration in the Guide. The provision of guidance to the Secretariat is requested.

<sup>6</sup> The text reflects the results of experts' consultations. However, concern about the elevated risk of unauthorized access to competitors' commercially sensitive information in ERAs may require elaboration in the Guide. The provision of guidance to the Secretariat is requested.

ERAs; the result may also be prices higher than those they would have obtained if other procurement techniques were used.

6. Recognizing both the potential benefits of ERAs and the concerns over their use, the Model Law enables ERAs subject to safeguards contained in article 30 on the conditions for use of ERAs, and in articles 52 to 56 setting out the procedural requirements. The following policy considerations are viewed as particularly important for the successful introduction and use of ERAs, and further guidance on them and the various aspects of the provisions in the Model Law is set out in the article-by-article commentary below:

(a) Type of auction: auctions are used to select the winning supplier or contractor. Although there are other models in use, the Model Law's approach to auctions is that the ERA itself is to be the final stage in the procurement proceedings in which the winner is selected, and the winning terms and conditions is to figure in the contract. This approach is considered the most transparent and at lowest risk of abuse, and reflects the general prohibition of negotiations after the selection of the successful supplier or contractor throughout the Model Law;

(b) Transparency: clear description of the subject matter of the procurement and other terms and conditions of procurement must be established and made known to suppliers or contractors at the outset of procurement, together with all information regarding how the auction will be conducted, in particular the timing of the opening and criteria governing the closing of the auction;

(c) A competitive market: a sufficient number of bidders is important not only to ensure competition but also to preserve the anonymity of bidders, to avoid collusion, dumping and other improper behaviour;

(d) Anonymity: the maintenance of anonymity is critical if there are not to be higher risks of collusion in ERAs than in other procurement methods. ERAs are therefore not suitable in markets with only a limited number of potentially qualified and independent suppliers or contractors, or in markets dominated by one or two major players, since such markets are especially vulnerable to price manipulation or other anti-competitive behaviour; repeated use of auctions with the same participants may also jeopardize anonymity;

(e) Appropriate use of auctions:

(i) ERAs are suitable for commonly used goods and services, for which there is a competitive market, in which price is the determining, or a significant determining, evaluation criterion. Types of procurement where non-quantifiable factors prevail over price and quantity considerations are not suitable for ERAs. It would therefore be inappropriate to use auctions in procurement of works or services entailing intellectual performance, such as design works, and other quality-based procurement. In addition, in order for an ERA to function correctly in eliciting low but realistic prices, it is important for bidders to be fully aware of their cost structures, which is unlikely to be the case where there are layers of sub-contractors, common in complex procurement, such as construction works;

(ii) The greater the number of criteria to be auctioned, the more difficult it is for both procuring entity and suppliers or contractors to understand how varying one element will impact on the overall ranking. Thus, where there are

many variables, the auction will be less appropriate. In addition, there will be no meaningful competition where the auction effectively ceases to be based on a common description of the subject matter of the procurement. Such risk is higher where many variables related to technical, quality and performance characteristics of the subject matter are involved;

(iii) Non-price evaluation criteria used must be quantifiable and capable of being expressed in monetary terms (such criteria could include delivery times and warranty periods) so as to be factored in the automated mathematical formula that will identify the winning bid at each successive stage of the auction. During the auction, each revised bid results in a ranking or re-ranking of bidders using these automated techniques;

(f) Appropriate guidance on the use of auctions: depending on the circumstances prevailing in an enacting State, including the level of experience with ERAs, an enacting State may choose to restrict the use of ERAs to procurement of goods. Some jurisdictions maintain lists identifying specific goods, construction or services that may suitably be procured through ERAs. Enacting States should be aware that maintaining such lists could prove cumbersome in practice, since it requires periodic updating as new commodities or other relevant items appear. If lists are intended to be used, it is preferable to develop illustrative lists of items suitable for acquisition through ERAs or, alternatively, to list generic characteristics that render a particular item suitable or not suitable for acquisition through this procurement technique;

(g) Phased introduction of auctions: it is recommended that enacting States lacking experience with the use of ERAs should introduce them in a staged fashion as experience with the technique evolves; that is, to commence by allowing price-only auctions, where price only is to be used in determining the successful submission, and subsequently, if appropriate, to proceed to the use of more complex auctions, where award criteria include non-price criteria. The latter type of auctions would require an advanced level of expertise and experience on the part of procuring entities, such as the capacity properly to factor any non-price criteria to a mathematical formula. Such experience and expertise in the procuring entity is necessary even if the procuring entity outsources the conduct of the auction to third-party service providers, because the procuring entity must still be able to supervise activities of such third-party providers;

(h) As discussed in paragraphs ... above, the Model Law discourages charging fees for the use of procurement systems. If there were to be any entry fee for the auction, consistent with the principles and objectives of the Model Law, at a minimum it must be disclosed at the outset of the procurement;

(i) Capacity-building: in order to derive maximum benefits from the use of ERAs, both procuring entities and suppliers and contractors must have confidence in the process and its results in terms of achieving the government's objectives in procurement, and must be able to operate ERAs effectively. To that end, States should be prepared to invest sufficient resources in awareness and training programmes at an early stage:

(i) Procuring entities will need to learn new skills and undergo orientation in ERAs, so as to understand the benefits and potential concerns, the conditions

for use of ERAs, the circumstances in which ERAs are appropriate, and the risks of using them even in situations when they are appropriate;

(ii) Suppliers and contractors, especially SMEs, will need to be aware and understand the changes involved in doing business with the government through an ERA and what impact these changes will have on their businesses. Otherwise, a marketplace where procurement was previously handled successfully through other procurement techniques may be abandoned, and the government investment in the ERA system may fail;

(iii) The public at large should understand benefits of introducing the new procurement technique and be confident that it will contribute to achieving the government's objectives in procurement.

An awareness and training programme can be delivered through various channels and means, many of which may already be in place, such as regular briefings, newsletters, case studies, regular advice, help desk, easy-to-follow and readily accessible guides, simulated auctions, induction and orientation courses. The awareness and training program should include collection and analysis of feedback from all concerned, which in turn should lead to necessary adjustments in the ERA processes.

7. ERAs under the Model Law may be conducted either as a procurement method ("stand-alone ERAs") or as the final phase preceding the award of the procurement contract in other procurement methods (or under framework agreements with second-stage competition, "ERAs as a phase"), as and where appropriate. The two types of ERAs require different provisions to some extent; enacting States may choose to provide for both types of ERAs, or only one.

8. The circumstances in which stand-alone ERAs are appropriate are where the procuring entity's needs are relatively straightforward, such as commodities and standardized items that can be purchased off-the-shelf. Where such purchases are likely to be repeated, procuring entities may wish to combine them with open framework agreements (guidance as to the use of which is found in paragraphs ... below). ERAs as a phase are suitable where successive bidding follows more detailed initial steps in the procedure (such as assessing qualifications and responsiveness, and perhaps ranking), and are normally better suited to less simple procurement. Where auctions are used in more complex procurement, there is a risk of a concentrated market, but where it is assessed that even relatively few players will compete aggressively, the technique can still be used effectively in such situations.<sup>7</sup> The provisions in chapter VI are drafted to allow for either option to be exercised without significant drafting amendments to the Model Law's provisions.

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<sup>7</sup> The Guide may need to explain further points to be considered when the choice is made between stand-alone ERAs and ERAs as a phase. The provision of guidance to the Secretariat is requested.

## **B. Provisions on electronic reverse auctions to be included in the article-by-article commentary**

### **Article 30. Conditions for use of an electronic reverse auction**

1. The purpose of the article is to set out exhaustive conditions for the use of ERAs, either as stand-alone ERAs or ERAs as a phase. These conditions are necessary to mitigate risks of improper use or overuse of ERAs.
2. Paragraph (1) sets out conditions for use of stand-alone ERAs. They are based on the notion that stand-alone ERAs are primarily intended to satisfy the needs of a procuring entity for standardized, simple and generally available goods that arise repeatedly, such as for off-the-shelf products (e.g., office supplies, commodities, standard information technology equipment, and primary building products). In these types of procurement, the determining factor is price<sup>8</sup> or quantity; a complicated evaluation process is not required; no (or limited) impact from post-acquisition costs is expected; and no services or added benefits after the initial contract is completed are anticipated.
3. The requirement for detailed and precise description of the subject matter of the procurement found in paragraph (1)(a) will preclude the use of this procurement technique in procurement of most services and construction, unless they are of a highly simple nature and are in reality quantifiable (for example, straightforward road maintenance works).
4. In formulating detailed and precise description of the subject matter of the procurement and other terms and conditions of the procurement, procuring entities will need to set out clearly the objective technical and quality characteristics of the goods, construction and services procured, as required in article 10 of the Model Law, so as to ensure that bidders will bid on a common basis. The use of a common procurement vocabulary to identify goods, construction or services by codes or by reference to general market-defined standards is therefore desirable.
5. Paragraph (1)(b) is aimed at mitigating the risks of collusion and ensuring an optimal outcome of the auction through rigorous competition. It requires that there must be a competitive market of suppliers or contractors anticipated to be qualified to participate in the ERA. (For concerns regarding compromising anonymity and collusion, see paragraphs ... above.) Paragraph (1)(b) is supplemented by article 54 (2) under which the procuring entity has the right to cancel the auction if the number of suppliers or contractors registered to participate in the auction is insufficient to ensure effective competition during the auction (see paragraphs ... of this Guide for the guidance on the relevant provisions of article 54 (2)).
6. The reference in paragraph (1)(b) to suppliers or contractors that are anticipated to be qualified to participate in the ERA should not be interpreted as implying that pre-qualification will necessarily be involved in procurement through ERAs. It may be the case that, in order to expedite the process and save costs, the qualifications of the winning bidder only are assessed after the auction. See paragraphs ... of this Guide for guidance on the relevant provisions of article 56.

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<sup>8</sup> The guidance on what constitutes price as compared to non-price criteria, including near-price criteria (such as the warranty period) expressed as a percentage to the total price, is to be found in the commentary to article 11.

7. The article is intended to apply to procurement where the award of contracts is based on either the price or the price and other criteria that are specified in the beginning of the procurement proceedings. The notion of an auction is that price is a significant (if not the only) determining award criterion: as mentioned in paragraph ... above, ERAs are not suitable for complex procurement, in which value judgements on the relative importance of evaluation criteria are involved, and where there may be many such criteria. When non-price criteria are involved in the determination of the successful submission, paragraph (1)(c) requires that such criteria must be quantifiable and capable of expression in monetary terms (e.g., figures, percentages). While all criteria can in theory be expressed in such terms, an optimal result will arise where it makes sense in practice to express the evaluation criteria in such terms.

8. Whether price alone or price and other award criteria are permitted to be factored into procurement by ERAs is to be decided by an enacting State in accordance with the prevailing circumstances on the ground, including the level of experience of its procuring entities and suppliers or contractors with ERAs, and in which sector of the economy the use of ERAs is envisaged. See paragraph ... above for the general policy considerations arising in the use of non-price award criteria.

9. The provisions of the Model Law should not be interpreted as implying that ERAs will be appropriate and should always be used even if all the conditions of paragraph (1) are met. Enacting States may wish to provide, for example in the procurement regulations and supporting guidance, further conditions for the use of ERAs, such as consolidating purchases to amortize the costs of setting up the system for holding auctions, including those of third-party software and service providers, and guidance on the concept of “price” criteria drawing on the relevant provisions of article 11 and commentary thereto.

10. Paragraph (2) addresses the use of ERAs as a phase. Such ERAs may be particularly suitable for second-stage competition in framework agreements, where there are limited numbers of variables to auction.<sup>9</sup> Using ERAs as a phase in all procurement methods envisaged under the Model Law may not, on the other hand, be always appropriate. Since an ERA presupposes fully automated processes, including automated evaluation through the use of a mathematical formula, the procuring entity must establish that the criteria to be used in determining the successful submission are quantifiable and capable of being expressed in monetary terms (paragraphs (1)(c) and (2)) if an ERA as a phase in other procurement methods is to be appropriate. Some procurement methods presuppose a focus on quality and involve more complex evaluation of quality aspects than through establishing pass/fail criteria for ascertainment of responsiveness of submissions. In such cases, it may often be impossible or inappropriate to evaluate the quality aspects through the auction. Since the Model Law requires the auction to be the final stage before the award of a procurement contract, auctions cannot be used

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<sup>9</sup> The text reflects the points made in the Working Group and during expert group consultations. The Guide may need elaborate further on difficulties of preserving anonymity of bidders and of ensuring genuine competition among them where ERAs are used as a phase, in particular in closed framework agreements. The provision of guidance to the Secretariat is requested.

where quality aspects are to be evaluated after the auction (on all these issues, see paragraphs ... above).<sup>10</sup>

**Article 52. Procedures for soliciting participation in procurement by means of an electronic reverse auction**

1. The article sets out the procedures for soliciting participation in procurement by means of a stand-alone ERA, i.e. where an ERA is used as a procurement method rather than a final phase before the award of a procurement contract in other procurement methods or under framework agreements. Although there are core procedures that will cover all stand-alone ERAs, the procedures for each procurement will depend on the complexity of the ERA at hand. Some ERAs may be very simple, not even requiring the bidders' qualifications and responsiveness to be ascertained before the auction, while other may be more complex and involve pre-qualification, examination and evaluation of initial bids. The subject matter of the procurement, the examination and evaluation criteria to be used, and whether qualifications are to be assessed before the auction (or, as allowed under article 56 (2), only those of the winner are to be assessed after the auction) will determine the complexity of the procedures.

2. For example, for the procurement of off-the-shelf products, there is almost no risk that bids will turn out to be unresponsive or bidders unqualified, and so the need for pre-auction checks is correspondingly low. In such cases, a simple declaration by suppliers or contractors before the auction may be sufficient (for example, that they possess the required qualifications and they understand the nature of, and can provide, the subject matter of the procurement). In other cases, ascertaining responsiveness before the auction may be necessary (for example, when only those suppliers or contractors capable of delivering cars with a pre-determined maximum level of emissions are to be admitted to the auction), and initial bids will therefore be required. In some such cases, the procuring entity may wish to rank suppliers or contractors submitting responsive initial bids before the auction (in the given example, suppliers or contractors whose initial bids pass the established threshold will be ranked on the basis of the emissions levels), so as to indicate their relative position and the extent of improvement that their bids may need during the auction in order to increase a chance to win the auction. In such cases, the auction must be preceded by an evaluation of the initial bids. The article has been drafted to accommodate all these different options.

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<sup>10</sup> The following suggestions were made at the Working Group's eleventh session (A/CN.9/623, paras. 57 and 74-76): (i) the guidance would recognize difficulties with introducing and regulating ERAs as a phase in some procurement methods; (ii) alert enacting States about the lack of practical experience with regulation and use of ERAs in this manner; and (iii) it would explain whether and if so how ERAs might be incorporated in various procurement methods envisaged by the Model Law, and which modifications of traditional characteristics of those procurement methods where ERAs might be incorporated would be needed. The Guide would note, with relevant cross-references, that the use of ERAs in tendering proceedings would be inappropriate due to the particular characteristics of the latter (such as prohibition of substantive modification of tenders after their submission) and whether, in other procurement methods, provisions of the Model Law would have to be amended to allow repetitive submission of offers or quotations so that to accommodate the use of ERAs in them. The appropriate guidance on the suggestions still considered current is to be included. The provision of guidance to the Secretariat is requested.

3. Paragraph (1) regulates the solicitation of bids in stand-alone ERAs. By cross-referring to the provisions of article 32, it requires open solicitation, reflecting one of the conditions for the use of ERAs as a stand-alone procurement method — the existence of a competitive market (see article 30 (1)(b)). By additionally requiring international solicitation as an application of the default rule under the Model Law, the provisions aim at achieving as wide participation in an ERA as possible. The limited exceptions to international solicitation are those that apply to other procurement methods requiring open solicitation and are listed in article 32 (4) (domestic procurement in accordance with article 8 and cases of low-value procurement. See the guidance to article 32 (4) in paragraphs ... above). Where the auction is preceded by pre-qualification, the provisions of article 17 will apply to the pre-qualification proceedings and to the solicitation of bids from those that have been pre-qualified (noting that those provisions have also been designed to ensure open international solicitation as the default rule).

4. The provisions on solicitation have been designed to fulfil one of the essential conditions for use of stand-alone ERAs — effective competition during the auction (article 30 (1)(b)). Effective competition can only be present in the absence of collusion, which in turn requires the anonymity of bidders. The importance of fulfilling that condition is reiterated in some other provisions of this chapter: for example by the requirement in article 52 that the minimum number of suppliers or contractors required to register for the auction must be specified in the invitation to the auction (paragraph (1)(j)), and by requiring the cancellation of the auction if the specified minimum of registered suppliers or contractors is not reached. In addition, in accordance with article 54 (2), the procuring entity may cancel the auction even if the required minimum has been reached but the procuring entity still considers that the number of registered suppliers or contractors is not sufficient to ensure competition.

5. Paragraph (1) in addition lists all information that must be included in the invitation to the auction. Since in simple auctions no further information may be provided as the invitation is followed by the auction itself, the list is intended to cover exhaustively all information that must be provided to suppliers or contractors before the auction. The aim is to enable them to determine whether they are interested and eligible to participate in the procurement proceedings, and if so, how they can participate. The information requirements are similar to those applicable to an invitation to tender (article 36) and contents of solicitation documents in open tendering proceedings (article 38). As in those cases, the procuring entity may omit information about the currency of payment and about language (subparagraphs (i) and (p)) in domestic procurement if it would be unnecessary in the circumstances; however, an indication of the language or languages may still be important in some multilingual countries even in the context of domestic procurement.

6. Additional information has been included in the list (as compared to the open tendering list) reflecting the procedural particularities of this procurement method, in particular that it is held online and involves the automatic evaluation of bids during the auction. Subparagraph (g) specifically highlights the need to provide to potential suppliers or contractors, alongside the evaluation criteria and procedures, the mathematical formula that will be used in the evaluation procedure during the auction. The automatic evaluation of bids using a mathematical formula, one of the distinct features of ERAs, is possible only where the evaluation criteria are



quantifiable and expressed in monetary terms (as required by article 30 (1)(c)). Providing the mathematical formula from the outset of the procurement ensures that bids will be evaluated on a transparent and equal basis. This information, coupled with the requirement in paragraph (4)(c) to provide suppliers or contractors submitting initial bids with the result of any pre-auction evaluation, and the requirement in article 55 (2) to keep bidders informed of the progress of the auction, allows bidders to establish their status during the auction transparently and independently from the procuring entity and the system. They can thus verify the integrity of the evaluation process.

7. The information to be provided in subparagraph (j) to (p) is also particular to ERAs. Subparagraph (j) refers to the minimum number of suppliers or contractors required to register for the auction to be held. The importance of such information for ensuring effective competition during the auction is highlighted in paragraph 4 above. No single minimum can be stated in the Model Law itself (unlike for other procurement methods, such as request for quotations, where reference is made to a minimum of three quotations). This is because in some ERAs, a minimum of three bidders may fulfil the requirement of ensuring effective competition and may ensure the anonymity of bidders and the avoidance of collusion, while in other cases it may not. The circumstances of each procurement will guide the procuring entity in specifying the appropriate minimum number. To avoid collusion, the minimum should be set as at a high a level as possible, taking into account however that the procuring entity will be obliged to cancel the auction if the minimum is not reached (while it may, under article 54 (2), cancel the auction even if the minimum has been reached, for example if collusion among registered suppliers or contractors is suspected or genuine competition even with the established minimum cannot be achieved (see the relevant commentary to article 54 (2) in paragraph ... below)). Issues of objectivity and fairness of treatment of suppliers or contractors should not be overlooked in this context.

8. Subparagraph (k) is an optional provision (accordingly presented in brackets) permitting a maximum number of bidders to be set, and setting out the procedure and criteria that are to be followed in selecting the maximum. As the accompanying footnote explains, the provision should not be enacted by States where local technical conditions do not so require, and in any event should be complemented with paragraph (2) of this article, so as to provide essential safeguards against abuse. UNCITRAL has permitted this measure in ERAs to allow for technical capacity limitations constraining access to the systems concerned (e.g. the software acquired for holding ERAs may accommodate only a certain maximum number of bidders). However, enacting States should be aware that such capacity constraints are declining at a rapid rate, and the provision should become obsolete within a short period.

9. Establishing a maximum contradicts the Model Law's general principle of full and open competition; it is therefore permitted only in the exceptional circumstances prescribed. The concept is to limit the number of participants for practical reasons but not the principle of competition, and the restriction is permissible only to the extent justified by the actual technical capacity constraints. Selection of the participants is to be carried out only in accordance with pre-disclosed criteria and procedures, which must conform to the provisions of the Model Law. The procuring entity may resort to random selection or "first come first

served”, as in restricted tendering used on the ground of article 28 (1)(b) (see paragraph ... above), to limit the number on an objective basis (reflecting that where there is a sufficient number of participants, there will be sufficient market homogeneity to allow the best market offers to be elicited). It may alternatively resort to pre-selection, as in request for proposals with dialogue (see paragraphs ... above).<sup>11</sup> As explained in paragraphs ... above, neither pre-qualification nor examination of initial bids (which involve pass/fail tests) permit the selection of a pre-determined number of best-qualified suppliers or contractors or best-ranked bids.

10. Subparagraphs (l) to (p) list information about the technical aspects of the auction that must be provided to accommodate its on-line features and to ensure transparency and predictability in the process (such as specifications for connection, the equipment being used, the website, any particular software, technical features and, if relevant, capacity). The Model Law lists only those minimum functional requirements crucial for the proper handling of ERAs, and they are expressed in technologically neutral terms. These requirements should be supplemented by detailed regulations. As an example, regulations must spell out the criteria governing the closing of the auction referred to in subparagraph (o), such as: (i) when the date and time specified for the closing of the auction has passed; (ii) when the procuring entity, within a specified period of time, receives no more new and valid prices or values that improve on the top-ranked bid; or (iii) when the number of stages in the auction, fixed in the notice of the ERA, has been completed. The regulations should also make it clear that each of these criteria may entail the prior provision of additional specific information. For example, item (ii) above would require the specification of the time that will be allowed to elapse after receiving the last bid before the auction closes. Item (iii) above would require the prior provision of information on whether there will be only a single stage of the auction, or multiple stages (in the latter case, the information provided should cover the number of stages and the duration of each stage, and what the end of each stage entails, such as whether the exclusion of bidders at the end of each stage is envisaged).

11. With reference to subparagraph (p), the regulations should also require the disclosure of: (i) the procedures to be followed in the case of any failure, malfunction, or breakdown of the system used during the auction process; (ii) how and when the information in the course of the auction will be made available to the bidders (at a minimum, and to ensure equal treatment, the same information should be provided simultaneously to all bidders); and (iii) as regards the conditions under which the bidders will be able to bid, any minimum improvements in price or other values in any new bid during the auction or limits on such improvements. In the latter, case, the information must explain the limits (which may be inherent in the technical characteristics of the items to be procured).

12. This detailed information may be provided in the notice of the ERA itself or, by reference, in the rules for the conduct of the auction, provided that all relevant information is made known to all suppliers or contractors sufficiently in advance

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<sup>11</sup> It is to be considered whether reference to pre-selection and methods of selection in restricted tendering proceedings are appropriate in the context of ERAs. The provision of guidance to the Secretariat is requested.

before the auction, to allow them to properly prepare for participation in the auction. It should be acknowledged that it may not always be possible to provide all relevant information in the invitation. For example, the deadline for registration to the auction (subparagraph (m)) and the date and time of the opening of auction (subparagraph (n)) in complex auctions involving the examination or evaluation of initial bids (see paragraphs 16-21 below) may not be known with certainty before the examination or evaluation is completed. The criteria for closing the auction may need to be determined when the number of suppliers or contractors registered for the auction and other information that affects the structure of the auction (whether it would be held in one round or several subsequent rounds) are known. Where it is not possible to provide all relevant information in precise terms, the invitation must set out at a minimum the general criteria, leaving specific criteria to be defined later in the process but in no case later than the commencement of the auction.

13. Some information listed in paragraph (1) must be interpreted by reference to other provisions of this chapter. For example, subparagraph (f), referring to the criteria and procedure for the examination of bids against the description of the subject matter of the procurement, should be read together with the provisions of article 56 (2) that allow the examination of the winning bid after the auction in very simple auctions. Subparagraph (f) also includes any criteria that cannot be varied during the auction (such as minimum technical requirements). Subparagraph (s), referring to the name, functional title and address of contact person(s) in the procuring entity for direct communication with suppliers or contractors “in connection with the procurement proceedings before and after the auction”, has to be read together with the provisions of article 55 (2)(d) that prohibits any communication between the procuring entity and bidders during the auction.

14. Some information required to be provided for other procurement methods is not appropriate in the context of ERAs, and so does not appear in paragraph (1). For example, bids for a portion or portions of the subject matter of the procurement are not permitted (otherwise, separate auctions within the same procurement proceedings would be required). There is no provision permitting a meeting of suppliers or contractors, in order to ensure that the anonymity of bidders is preserved. Subparagraph (x) on post-auction formalities does not include any reference to approval by an external authority, both to reflect the conditions for the use of stand-alone ERAs and the type of the subject matter envisaged to be procured through such ERAs under article 30 (1) of the Model Law. The execution of a written procurement contract under article 21 of this Law is, however, provided for, and specific formalities in the context of ERAs, such as possibility of assessing qualifications or responsiveness after the auction, have been included.<sup>12</sup>

15. Paragraph (2) dealing with the imposition of a maximum number of suppliers or contractors that can be registered for the auction has been discussed in connection with paragraph (1) (k) of the article (see paragraph 8 above). Notably, the procuring entity may impose such a maximum number only to the extent that technical capacity limitations in its communication system so require. As is also the case with open framework agreements, enacting States should be aware that

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<sup>12</sup> It may be considered that more detail of the policy considerations should be included. If so, the provision of guidance on those policy considerations to the Secretariat is requested.

technical developments are likely to make this provision obsolete in the short to medium term.

16. Paragraphs (3) and (4) establish additional requirements for the contents of the invitation to the auction and other pre-auction stages in stand-alone ERAs involving initial bids. Although it would normally be the case that a price-only auction does not require initial bids and other pre-auction procedures, the provisions are flexible enough to allow for this eventuality (where, for example, the procuring entity considers that minimum technical requirements are critical). The enacting State may omit these two paragraphs if it decides to provide in its national public procurement law only for very simple auctions, not involving any pre-auction stages beyond the invitation and registration for the auction.

17. In more complex auctions involving initial bids, the procuring entity must include information in the invitation to the auction as specified in paragraph (3), i.e. additional to that listed in paragraph (1). In such cases, the procuring entity must both request initial bids and provide sufficiently detailed instructions for preparing them, including the scope of the initial bids, the language in which they are to be prepared and the manner, place and deadline for presenting them. Paragraphs (1) (f) and (g) as regards the criteria for examination and evaluation of bids will also be applicable to initial bids, and the information to be provided under those paragraphs will therefore need to cover examination or evaluation of bids before and during the auction. Since an overlap will exist between the information to be provided about the initial bids and bids during the auction, the procuring entity must correctly identify which information is relevant to which stage, to avoid confusion (in particular as regards the manner, place and deadline for presenting initial bids as opposed to the manner of accessing the auction and the manner and deadline for registering to the auction, different evaluation criteria and procedures and so on). The information provided as regards preparation, examination or evaluation of initial bids must be carefully drafted to allow suppliers or contractors to prepare initial bids and assure them that their initial bids will be examined or evaluated on an equal basis.

18. Paragraph (4) regulates additional pre-auction steps that are required for an examination or evaluation of initial bids. To allow effective challenge by aggrieved suppliers or contractors, a notice of rejection of any initial bid together with the reasons for rejection must be promptly communicated to the supplier or contractor concerned. The provisions of paragraph (4) do not regulate the reasons for rejection but provisions of chapter I of the Model Law will apply, such as article 9 setting reasons for disqualification, article 10 that set out responsiveness criteria, article 19 on rejection of abnormally low submissions, and article 20 on exclusion of a supplier or contractor on the ground of inducements, conflicts of interest or unfair competitive advantage. For ease of reference, the enacting State may wish to consider listing all grounds for rejection of initial bids in the procurement regulations.

19. All suppliers or contractors submitting responsive initial bids must be invited to the auction unless the provisions of paragraphs (1) (k) and (2) have been enacted and the number of suppliers or contractors submitting responsive initial bids to be invited to the auction has been limited by the procuring entity in accordance with those provisions. If so, the procuring entity can reject bids in accordance with the criteria and procedure specified in the invitation to the auction for the selection of

the maximum number. If the pool of suppliers or contractors submitting responsive initial bids will turn out to be below the minimum established in accordance with paragraph (1) (j), the procuring entity must cancel the auction; if the pool turns out to be above the minimum but still insufficiently large to ensure effective competition during the auction, the procuring entity may decide to cancel the auction, in accordance with article 54 (2) (see the relevant commentary to article 54 (2)).

20. As stated in paragraph 2 above, some complex auctions may involve an examination and all initial bids that meet the minimum threshold are admitted to the auction. In some other complex auctions, in addition, there is an evaluation of the initial bids and they may be ranked. In the latter case, the ranking of suppliers or contractors submitting responsive bids and other information about the outcome of the evaluation must be communicated to them, under paragraph (4)(c), before the auction can commence. The information to be communicated may vary from auction to auction; in all cases, it should be sufficient to allow those suppliers or contractors to determine their status vis-à-vis their competitors in the auction before the auction so that to allow meaningful and responsible bidding during the auction. Together with the mathematical formula to be used during the auction, as disclosed in the invitation to the auction in accordance with paragraph (1)(g), this information should allow suppliers or contractors to independently assess their chances to succeed in the auction and identify which aspects of their bids they should and could vary and by how much, in order to improve their ranking.<sup>13</sup>

21. The provisions of paragraph (4) have been designed with a view to preserving the anonymity of bidders and the confidentiality of information about their initial bids and the results of any examination or evaluation. Only information relevant to the supplier or contractor's initial bid is provided to each supplier or contractor. To ensure fair and equitable treatment of suppliers and contractors, the information must be dispatched promptly and concurrently to all of them.<sup>14</sup>

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<sup>13</sup> The Guide may need to provide further guidance as regards the extent of information on the outcome of the full evaluation that should be provided to suppliers or contractors presenting initial bids. See paragraph 3 of the guidance to article 55 for similar considerations. The provision of the guidance to the Secretariat on this issue is requested.

<sup>14</sup> The location of the following wording that was suggested in the Working Group to be included in the Guide is to be considered: "In complex auctions, the procuring entity may receive initial bids that significantly exceed the minimum requirements, particularly where suppliers would be permitted to offer items with different technical merits and correspondingly different price levels." Another issue for consideration is the question of tender securities and whether or not they would be used in stand-alone ERAs. For simple auctions, the answer is presumably not (whether they are stand-alone or a phase); for complex auctions, the situation may be different and tender securities might be appropriate. If they are to be required, how will the requirements work in practice? What could permit the forfeiture of the tender security? Will the failure to register for the auction under article 54 permit the forfeiture on the ground that participating in the auction has been identified as a term of the procurement? In this case, the aim is to avoid situations where the procuring entity is prevented from holding the auction because one or two suppliers have failed to register for the auction. In practice, however, bidders cannot be obliged to change any aspects of their bids and can simply abstain from the bidding, so the tender security may in fact be worthless. It should be recalled that the Working Group has decided that there should be no provisions requiring bidding during the auction and excluding from the auction inactive bidders because such provisions would be worthless, especially in the light of the tendency in auctions to actively bid at last moment. The guidance on tender securities in the

**Article 53. Procedures for soliciting participation in procurement proceedings involving an electronic reverse auction as a phase preceding the award of the procurement contract**

1. This article regulates the procedures for soliciting participation in procurement proceedings involving an ERA as a phase. The conditions for use of such ERAs are discussed in the guidance to article 30, at paragraphs ... above.
2. Paragraph (1) refers to the minimum information that must be included when the procuring entity first solicits participation of suppliers or contractors in such procurement proceedings. The provisions of paragraph (1) require that, in addition to all the other information required to be provided to suppliers or contractors, the procuring entity must specify that an ERA will be held, must provide the mathematical formula to be used during the auction and must disclose all other information necessary for participation in the auction. The disclosure of this minimum information at the outset of the procurement is essential in order to allow suppliers or contractors to determine not only their interest but also their ability to participate in the procurement. Suppliers or contractors may decide against participation in procurement involving ERAs, for example because of the lack of technical capacity, information technology literacy or confidence in the process (for the latter, and suggested confidence-building measures, see paragraphs ... above).
3. Once announced, the ERA will be the method of selecting the successful supplier or contractor, unless the number of suppliers or contractors participating is insufficient to ensure effective competition. In this case, and in accordance with article 54 (2), the procuring entity has the right to cancel the ERA. It also has a separate right under article 18 to cancel the procurement proceedings. This right may in particular be exercised if it is become known to the procuring entity that the anonymity of bidders has been compromised at earlier stages of the procurement proceedings and there is a risk of collusion.
4. Paragraph (2) refers to the stage immediately preceding the holding of the auction, after all other steps required to be taken in the procurement concerned have been completed (such as pre-qualification, examination or evaluation of initial bids) and the only remaining step is to determine the successful bid through the auction. The procuring entity must provide the remaining participants with detailed information about the auction: the deadline by which they must register for the auction, the date and time of the opening of the auction, identification requirements and all applicable rules for the conduct of the auction. The provisions of articles 52 and 53 have been drafted to ensure that equivalent information is provided to participants in stand-alone ERAs and ERAs as a phase. Further discussion of the required information is found in the guidance to article 52 (see paragraphs ... above).

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context of this chapter should be aligned with the commentary to article 16 on tender securities where similar issues are raised.

**(A/CN.9/731/Add.7) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany articles 54-56 of chapter VI (Electronic reverse auctions) of the UNCITRAL Model Law on Public Procurement, and points regarding electronic reverse auctions proposed to be discussed in a section of the Guide to Enactment addressing changes from the 1994 text of the Model Law.

**GUIDE TO ENACTMENT OF THE  
UNCITRAL MODEL LAW ON  
PUBLIC PROCUREMENT****B. Provisions on electronic reverse auctions to be included in the article-by-article commentary (*continued*)****Article 54. Registration for the electronic reverse auction and timing of holding of the auction**

1. This article regulates the essential aspects of registration for the auction and the timing of the auction, and is intended to ensure the fair and equitable treatment of participating bidders, through the transparency requirements in paragraphs (1) and (2) (communicating confirmation of registration and, where relevant, a decision on the cancellation of the auction promptly to each registered supplier or contractor) and the requirement in paragraph (3) that reasonable time be afforded to suppliers or contractors to prepare for the auction. The latter requirement is also important, especially in stand-alone ERAs, to permit an effective challenge to the terms of solicitation under chapter VIII. Such a challenge can be made only up to the deadline for presentation of submissions, which in simple auctions (with no pre-auction examination or evaluation of initial bids) means up to the opening of the auction; in other cases, it means up to the presentation of initial bids. The period of time between the issue of the invitation to the auction and the auction itself should therefore be determined by reference to what sufficient time to prepare for the auction will be in the circumstances (the simpler the auction, the shorter the possible duration). Other considerations include how to provide a minimum period that will allow a challenge to the terms of solicitation. The time requirement is qualified, as stipulated in paragraph (3), by the reasonable needs of the procuring entity, which may in limited circumstances (for example, in cases of extreme urgency following catastrophic events) prevail over the other considerations.

2. Paragraph (2) allows the procuring entity to cancel the auction if the number of suppliers or contractors registered for the auction is insufficient to ensure effective competition. The provisions are not prescriptive: they give discretion to the procuring entity to decide on whether the auction in such circumstances should be cancelled. Since the decision not to cancel may be inconsistent with the general thrust of competition and avoiding collusion, it should be justified only in the truly

exceptional cases where the procurement must continue despite the lack of effective competition. The enacting State is encouraged to provide in the procurement regulations for the exhaustive list of circumstances that would justify the auction to proceed in such cases. There may be other reasons permitting cancellation (for example, suspicion of collusion as explained in paragraph ... above). The provisions do not apply in situations when the procuring entity must cancel the auction, for example under article 52 (1) (j) when any required minimum number of registered suppliers or contractors has not been reached (see paragraphs ... above), or when the procuring entity must terminate the auction for technical grounds under article 55 (5) (see paragraphs ... below).

3. In stand-alone ERAs, the cancellation of the auction means the cancellation of the procurement. The procuring entity, upon analysing the reasons leading to the cancellation, may decide that another ERA would be appropriate, for example if mistakes in the description that caused a failure of sufficient number of suppliers or contractors to register for the auction can be rectified, or may choose another procurement method. Where ERAs as a phase are used, the cancellation of the auction will not necessarily lead to the cancellation of the procurement: the procuring entity may decide to award the contract on the basis of the results of the pre-auction examination and evaluation of bids, provided that this option was specified at the outset of the procurement.<sup>1</sup>

4. Where ERAs as a phase are used, the procuring entity should also specify at the outset of the procurement any consequences if suppliers or contractors fail to register for the auction [and address issues of tender securities if needed].<sup>2</sup>

#### **Article 55. Requirements during the electronic reverse auction**

1. This article regulates the requirements during auctions, whether stand-alone ERAs or ERAs as a phase. Paragraph (1) specifies two types of auctions: the first type, simpler auctions, where the winning (lowest) price determines the successful bid; and a second type, where the winning bid is determined on the basis of price and additional non-price criteria. Such additional non-price criteria may vary from near-price criteria (such as delivery and guarantee terms) to more complex criteria (such as the level of emissions in cars). Regardless of the complexity of such additional criteria, all must be assigned a value, expressed in figures or percentages, in a pre-disclosed mathematical formula that makes their automatic evaluation possible. As required under articles 52 and 53 of the Model Law, information about each criterion used in evaluation, the value assigned to it and the mathematical formula are to be disclosed at the outset of the procurement proceedings; they cannot be varied during the auction. What can be varied during the auction are prices and modifiable elements.<sup>3</sup>

2. Paragraph (2) lists the essential requirements for holding the auction: in this respect, they reflect the features of the auction system under the Model Law and as

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<sup>1</sup> The text reflects the points made in the Working Group; however the option to award the contract on the basis of the results of the pre-auction examination and evaluation of bids, provided that this option was specified at the outset of the procurement, is not explicitly envisaged in the text of the Model Law.

<sup>2</sup> As regards the text put in square brackets, see footnote 14 in document A/CN.9/731/Add.6.

<sup>3</sup> The term “modifiable elements” may need further explanation in the Guide.



defined in article 2 (by contrast with some other types of auction that are in use in practice), implement the conditions for use of auctions as set out in article 30 and elaborate on the requirements contained in articles 52 and 53. Subparagraphs (a) and (c), for example, highlight the continuous process of bidding. Subparagraph (a) in addition requires that the bidders are provided with an equal opportunity to bid. In practical terms, this means for example, that the system must record bids immediately upon receipt, regardless of the originator, and must evaluate them and their effect on other bids. The system must promptly communicate the relevant information to all bidders. The latter requirement is elaborated in subparagraph (c), which refers to instantaneous communication to each bidder of sufficient information allowing it to determine the standing of its bid vis-à-vis other bids. The drafting of these provisions indicates that the same information is not necessarily communicated to all bidders, but the information communicated must be sufficient to allow this determination to be made, and it must ensure the fair and equitable treatment of bidders.

3. The Model Law is intentionally silent on the nature of the information that must be disclosed to fulfil this requirement. In deciding on how to regulate this issue, enacting States will need to balance considerations of transparency and promoting rigorous bidding against avoiding collusion and preventing the disclosure of commercially sensitive information. Appropriate options, depending on the auction and reflecting its complexity and other factors, include: (a) disclosing whether or not a bidder was leading the auction or had submitted the leading price; (b) disclosing the leading price; (c) disclosing to each bidder its standing compared with the leading bid (but no information on other bids); and (d) disclosing the spread of all bids. In addition, the procuring entity should be able to see the spread of all bids. Enacting States should be aware that, as experience in some jurisdictions indicates, the disclosure of the leading price could encourage very small reductions in the bid price, and thereby prevent the procuring entity from obtaining the best result; it could also encourage the submission of abnormally low bids. The greater the degree of information provided about other bids, the greater the possible risks of collusion; suppliers may also be able to reverse engineer others' bids in more complex auctions using the mathematical formula provided. [There are reported difficulties in preventing these situations; at the same time, ensuring a meaningful bidding process and automatic evaluation while not revealing commercially sensitive information is also problematic.]<sup>4</sup> Whatever decision is taken by the procuring entity as regards the type of information that is to be disclosed during the auction, this decision must be reflected in the rules for the auction that are made available to potential bidders before the auction commences. These provisions supplement the requirement in articles 52 (1) (g) and 53 (1) (a) to disclose the criteria and procedure that will be used during the auction and the requirement to provide the results of any pre-auction evaluation.

4. Subparagraph (b) reiterates the principle of automatic evaluation of bids during the auction. Together with subparagraph (d), it highlights the importance of avoiding any human intervention during the running of the auction. The auction device collects electronically the bids which are automatically evaluated according to the criteria and processes disclosed in the invitation to the auction. The collection

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<sup>4</sup> Examples of existing good practices as regards the text put in square brackets may need to be included in the Guide. The provision of the guidance to the Secretariat is requested.

device should ascribe identification tags to each bid that do not compromise anonymity. Online capacity should also exist to allow an immediate and automatic rejection of invalid bids, with immediate notification of the rejection and an explanation of the reasons for rejection.<sup>5</sup> A contact point for urgent communications concerning possible technical problems should be offered to bidders. Such a contact point must be external to the auction device [and to the procurement proceedings in question].<sup>6</sup>

5. Paragraphs (3) and (5) of the article reiterate another important principle underlying auctions as provided for in the Model Law — the need to preserve the anonymity of bidders before, during and after the auction. Paragraph (3) reflects this principle by prohibiting the procuring entity from disclosing the identity of any bidder during the auction. Paragraph (5) extends this prohibition to the post-auction stage, including where the auction is suspended or terminated. The provisions should be construed broadly, prohibiting not only explicit disclosure but also indirect disclosure, e.g. by allowing the identities of the bidders to be disclosed or identified by other bidders. Operators of the auction system on behalf of the procuring entity, including any persons involved, or others involved in the process in other capacities, e.g. the contact point for urgent communications concerning possible technical problems, should be regarded as agents for the procuring entity in that regard, and so subject to the same prohibition. It is clear, however, that there may be practical difficulties in preserving the anonymity of bidders, despite the provisions of this article and the chapter as a whole, in procurement for which a more or less stable pool of providers exists, and in repeated procurement of similar items through ERAs.<sup>7</sup>

6. Paragraph (4) supplements the requirements in articles 52 (1) (o) and 53 (2) (c) as regards the need to disclose the criteria governing the closing of the auction at the latest before the auction is held. These rules, which will have been previously disclosed, may not be changed during the auction. Further, under no circumstances may the auction be closed before the established deadline even if no bidding takes place. It is commonly observed in practice that active bidding starts towards the closure of the auction. Giving the discretion to the procuring entity to close the auction before the established deadline would open the door to abuse, for example by allowing pre-auction arrangements between a bidder and the procuring entity to influence the outcome of the auction in favour of that bidder. On the other hand, there is no prohibition against extending the deadline for submission of bids as long as it is done in a transparent manner. This facility may prove useful, for example when the auction had to be suspended for technical reasons (as provided for in paragraph (5) of the article). It is good practice to require the rules of the auction to address the criteria and procedures for any extension of the deadline for submission of bids.

7. Suppliers may withdraw from the ERA before its closure. This should not affect the auction unless the withdrawal occurs for reasons requiring suspension or

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<sup>5</sup> Further explanation in the Guide may be needed. The provision of the guidance to the Secretariat is requested.

<sup>6</sup> Further explanation in the Guide may be needed. The provision of the guidance to the Secretariat is requested.

<sup>7</sup> Examples of existing good practices to mitigate such risks may need to be included in the Guide. The provision of the guidance to the Secretariat is requested.

termination of the auction under paragraph (5) of the article (for example, failures in the procuring entity's communication system). In all other cases, the auction must proceed. Upon the closure of the auction, the procuring entity may need to analyse the reasons for withdrawal, especially if a substantial number of bidders have withdrawn, and any negative effect of such withdrawal on the outcome of the auction. The procuring entity's right to cancel the procurement at any stage of the procurement is reiterated in article 56, which in this respect supplements article 18 (1) (for the guidance to article 18 on cancellation of the procurement, see paragraphs ... above).

8. Paragraph (5) requires terminating or suspending of the auction in the circumstances set out in the paragraph. Apart from failures in the procuring entity's communication system that risk the proper conduct of the auction, there may be other reasons for termination or suspension of the auction. While it would not be possible to list all of them in the procurement law, the Model Law requires setting them all in the rules for the conduct of the auction that are to be made available under articles 52 and 53 as applicable. No further discretion should be given to the procuring entity in this respect since the exercise of such discretion could lead to abuse and human intervention in the process. Although in some cases this intervention may be unavoidable, such cases must be minimized. For example, enacting States may put in place through the procurement regulations mechanisms for procuring entities to monitor the auction proceedings for market manipulation [and to permit them to intervene to prevent possible collusive behaviour. This should however be coupled with the requirement for the procuring entity to possess good intelligence on past similar transactions, the relevant marketplace and market structure. Enacting States should be aware that practical difficulties may exist in distinguishing justifiable from collusive behaviour and therefore any discretion given to procuring entities in this respect should be carefully regulated in order to prevent abuses and unjustifiable disruptions.]<sup>8</sup>

9. The rules for the conduct of the auction must also provide for procedural safeguards that should be in place to protect the interests of bidders in case of the termination or suspension of the auction, such as: immediate and simultaneous notification of all bidders about suspension or termination; and in the case of suspension, the time for the reopening of the auction and the new deadline for its closure.

10. A termination of the auction, unlike suspension, is likely to lead to the cancellation of the procurement (for the differences between simple and complex auctions in this regard, see paragraph 3 of the commentary to article 54 above).<sup>9</sup>

#### **Article 56. Requirements after the electronic reverse auction**

1. This article regulates steps to be taken after the auction, regardless of whether it is a stand-alone ERA or ERA as a phase. The applicable rules are the same since in all cases the auction precedes the award of the procurement contract. No further evaluation or negotiation is allowed after the auction has been held to avoid

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<sup>8</sup> It is to be considered whether this guidance should be expanded, left as is, or moved to a more general discussion of collusion.

<sup>9</sup> Further explanation as to how termination of the auction could not lead to cancellation in stand-alone ERAs is needed.

impropriety, favouritism or corruption. The results of the auction are therefore intended to be the final results of the procurement proceedings. The practical implication is that, where the solicitation documents stipulate that the procurement contract is to be awarded to the lowest priced bid, the bidder with that bid is to be awarded the procurement contract and the winning price is to figure in the procurement contract. Where the solicitation documents stipulate price and non-price criteria for the award of the procurement contract, the bidder submitting the most advantageous bid<sup>10</sup> as determined through the application of the pre-disclosed mathematical formula is to be awarded the procurement contract and the terms and conditions of the winning bid are to figure in the procurement contract. The limited exceptions to these rules are spelled out in paragraphs (2) and (3).

2. Paragraph (2) is applicable to simple stand-alone ERAs (which are not preceded by initial bids). In such auctions, assessments of qualification and responsiveness are carried out after the auction, and only with respect to the winner and the winning bid. This approach saves time and cost. If the winner turns out to be unqualified or its bid unresponsive, the procuring entity has two options: either to cancel the procurement proceedings or award the procurement contract to the next winning bidder, provided that the latter is qualified and its bid is responsive. This approach proceeds on the assumption that all bidders responding to the invitation can deliver the requested products or services at more or less the same level of quality; where the procurement involves simple, off-the-shelf goods or services, the risk to the procuring entity is low, because alternative sources of supply will be readily available. Guidance to suppliers that will participate in auctions should underscore this possibility, so that they are not lured into presenting unsustainable bids at later stages of the auction.

3. Paragraph (3) is applicable to any type of auction, and addresses the situation in which the winning bid appears to the procuring entity to be abnormally low (for an explanation of this term, see the guidance to article 19 in paragraph ... above). The provisions of this paragraph are also subject to the general rules on the investigation of abnormally low submissions contained in article 19, including the safeguards to ensure an objective and transparent assessment. If all conditions of article 19 for rejecting the abnormally low bid have been fulfilled, the procuring entity may reject the bid and choose either to cancel the procurement proceedings or award the procurement contract to the next winning bidder (see the guidance to that article on the appropriate procedures). This exception to the general rule requiring the award of the procurement contract to the winning bidder as determined at the end of the auction is included, in particular, to prevent dumping. The provisions of the Model Law have been drafted to allow greater flexibility to the procuring entity, but subject to the safeguards against abuse provided for in article 19.

4. In deciding which option to follow under paragraph (2) or (3) — to cancel the procurement proceedings or award the procurement contract to the next winning bidder — the procuring entity should assess the consequences of cancelling the auction, in particular whether holding a second auction in the same procurement

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<sup>10</sup> No explanation of the term “most advantageous bid” is made in the commentary to article 56: this notion will be addressed elsewhere, unless it is considered that such explanation is required in the context of article 56 as well.

proceedings would be possible and the costs of an alternative procurement method. In particular, the anonymity of the bidders may have been compromised and any re-opening of competition may also be jeopardized. This risk, however, should not encourage the procuring entity always to opt for the next winning bid, in particular where collusion between the winning bidder and the next winning bidder is suspected. The provisions of paragraph (2) and (3) are drafted with the intention of avoiding the imposition of any particular step on the procuring entity.

5. In either case under paragraph (2) or (3), prompt action must be taken after the auction, in strict compliance with the applicable provisions of the Model Law, so as to ensure that the final outcome should be determined as soon as reasonably practical. These steps should not be treated as an opportunity to undermine the automatic identification of the winning bid.<sup>11</sup>

### **C. Points regarding electronic reverse auctions proposed to be discussed in a section of the Guide to Enactment addressing changes from the 1994 text of the Model Law**

ERAs have been increasing in use since the adoption by UNCITRAL of the 1994 Model Law. The 1994 text did not provide for traditional in-person auctions, in large part because of observed collusion. Electronic technologies have facilitated the use of reverse auctions by greatly reducing the transaction costs, and by permitting the anonymity of the bidders to be preserved as the auctions take place virtually, rather than in person. For this reason, the Model Law allows only online auctions with automatic evaluation processes, where the anonymity of the bidders, and the confidentiality and traceability of the proceedings, can be preserved. The risk of collusion may nevertheless be present even in ERAs especially when they are used as a phase in other procurement methods or preceded by off-line examination or evaluation of initial bids.

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<sup>11</sup> The provision of the guidance to the Secretariat is required on the following points raised in the Working Group: on the practical implications of each option described in paragraphs (2) and (3); on the appropriate explanation of the nature of bids (binding/non-binding and under which conditions); and on the use of standstill periods and review in the auction context (including whether this guidance should be under article 21 and chapter VIII with a cross-reference here, or vice versa).

**(A/CN.9/731/Add.8) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement****ADDENDUM**

This addendum sets out a proposal for a section in the Guide that would discuss general issues arising from the use of framework agreements, and a proposal for the Guide text to accompany article 31 on conditions for use of a framework agreement procedure and article 57 of chapter VII (Framework agreements procedures) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE  
UNCITRAL MODEL LAW ON  
PUBLIC PROCUREMENT**

...

**A. Provisions on framework agreements to be included in Part I of the Guide, preceding the article-by-article commentary, or in the article-by-article commentary as an introduction to chapter VII**

**1. General description of framework agreement procedures**

1. Framework agreement procedures can be described as methods of making repeated purchases of a subject matter of the procurement over a period of time, which involve:

(a) The solicitation of submissions against pre-determined terms and conditions;

(b) The assessment of suppliers' or contractors' qualifications and the examination of their submissions against those terms and conditions, and, in closed framework agreements (described in ... below), the evaluation of those submissions;

(c) Selected supplier(s) or contractor(s) and the procuring entity entering into a framework agreement on the basis of the submissions. The framework agreement sets out the terms and conditions of future purchases, and is concluded for a given duration (steps (a)-(c) are the "first stage" of the procurement); and

(d) Subsequent and periodic placing of purchase orders with the supplier(s) or contractor(s) under the terms of the framework agreement, as particular requirements arise (which may involve a further round of competition. This is the "second stage" of the procurement, and the placement of purchase orders with a particular supplier or contractor is the award of procurement contracts).

2. Framework agreement procedures are often used to procure subject matters for which a procuring entity has a repeat need over a period of time, but does not know the exact quantities, nature or timing of its requirements. The purchases could otherwise be made through a single procurement, with a series of deliveries over the duration of the procurement contract. In essence, the framework agreement establishes the terms upon which purchases will be made (or establishes the main

terms and a mechanism to be used to establish the remaining terms or refine the initially established terms). Terms that are not established at the outset or need to be refined may include the quantities to be delivered at any particular time, the time of deliveries, the overall quantity of the procurement and the price.

3. There is a variety of terminology in practical use for the type of procedures described above, including supply arrangements, indefinite-delivery/indefinite-quantity contracts or task-order contracts and umbrella contracts. The extent to which the first stage of the procurement includes all the steps set out in paragraph 1(a)-(c) above also varies. Enacting States, in considering introducing framework agreements procedures in their jurisdictions should consider that, because of these variables, practical experience and guidance from other jurisdictions may not necessarily be easily replicable in their jurisdictions.

## **2. Potential benefits and concerns observed in the use of framework agreements procedures**

4. The main potential benefit of framework agreement procedures is that they are administratively efficient because they effectively aggregate procurement proceedings. Under a framework agreement procedure, many steps in the procurement process are undertaken once for what would otherwise be a series of procurement procedures each requiring the same steps. These steps include drafting terms and conditions, advertising, assessing suppliers' or contractors' qualifications, examining, and in some forms of framework agreements evaluating, submissions. As a result, purchases can be made with lower transaction costs and shorter delivery times than would be the case were each purchase procured separately. Other noted benefits include enhancing transparency and competition for smaller procurements, which are sometimes considered at risk of abuse or failure to achieve value for money because of the less transparent and open ways in which they are often conducted: the grouping of a series of smaller procurements can amortize advertising and other costs and can facilitate oversight, either by oversight agencies or by suppliers or contractors themselves. Framework agreements can also ensure security of supply,<sup>1</sup> and enable further costs savings to be made through centralized purchasing (that is, a central unit of one entity makes purchases for a number of units, or one entity or consortium makes purchases on behalf of several entities).

5. However, enacting States should be aware of concerns about the use of framework agreement procedures, some of which are inherent in the technique, and some that arise from its misuse or overuse. For example, the administrative efficiency that supports the use of the technique may compromise other procurement objectives, such as value for money, if procuring entities use framework agreements where they are not in fact the appropriate tool for the procurement concerned, simply to achieve administrative efficiencies. It is often the case that, under a framework agreement, prices do not remain current and competitive, because they tend to remain fixed rather than varying with the market. Nevertheless, procuring entities may decide to procure through an existing framework agreement, even though its terms and conditions do not quite meet their needs or reflect the current

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<sup>1</sup> Reference to security of supply is made in this and other similar context throughout this draft despite the fact that article 31 of the draft Model Law does not list security of supply as a condition for use of a framework agreement procedure.

market conditions, to avoid having to go through the new procurement proceedings (and to draft new terms and conditions of the procurement, to issue a procurement notice, to ascertain the qualifications of suppliers or contractors, to conduct a full examination and evaluation of initial submissions and so on). As a result, procuring entities may fail to assess price and quality sufficiently, when placing a particular purchase order, and will tend to overemphasize specifications over price. In addition, where the operation of framework agreements is outsourced to centralized purchasing entities, the entities concerned may have an interest in keeping their fee earnings high by keeping prices high and promoting purchases that go beyond the needs of the procuring entity. Furthermore, centralized purchasing through framework agreements can encourage standardization across government, but the needs of individual ministries or agencies may themselves not be identical, with the result that some obtain better value for money than others.

6. Experience in the use of framework agreement procedures has also indicated risks to, or reduced, transparency, competition and value for money in the award of procurement contracts under the framework agreement as compared with traditional procurement methods. As suppliers or contractors that are not parties to the framework agreement cannot participate in the award of procurement contracts, there is in fact limited competition at the second stage. The negative consequences of restricted competition are exacerbated where the effect of the framework agreement is to create a monopolistic or oligopolistic market. The suppliers or contractors that are parties to the framework agreement will be aware of each other's identities, and so ensuring competition (rather than collusion) once the framework agreement is in place can also be difficult in practice. Framework agreements are also considered to involve a higher risk of procurement being directed to certain suppliers or contractors because of their relationships with procuring entities, without genuine competition among suppliers or contractors. Under some closed framework agreements, no competition among suppliers or contractors parties to the framework agreement takes place at all: without transparent award mechanisms at the second stage, there are significantly higher risks of favouritism and corruption. Furthermore, the flexibility in refining requirements at the second stage (further discussed in paragraphs ... below) means that there is a risk in practice of substantive changes in the ultimate procurement contract, without the safeguards of opening the procurement to full competition (i.e. by suppliers or contractors not parties to the framework agreement). Such risks are however lower in open framework agreements where newcomers can join the agreement on a continuous basis (see ... below).

7. The approach to the provisions enabling the use of framework agreement procedures under the Model Law has therefore been designed to facilitate the appropriate and beneficial use of the technique, but to discourage its use where framework agreement procedures will not maximise value for money. For example, the procedures can be appropriate for commodity-type purchases in a highly competitive market, such as stationery, spare parts, information technology supplies and maintenance, and where there will normally be regular purchases for which quantities may vary. They are also suitable for the purchase of items from more than one source, such as electricity, and for items for which the need can sometimes arise on an emergency basis, such as medicines (where a significant objective is to avoid the excessively high prices and poor quality that may result from the use of single-source procurement in emergency situations). These types of procurement may also



require security of supply, as may be the case for specialised items requiring a dedicated production line, and framework agreements are suitable tools for such procurement.

8. Even where the framework agreement is the appropriate technique for the procurement(s) concerned, careful oversight is required to ensure the framework agreement is used appropriately. There will be no advantage in terms of administrative efficiency of a two-stage procedure over a one-stage procedure if the framework agreement is not subsequently used for repeated purchases. This point underlies why complex procurement for which the terms and conditions (including specifications) vary for each purchase, such as large investment or capital contracts, highly technical or specialized items, and more complex services procurement, would not be suitable for procurement through framework agreements. There is insufficient repetition in these procurements: tailoring the second stage to the particular need at hand will require more steps of the first stage of the procurement to be repeated, compromising administrative efficiency (and transparency and competition, as described in paragraph ... above). Where the reason for use of framework agreements is not administrative efficiency but security of supply of preparation for future emergencies, the additional costs of a two-stage procedure are set against the other potential benefits.

9. The administrative costs of the two-stage procedure will be amortized over a greater number of purchases; i.e. the more the framework agreement is used. Nonetheless, effective management of the technique should include issuing notices of procurements as they arise under the framework agreement, with a view to stimulating further response from the market where, for example, the technical solution or product proposed is no longer the best that the market offers. A further aspect of best practice is for procuring entities to assess on a regular basis whether a framework agreement continues to offer value for money and continues to allow access to the best that the market can offer at that time, and to consider the totality of the purchases under the framework agreement to assess whether their benefits exceed their costs. These considerations are in particular relevant in the context of closed framework agreements.

10. The economic benefits of framework agreements will be realised where they are used to satisfy the procuring entity's needs for the subject matter of the procurement. Practical experience in the operation of framework agreements indicates that the value for money to be obtained through their use is maximized where procuring entities make full use of them to make their purchases, rather than conducting new procurements for the subject matter concerned. Where such full use is observed, suppliers and contractors should have greater confidence that they will receive orders to supply the procuring entity, and should give their best prices and quality offers accordingly. The use of estimated quantities in the solicitation documents and framework agreement can thus facilitate realistic offers based on a clear understanding of the extent of the procuring entity's needs. However, enacting States may wish to consider discouraging the framework agreement from operating as an exclusive purchasing agreement in normal circumstances, as the procuring entity will not be able to purchase outside the framework agreement if market conditions change. (There may, nonetheless, be circumstances in which the benefits of exclusivity are considered to outweigh this risk.) This approach allows commercial considerations to dictate the extent of use. Nonetheless, the terms of the

framework agreement itself may limit commercial flexibility if guaranteed minimum quantities are set out as one of its terms, though this flexibility should be set against the better pricing from suppliers or contractors. Where the framework agreement no longer offers good commercial terms to the procuring entity, a new procurement procedure (classical or a new framework agreement procedure) will be required.

11. Thus the technique, properly used, can provide benefits in terms of value for money and security of supply, as well as administrative efficiency. Whether it will do so in any particular case will require a careful assessment of the costs and benefits of the procedure and the appropriate terms for the framework agreement itself.

### **3. The framework agreement**

12. Under the Model Law (see article 2 (e)), the framework agreement procedure can take one of three forms:

(a) A “closed” framework agreement procedure without second-stage competition, involving a framework agreement concluded with one or more suppliers or contractors, and in which all terms and conditions of the procurement are set out in the framework agreement. As a result, there is no further competition between the suppliers or contractors at the second stage of the procurement, and the only difference of this type of framework agreement procedure as compared with traditional procurement procedures is that the items are purchased in batches over a period of time. These framework agreements are “closed” in that no new suppliers or contractors can become parties to the agreement after it has been concluded;

(b) A “closed” framework agreement procedure with second-stage competition, involving a framework agreement concluded with more than one supplier or contractor, and which sets out some of the main terms and conditions of the procurement. A further competition among suppliers or contractors parties to the framework agreement is required to award the procurement contract at the second stage of the procurement. These framework agreements are also “closed” in the sense described above. They can be concluded only where there is more than one supplier or contractor (although they could theoretically be concluded with one supplier or contractor (which is then invited to improve its offer for a particular purchase under the framework agreement), the Model Law does not allow for such a procedure. It is considered at too great a risk of abuse, and of effectively amending the terms and conditions of the procurement and framework agreement itself. For this reason, too, the Model Law does not envisage the possibilities of suppliers or contractors unilaterally improving their submissions during the operation of the closed framework agreement (other than through second-stage competition));

(c) An “open” framework agreement procedure, involving a framework agreement concluded with more than one supplier or contractor and involving second-stage competition between suppliers or contractors parties to the agreement. These framework agreements remain “open” to new suppliers or contractors, meaning that any supplier or contractor interested to become a party to the agreement after it has been concluded may become the party thereto at any time during the operation of the agreement if it satisfies the pre-established requirements, in particular as regards qualifications of suppliers or contractors parties to the

agreement and responsiveness of their indicative submissions. This type of framework agreement is intended to provide for commonly used, off-the-shelf goods or straightforward, recurring services that are normally purchased on the basis of the lowest price. These agreements must operate electronically, as is explained in the commentary to article 59 below.

13. The framework agreement itself contains the terms and conditions of the envisaged procurement contracts (other than those to be established through the second-stage competition). The agreement itself should be complete in recording all terms and conditions, the description of the subject matter of the procurement (including specifications), and the evaluation criteria, both to enhance participation and transparency, and because of the restrictions on changing the terms and conditions during the operation of the framework agreement (see also the commentary to articles 57 to 62 below).

14. The framework agreement, depending on its terms and conditions and the law that governs agreements by procuring entities in the enacting State concerned, may be a binding contract. Nonetheless, the definition of the “procurement contract” under article 2(i) of the Model Law, does not include a framework agreement. The procurement contract for the purposes of article 2(i) of the Model Law is concluded at the second stage of the procedure, when the procuring entity awards a procurement contract under the framework agreement. Technically, the award occurs when the procuring entity issues an acceptance notice accepting the supplier’s or contractor’s second-stage submission in accordance with article 21 of the Model Law.

15. Whereas the open framework agreement is required under the Model Law to be operated electronically, the procuring entity has flexibility in this regard as regards closed framework agreements. Enacting States may wish to note the advantages of an online procedure in terms of increased efficiency and transparency (for example, the terms and conditions can be publicized using a hyperlink; a paper-based invitation to the second-stage competition could be unwieldy and user-unfriendly. See further paragraphs ... of Part I of the Guide). Where the enacting State requires or encourages (or intends to do so) that all framework agreements be operated electronically, it may wish to require through regulations that all of them be maintained in a central location, which further increases transparency and efficiency in their operation.

#### **4. Controls over the use of framework agreements procedures**

16. Controls over the use of framework agreements procedures are included in the text of the Model Law to address the concerns set out above. There are conditions for the use of framework agreement procedures in article 31, and mandatory procedures for conducting them in articles 57-62.

17. One of the main controls in the case of a closed framework agreement procedure is that a procuring entity that wishes to use such procedure will be required to follow one of the procurement methods of the Model Law to select the suppliers or contractors to be parties to the closed framework agreement (i.e. at the first stage). Thus all the safeguards applicable to the selected procurement method, including conditions for its use, will apply. An open framework agreement is to be established following specifically-designed open procedures.

18. The solicitation documents for a framework agreement procedure must follow the normal rules; that is, they must set out the terms and conditions upon which suppliers or contractors are to provide the subject matter of the procurement, the criteria that will be used to select the successful suppliers or contractors, and the procedures for the award of procurement contracts under the framework agreement. This information is required to enable suppliers or contractors to understand the extent of the commitment required of them, which itself will enable the submission of the best price and quality offers. Thus, the normal safeguard that all the terms and conditions of the procurement (including the specifications and whether the selection of suppliers or contractors will be based on the lowest-priced or most advantageous submission) must be pre-disclosed also applies.

19. The provisions regulating the award of procurement contracts under framework agreements have been drafted to ensure sufficient competition where a second-stage competition is envisaged. Application of provisions of article 21, including on a standstill period, ensures sufficient transparency in decision-taking at the second stage.

20. Another important control measure is contained in provisions of the Model Law envisaging the limitation of the duration of framework agreements. Since no supplier or contractor may be awarded a procurement contract under the closed framework agreement without being a party to the closed framework agreement, closed framework agreements have a potentially anti-competitive effect. Ensuing full competition for the purchases envisaged on a periodic basis, by limiting the duration of a closed framework agreement and requiring subsequent purchases to be reopened for competition is generally considered to assist in limiting the anti-competitive potential. Under article 58(1)(a) of the Model Law, the procuring entity is to set out the maximum duration of the closed framework agreement within the maximum established by the enacting State in the procurement regulations (i.e. no stated limit is set out in the Model Law itself). Practical experience in those jurisdictions that operate closed framework agreements indicates that the potential benefits of the technique are generally likely to arise where they are sufficiently long-lasting to enable a series of procurements to be made, such as a period of 3-5 years. Thereafter, greater anti-competitive potential may arise, and the terms and conditions of the closed framework agreement may no longer reflect current market conditions. As some types of subject matters may change more rapidly, especially where technological developments are likely, or the procuring entity's needs may not remain the same for a sustained period, the appropriate period for each procurement may be significantly shorter than the maximum.<sup>2</sup>

21. Enacting States, in addition to setting out the maximum duration of closed framework agreement in the procurement regulations, are thus encouraged to provide guidance on appropriate durations of closed framework agreement for particular procurement types, and may also wish to encourage procuring entities

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<sup>2</sup> The provision of guidance to the Secretariat on mitigating risks of framework agreements of excessively long duration through extensions and exceptions to the initially established duration of the framework agreement is requested. At the thirteenth session of the Working Group, it was observed that procurement-related disputes in the framework agreement context arose relatively commonly regarding extensions or exceptions to the permitted duration of the framework agreement (A/CN.9/648, para. 43).

themselves to assess on a periodic basis during the currency of the closed framework agreement whether its terms and conditions remain current.

22. Because of the less anti-competitive effect of open framework agreements, the duration of the open framework agreement is established at the discretion of the procuring entity without any maximum limit imposed by the procurement regulations (see article 60 (1)(a)).

23. UNCITRAL has sought to avoid limiting the usefulness of framework agreements and their administrative efficiency by formulating too many conditions for their use or too many inflexible procedures. Both stages of the framework agreement procedures are subject to the challenge and appeal mechanisms of chapter VIII of the Model Law.

## **B. Provisions on framework agreements to be included in the article-by-article commentary**

### **Article 31. Conditions for use of a framework agreement procedure**

1. The purpose of the article is to set out the conditions for use of a framework agreement procedure (paragraph (1)) and provide for the record and justification requirements in resort to the procedure (paragraph (2)).

2. Paragraph (1) lists conditions for use of framework agreement procedures, regardless of whether the procedure will result in a closed or open framework agreement. The conditions are based on the notion that framework agreement procedures can offer benefits for procurement notably in terms of administrative efficiency where the procuring entity has needs that are expected to arise in the short to medium term, but where not all terms and conditions can be set at the outset of the procurement. (For a description of the benefits, see paragraphs ... above.) Paragraph (1) permits the use of framework agreement procedures to reflect two situations where these circumstances may arise: first, where the need is “indefinite”, meaning its frequency, extent, timing and/or quantity are unknown, and, secondly, where the need is expected to arise on an urgent basis. The first set of circumstances may arise for repeat purchases of relatively standard items or services (office supplies, simple services such as janitorial services, maintenance contracts and so forth). The second set of circumstances may arise where a government agency is required to respond to natural disasters, pandemics, and other known risks; this condition will normally, but need not, be cumulative with the first condition. Security of supply is usually a concern in this type of situations but also may become in the first type of situations where indefinite need for repeat purchases will arise with respect to the items requiring specialist production.<sup>3</sup> (See the general discussion of the types of procurement for which framework agreements are suitable in paragraphs ... above). Where the procedure will result in a closed framework agreement, the conditions for use applicable to the procurement method intended to be used for the award of the agreement are also to be satisfied. This is because, in accordance with article 57 (1) of the Model Law, a closed

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<sup>3</sup> As noted above, security of supply cannot be used as a ground for use of a framework agreement procedure unless one of the specific conditions for use listed in article 31 is also satisfied (i.e. expected indefinite or urgent needs during a given period of time).

framework agreement is to be awarded by means of open tendering proceedings unless resort to other procurement methods is justified under chapter II of the Model Law.

3. The specific conditions for the use of a framework agreement procedures are considerably more flexible than the conditions for use of the procurement methods listed in article 26 (1): they do not require the procuring entity to state definitively that the needs will arise indefinitely or on an urgent basis, but merely that the need is expected to arise. The inherent subjectivity of the conditions means that it is more difficult to enforce compliance with them than with the conditions for use of the procurement methods listed in article 26 (1), but it will be possible to evaluate objectively whether decisions are reasonable in the circumstances of a given framework agreement. In this manner, the conditions do facilitate accountability and promote best practice.

4. As is noted above (paragraphs ...), the costs of establishing and operating framework agreement procedures, which involve two stages, will normally be higher than those for one single-stage procurement, and so whether framework agreement procedures are appropriate will depend on whether the potential benefits will exceed these higher costs. Where the need is expected to be indefinite, the administrative costs of setting up and operating the framework agreement can be amortized over a series of repeat procurements; where the need is expected to arise urgently, the administrative costs are to be considered against the value-for-money benefits that the earlier setting of the terms and conditions of the procurement may bring by comparison with the procedures available for urgent or emergency procurement. The procuring entity, therefore, will need to conduct a cost-benefit analysis based on probabilities before engaging in a framework agreement procedure, and enacting States will wish to provide guidance and training to ensure that the procuring entity has the appropriate tools to do so. The above considerations are relevant particularly in the context of closed framework agreements.

5. In addition, the use of framework agreements should not be considered to be an alternative to effective procurement planning. In the context of a closed framework agreement in particular, unless realistic estimates for the ultimate procurement are determined and made known at the outset of a framework agreement procedure, potential suppliers will not be encouraged to submit their best prices at the first stage, meaning that a closed framework agreement may not yield the anticipated benefits, or that the administrative efficiency may be outweighed by price and/or quality concerns that compromise value for money.

6. A further reason for including conditions for use is to address the potential restriction on competition that the use of the technique, in particular a closed framework agreement, involves (see ... above). The conditions are supported by the limited duration provided for closed framework agreements in article 58 (1)(a), and the defined duration required by article 60 (1)(a), which require the needs concerned to be reopened to full competition after the duration of the agreement expires.

7. The conditions for use should be read together with the definition of the term “procuring entity”, which allows for more than one purchaser to use the framework agreement. If enacting States wish centralized purchasing agencies to be able to act as agents for one or more procuring entities, so as to allow for the economies of scale that centralized purchasing can offer, they may wish to promulgate regulations

or issue guidance to ensure that such arrangements can operate in a transparent and an effective fashion.

8. Paragraph (2) requires the procuring entity to justify the use of the framework agreement procedure in the procurement record; the intention is that the cost-benefit analysis referred to in the preceding paragraphs be included. In the case of the award of a closed framework agreement, the paragraph will be supplemented by article 27 (3) of the Model Law that requires the procuring entity to put on the record a statement of the reasons and circumstances upon which it relied to justify the use of the procurement method other than open tendering in the award of the agreement. Given the observed risks of overuse of framework agreements because of their perceived administrative efficiency (see paragraphs ... above), and the broad conditions for use, timely and appropriate oversight of the justification in the record will be important (also to facilitate any challenge to the use of the framework agreement procedure by suppliers and contractors). Effective oversight will involve the scrutiny of the extent of purchases made under the framework agreement to identify over- or under-use as described above (see ...).

#### **Article 57. Award of a closed framework agreement**

1. The purpose of the article to set rules for the award of a closed framework agreement. Provisions apply to both framework agreement procedures with second-stage competition and framework agreement procedures without second-stage competition, both of which, as explained in ... above, may lead to the award of a closed framework agreement.

2. Paragraph (1), by referring to in its subparagraph (b) to chapter II of the Model Law, requires the procuring entity to follow the provisions of chapter II of the Model Law in selecting the procurement method appropriate for the award of a closed framework agreement, and the procedures applicable to the procurement method selected. Neither the conditions for use nor this paragraph limit the procurement methods that can be used to award a closed framework agreement, on the condition, however, that resort to open tendering must be considered first and resort to an alternative method of procurement must be justified. The choice takes account of both the circumstances of the procurement(s) concerned and the need to maximize competition as required by article 27. However, the importance of rigorous competition at the first stage of closed framework agreements means that the application of exceptions to open tendering should be carefully scrutinized, particularly in the light of the competition risks in framework agreements procedures and types of purchases for which framework agreements are appropriate (as to which, see ... and ...).

3. Examples of when procurement methods alternative to open tendering may be appropriate include the use of framework agreements for the swift and cost-effective procurement of low-cost, repeated and urgent items, such as maintenance or cleaning services (for which open tendering procurements may not be cost-effective), and specialised items such as drugs, energy supplies and textbooks, for which the procedure can protect sources of supply in limited markets. The use of competitive negotiations or single-source procurement may be appropriate for the award of a closed framework agreement in situations of urgency. If the procuring entity is unable to draft specifications or define the main terms and conditions of the procurement at the outset, such as in more complex services or construction

procurement, framework agreements are less likely to be appropriate because the uncertainties involved may diminish participation, but there are examples in practice of effective framework agreements concluded through dialogue-based request for proposals methods.<sup>4</sup> (See the guidance to conditions for use of procurement methods at ... ). [The linked decisions to use a framework agreement procedure and the choice of the procurement method and type of solicitation, which involve discretion and require appropriate capacity, are such that guidance and regulations to enhance decision-making will be crucial to allow for the potential benefits of the technique to accrue.]

4. Paragraph (1) also envisages derogations from the procedures for the procurement method chosen as required to reflect a framework agreement procedure, such as that references to “tenders” or other submissions are to be construed as references to “initial” tenders or submissions where there will be second-stage competition involving second-stage tenders or submissions, and references to the selection of the successful supplier or contractor and to the conclusion of a procurement contract are to be construed as references to the admission of supplier(s) or contractors(s) to the framework agreement and the conclusion of that agreement. Enacting States may wish to provide guidance on the possible derogations, noting that the flexibility required to provide for closed framework agreements with and without second-stage competition and with one or more supplier or contractor parties means that the extent of the derogations will vary from case to case.

5. Paragraph (2) sets out the information that should be provided when soliciting participation in the framework agreement procedure. The solicitation documents must follow the normal rules for the procurement method chosen: that is, they must set out the terms and conditions upon which suppliers or contractors are to provide the subject matter of the procurement and the procedures for the award of procurement contracts (which will take place under the framework agreement).<sup>5</sup> The two-stage nature of framework agreement procedures, which end with the award of procurement contract(s), means that the information provided to potential suppliers or contractors at the outset should cover both stages of the procurement. Hence the provisions regulate information pertaining to both stages, while making allowance for the fact that some terms and conditions of the procurement, disclosed in the solicitation documents in “traditional” procurement, will be refined or established at the second stage of the procedure.

6. The chapeau to paragraph (2) requires the normal solicitation information to be set out in full “*mutatis mutandis*”, meaning that information should be adapted to particularities of any given framework agreement procedure. This information must be repeated in the framework agreement itself, or, if it is feasible and would achieve administrative efficiency, and the legal system in the jurisdiction concerned treats annexes as an integral part of a document, the solicitation documents can be annexed to the framework agreement.

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<sup>4</sup> The statement reflects the results of consultations with experts. The provision of guidance to the Secretariat on specific examples is requested.

<sup>5</sup> This guidance may need to be amended in the light of specifics of request for proposals with dialogue, if it is considered that this method is appropriate for the award of framework agreements. See the relevant concern in paragraph 3 and the accompanying footnote above.



7. Deviations from the requirement to provide exhaustive information about the terms and conditions of the procurement at the time of solicitation of participation in the framework agreement procedure are permitted only so far as needed to accommodate the procurement concerned. For example, the procuring entity is unlikely to be able to fulfil the requirement of article 38(d) for the solicitation documents to set out “the quantity of the goods; services to be performed; the location where the goods are to be delivered, construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided”. However, the extent of the necessary deviation will vary: the procuring entity may know the dates of each intended purchase, but not the quantities, or vice versa; alternatively, it may know the total quantity but not the purchase dates; or it may know none or all of these things.

8. Details, which are normally required to be provided when soliciting participation in a single-stage procedure, and which will be omitted in a framework agreement procedure will vary from procedure to procedure. Any failure to provide information that goes beyond the permissible deviations will be susceptible to challenge. So if the total quantity and delivery details regarding the purchases envisaged under the framework agreement are known at the first stage of the procurement, they must be disclosed. If the total quantity is not known at the first stage of the procurement, minimum and maximum quantities for the purchases envisaged under the framework agreement should be included, to the extent that they are known, failing which estimates should be provided.

9. Paragraph (2)(b) requires disclosure of whether there will be one or more supplier or contractor parties to the agreement. The administrative efficiencies of framework agreements tend to indicate that multiple-supplier framework agreements are more commonly appropriate, but the nature of the market concerned may indicate that a single-supplier framework agreement is beneficial (for example, where confidentiality or security of supply is an important consideration, or where there is only one supplier or contractor in the market).

10. There is no requirement for either a minimum or a maximum number of suppliers or contractors parties to a framework agreement. A minimum number may be appropriate to ensure security of supply; where second-stage competition is envisaged, there need to be sufficient suppliers or contractors to ensure effective competition, and the terms of solicitation may require a minimum number, or a sufficient number to ensure such effective competition. Where the stated minimum is not achieved, the procuring entity may/must cancel the procurement using the provisions of article 18.<sup>6</sup>

11. A maximum number may also be appropriate where the procuring entity envisages that there will be more qualified suppliers or contractors presenting responsive submissions than can be accommodated. This situation may reflect the administrative capacity of the procuring entity, notably in that more participants may defeat the administrative efficiency of the procedure. An alternative reason for limiting the number of participants is to ensure that each has a realistic chance of

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<sup>6</sup> The provision of guidance to the Secretariat is requested on consequences of the failure to achieve the minimum required number, for example where it was intended to have a multi-supplier framework but only one supplier or contractor is qualified and responsive.

being awarded a contract under the framework agreement, and to encourage it to price its offer and to offer the best possible quality accordingly.

12. Where a minimum and/or a maximum of suppliers or contractors is or are to be imposed, the relevant number(s) must be notified in the solicitation documents. The procurement record should, as a matter of best practice, include a justification of the procuring entity's decision(s) — and recording such information is an example of the additional information that the enacting State may wish to include under article 24 (1), or in supporting regulations under article 24 (1)(w). Where a maximum is stated, the criteria and procedures for selecting the participants should be to identify the relevant number of lowest-priced or most advantageous submissions. This approach involves ranking to select the suppliers or contractors to become parties to the framework agreement; although a defined maximum may be administratively simple, it has been observed, identifying a strictly defined number in advance could invite challenges from those whose submissions are ranked just below the winning suppliers or contractors' (i.e. where there is very little to choose between successful and unsuccessful suppliers or contractors). A statement that a number within a defined range may be an appropriate alternative approach, provided that its intended use is clearly set out in the solicitation documents.

13. Paragraph (2)(d) requires that the form, terms and conditions of the framework agreement including, for example, whether there is to be second-stage competition, and evaluation criteria for the second stage, are to be provided in the solicitation documents. These transparency provisions are an application of the general principle of the Model Law that all terms and conditions of the procurement are to be determined in advance, as also reflected in the chapeau provisions of paragraph (2) (see paragraphs ... above).

14. There is no exemption regarding the qualification and evaluation criteria and procedures for their application both for admission to the framework agreement and for any second-stage competition, save that the evaluation criteria to be applied at the second stage can vary within a pre-determined range, as explained in the commentary to article 58(1)(d) below. If this flexibility is to be used, the applicable range must be disclosed in the solicitation documents.

15. One feature of selection that is more complex in the context of framework agreements than traditional procurement is the relative weight to be applied in the selection criteria for both stages of the procurement, if any. Particularly where longer term and centralized purchasing are concerned, there may be benefits in terms of value for money and administrative efficiency in permitting the procuring entity to set the relative weights and their precise needs only when making individual purchases (that is, at the second stage of the procedure). On the other hand, transparency considerations, objectivity in the process, and the need to prevent changes to selection criteria during a procurement are central features of the Model Law designed to prevent the abusive manipulation of selection criteria, and the use of vague and broad criteria that could be used to favour certain suppliers or contractors. Permitting changes to relative weights during the operation of a framework agreement might facilitate non-transparent or abusive changes to the selection criteria. The Model Law seeks to address these competing objectives by providing that relative weights at the second stage can be varied within a pre-established range or matrix set out in the framework agreement and thus also in

the solicitation documents, and provided that the variation does not lead to a change in the description of the subject matter of the procurement (see article 62).

16. Further guidance on the form, terms and conditions of the framework agreement is provided in the commentary to article 58 below.

17. Paragraph (3) provides that the provisions of article 21 on the acceptance of the successful submission and entry into force of the procurement contract apply to the award of a closed framework agreement, adapted as necessary to the framework agreement procedure (the commentary to article 21 appears at ... above). This provision is necessary because article 21 addresses the conclusion of a procurement contract and, as the definitions of the framework agreement and relevant procedures in article 2 make clear, the framework agreement itself is not a procurement contract (see, further, paragraphs ... above).

18. The suppliers or contractors that will be parties to the framework agreement are selected on the basis set out in the solicitation documents, i.e. those submitting the lowest-price or most advantageous submission(s). The selection is made on the basis of a full examination of the initial submissions (where there is to be second-stage competition) or of the submissions (where there is no second-stage competition), and assessment of the suppliers' or contractors' qualifications. The responsive submissions are then evaluated, applying the evaluation criteria disclosed in the solicitation documents, and subject to any applicable minimum or maximum number of suppliers or contractors parties as set in the solicitation documents.<sup>7</sup>

19. Thereafter, the notification provisions and standstill period required by article 21 apply to the procedure through a cross reference in paragraph (3) (the exemptions envisaged to the standstill period under article 21 (3) either do not or are most unlikely to apply to the award of a closed framework agreement). The award of the closed framework agreement may also be made subject to external approval; where framework agreements are being used across government ministries and agencies, ex ante control mechanisms of this type may be considered appropriate. If so, additional wording can be included in paragraph (3) or elsewhere in article 57 or in supporting regulations, based on the optional wording found in article 29 (2).

20. In order to forestall concerns that the normal publicity mechanisms under procurement systems may not apply to framework agreements (because they are not procurement contracts) and to some procurement contracts under them (if they are under the publication threshold), article 22 of the Model Law requires the publication of a notice where a closed framework agreement is made in the same manner as the award of a procurement contract. (Article 22 also applies in full to procurement contracts concluded under a framework agreement.)

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<sup>7</sup> With reference to paragraph (2) (c) of article 57 of the draft Model Law, the provision of guidance to the Secretariat is requested on whether a maximum number must always be required in a closed framework agreement (under the current wording the procuring entity has the discretion to establish either maximum or minimum). Otherwise, all suppliers or contractors presenting responsive submissions must be accepted and there would be no evaluation at the first stage. This would create no difference between open and multi-supplier closed framework agreements.

21. As the definitions of the framework agreement and relevant procedures in article 2 make clear, the framework agreement is not a procurement contract as defined in the Model Law, but it may be an enforceable contract in enacting States. States may therefore wish to issue guidance on the implications of binding the Government through the first stage of the procedure. Suppliers' or contractors' submissions may be binding under the law of the enacting State; under a closed framework agreement without second-stage competition, the terms and conditions of the procurement are set and the first-stage submissions will be enforceable in the normal manner. Where there is to be second-stage competition, however, States may wish to provide guidance to ensure that the extent to which suppliers or contractors can vary their first-stage (initial) submissions at the second stage is clear, where the result is less favourable to the procuring entity (e.g. by increasing prices if market conditions change).

22. More generally, the extent to which suppliers or contractors may improve their submissions is not addressed in the Model Law. Enacting States may wish to suggest that procuring entities make specific provision in framework agreements, or to address the matter by regulation or using a combination of the two approaches, while ensuring that equitable treatment is preserved. For example, it may be necessary to allow suppliers or contractors to improve their submissions under framework agreements without second-stage competition, or, if significant amendments are proposed, to reopen the procurement to full competition using the most appropriate procurement method for the circumstances concerned. Where there is second-stage competition, it may be sufficient to notify the other suppliers or contractors parties of the revised offer.<sup>8</sup>

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<sup>8</sup> The provision of guidance to the Secretariat on the points raised in this paragraph that have not been discussed in the Working Group is requested.

**(A/CN.9/731/Add.9) (Original: English)****Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany articles 58-62 of chapter VII (Framework agreements procedures) of the UNCITRAL Model Law on Public Procurement, and points regarding framework agreements procedures proposed to be discussed in a section of the Guide to Enactment addressing changes from the 1994 text of the Model Law.

**GUIDE TO ENACTMENT OF THE  
UNCITRAL MODEL LAW ON  
PUBLIC PROCUREMENT**

...

**B. Provisions on framework agreements to be included in the article-by-article commentary (*continued*)****Article 58. Requirements of closed framework agreements**

1. The purpose of the article is to set out the terms and conditions of the closed framework agreement and the award of contracts under that agreement. As certain terms and conditions of the procurement are not set at the outset of a framework agreement procedure (by contrast with “traditional” procurement), it was considered appropriate to require that they will be contained in the framework agreement itself, to ensure that the terms and conditions of the procurement are known and consistent throughout the procedure. The framework agreement will in particular contain the terms and conditions that will apply to the second stage of the framework agreement procedure, including how the terms and conditions that were not established at the first stage will be settled: this information being important to encourage participation and transparency, it is also to be disclosed in the solicitation documents under article 57.
2. The law of the enacting State will address such issues as the enforceability of the agreement in terms of contract law, and such issues are therefore not provided for in the Model Law.
3. The chapeau provisions of paragraph (1) require the framework agreement to be in writing, in order to ensure that the terms and conditions are set out clearly for all parties. They are supplemented by paragraph (2) of the article that allows under certain conditions to conclude individual agreements between the procuring entity and each supplier or contractor that is a party (see further paragraph ... below).
4. Paragraph 1(a) limits the duration of all closed framework agreements; the potentially anti-competitive effect of these agreements is considered to increase as their duration increases. A maximum duration is also considered to assist in preventing attempted justifications of excessively long framework agreements. On

the other hand, longer durations can enhance the administrative efficiencies of framework agreements. UNCITRAL considers that there is no one appropriate maximum duration, because of differing administrative and commercial circumstances in individual States, and so the enacting State is invited to set the appropriate limit in the procurement regulations. It is important to note that the limit is the maximum duration, and not the average or appropriate duration: the latter may vary as market conditions change, and in any event should reflect the nature of the procurement concerned, financial issues such as budgetary allocations, and regional or developmental differences within or among States. Bearing in mind the need to ensure that framework agreements are cost-effective as well as ensuring periodic full competition, and on the basis of practice examined by UNCITRAL, an appropriate range for the maximum duration may be of 3-5 years. Enacting States may also consider that different periods of time might be appropriate for different types of procurement, and that for some highly changeable items the appropriate period may be measured in months. Shorter durations within the legal maximum contained in article 58 can be set out in regulations; if this step is taken, clear guidance must be provided to procuring entities to ensure that they consult the appropriate source.<sup>1</sup> Such guidance should also address any external limitations on the duration of framework agreements (such as State budgeting requirements).

5. The Model Law does not provide for extensions to concluded framework agreements or exemptions from the prescribed maximum duration: allowing such variations would defeat the purpose of the regime contemplated by the Model Law. If enacting States wish to provide for extensions in exceptional circumstances, clear regulations or guidance will be required to ensure that any extensions are of short duration and limited scope. For example, new procurements may not be justified in cases of a natural disaster or restricted sources of supply, when the public may be able to benefit from the terms and conditions of the existing framework agreement. Guidance should also address the issue of a lengthy or sizeable purchase order or procurement contract towards the end of the validity of the framework agreement, not only to avoid abuse, but to ensure that procuring entities are not purchasing outdated or excessively priced items. If suppliers or contractors consider that procuring entities are using framework agreements beyond their intended scope, future participation may also be compromised: the efficacy of the technique in the longer-term will depend on whether or not the terms are commercially viable for both parties.

6. Paragraph 1(b) requires the terms and conditions of the procurement to be recorded in the framework agreement (and under article 57 will have been provided in the solicitation documents). These terms and conditions will include the description of the subject matter of the procurement, which should fulfil the requirements of article 10, and the evaluation criteria. Where the subject matter of the procurement is highly technical, an overly narrow approach to drafting the description and the use of detailed technical specifications may limit the use of the framework agreement. The use of functional descriptions may enhance the efficacy of the procedure, by allowing for technological development and variations to suit the precise need at the time of the procurement contract. The procuring entity must ensure that the description is as accurate as possible both for transparency reasons

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<sup>1</sup> The provision of guidance to the Secretariat is requested on more detail for the Guide to Enactment on this point, if necessary.

and to encourage participation in the procedure, and enacting States may wish to provide guidance to assist in this process. For guidance on the evaluation criteria in framework agreements procedures, see paragraphs ... below.

7. Paragraph (1)(c) requires setting out in the framework agreement estimates of the terms and conditions that cannot be established with precision at the outset of the procedure. They are usually to be refined or established through second-stage competition, such as the timing, frequency and quantities of anticipated purchases, and the contract price. To the extent the estimates are known, they must be set out (see paragraph ... above). Providing the best available estimates, where firm commitments are not possible, will also encourage participation. Naturally, the limitations on estimates should also be recorded, or a statement that accurate estimates are not possible (for example, where emergency procurement is concerned).

8. Maximum or minimum aggregate values for the framework agreement may be known; if so, they should be disclosed in the agreement itself, failing which an estimate should be set out. An alternative approach is, where there are multiple procuring entities that will use the framework agreement, to allow each procuring entity to set different maxima depending on the nature and potential obsolescence of the items to be procured; in such cases, the relevant values for each procuring entity should be included. The maximum values or annual values may be limited by budgetary procedures in individual States; if so, guidance to these provisions should set out other sources of regulation in detail.

9. The contract price may or may not be established at the first stage. Where the subject matter is subject to price or currency fluctuations, or the combination of service-providers may vary, it may be counter-productive to try to set a contract price at the outset. A common criticism of framework agreements of this type is that there is a tendency towards contract prices at hourly rates that are generally relatively expensive, and task-based or project-based pricing should therefore be encouraged, where appropriate.

10. It will generally be the case that the agreement will provide that suppliers or contractors may not increase their prices or reduce the quality of their submissions at the second stage of the procedure, because of the obvious commercial disadvantages and resultant lack of security of supply that would ensue, but in certain markets, where price fluctuations are the norm, the framework agreement may appropriately provide a price adjustment mechanism to match the market.

11. Paragraph 1(d) requires the framework agreement to identify whether or not second-stage competition will be used to award the procurement contracts under the framework agreement, and if it will be used, to define terms and conditions of such second-stage competition. Paragraphs (1)(d)(i) and (ii) require the substantive rules and procedures for any second-stage competition to be set out in the framework agreement. The rules and procedures are designed to ensure effective competition at the second stage: for example, all suppliers or contractors parties to the framework agreement are, in principle, entitled to participate at the second stage, as is explained further in the commentary to article 61 below. The framework agreement must also set out the envisaged frequency of the competition, and anticipated time frame for presenting second-stage submissions — this information is not binding on the procuring entity, and is included both to enhance participation through providing

to suppliers or contractors the best available information and to encourage effective procurement planning.

12. A key determinant of effective second-stage competition is the manner in which evaluation criteria will be designed and applied. A balance is needed between evaluation criteria that are so inflexible that there may be effectively only one supplier or contractor at the second stage, with consequential harm to value for money and administrative efficiency, and the use of such broad or vague criteria that their relative weights and the process can be manipulated to favour certain suppliers or contractors. The rules in paragraph (1)(d)(iii) therefore provide that the relative weight to be applied in the evaluation criteria during the second-stage competition should be disclosed at the first stage of the procedure. However, they also provide for limited flexibility to vary or give greater precision to the evaluation criteria at the second stage, reflecting the fact that multiple purchasers might use a framework agreement, with different relative weights to suit their individual evaluation criteria, and that some framework agreements may be of long duration. This flexibility will also be useful for centralized purchasing agencies, and to avoid the negative impact on value for money if one common standard must be applied to all users of the framework agreement.

13. The mechanism in paragraph 1(d)(iii) therefore allows for relative weights of the evaluation criteria at the second stage to be varied within a pre-established range or matrix set out in the framework agreement and the solicitation documents. This flexibility has to be read together with the qualification provided in article 62 that the variation must be authorized by the framework agreement but in any event may not lead to a change to the description of the subject matter of the procurement. Thus even if within the permitted scope of variations under the framework agreement, a change would not be acceptable if it effectively leads to the change in the description of the subject matter of the procurement (for example, if the minimum quality requirements were waived or altered).<sup>2</sup>

14. Flexibility in applying evaluation criteria should be monitored to ensure that it does not become a substitute for adequate procurement planning, does not distort purchasing decisions in favour of administrative ease, does not encourage the use of broad terms of reference that are not based on a careful identification of needs, and does not encourage the abusive direction of procurement contracts to favoured suppliers or contractors. These latter points may be of increased significance where procurement is outsourced to a fee-earning centralized purchasing agency, which may use framework agreements to generate income (see, further, the discussion of outsourcing at ...). Oversight processes may assist in avoiding the use of relatively flexible evaluation criteria in framework agreements to hide the use of inappropriate criteria based on agreements or connections between procuring entities and suppliers or contractors, and to detect abuse in pre-determining the second-stage results that would negate first-stage competition, the risks of which are elevated with recurrent purchases. Transparency in the application of the flexibility, and the use of a pre-determined and pre-disclosed range both facilitates such oversight and ensures that the mechanism complies with the requirement of the United Nations Convention against Corruption that requires the evaluation criteria to be set and

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<sup>2</sup> The provision of guidance to the Secretariat on further relevant examples is requested, to underscore that this flexibility should be the exception rather than the rule.



disclosed in advance (article 9(1)(b) of the Convention). Enacting States will wish to provide that their oversight regimes examine the use of a range of evaluation criteria, in order to ensure that the range set out in the framework agreement is not so wide as to make the safeguards meaningless in practice.

15. Paragraph 1(e) notes that the framework agreement must also set out whether the award of the procurement contract(s) under the framework agreement will be made to the lowest-priced or most advantageous submission<sup>3</sup> (for a discussion of those terms, see ...). The basis of the award will normally, but need not necessarily, be the same as that for the first stage; for example, the procuring entity may decide that among the highest-ranked suppliers or contractors at the first stage (chosen using the most advantageous submission), the lowest-priced responsive submission to the precise terms of the second-stage invitation to participate will be appropriate.

16. Paragraph (2) provides limited flexibility to the procuring entity to enter into separate agreements with individual suppliers or contractors that are parties to the framework agreement. General principles of transparency and fair and equitable treatment indicate that each supplier or contractor should be subject to the same terms and conditions; the provisions therefore limit exceptions to minor variations that concern only those provisions that justify the conclusion of separate agreements; those justifications are to be put on the record. An example may be the need to execute separate agreements to protect intangible or intellectual property rights and to accommodate different licensing terms or where suppliers or contractors have presented submissions for only part of the procurement.<sup>4</sup> Nonetheless, the result should not involve different contractual obligations for different suppliers or contractors parties to the framework agreement.

17. Paragraph (3) requires all information necessary to allow for the effective operation of the framework to be set out in the framework agreement, in addition to the above requirements, and to ensure transparency and predictability in the process. Such information may include technical issues such as requirements for connection, a website if the framework agreement is to operate electronically, particular software, technical features and, if relevant, capacity; this access information should be issued in technologically neutral terms where possible and appropriate. These requirements can be supplemented by detailed regulations to ensure that the technology used by the procuring entity does not operate as a barrier to access to the relevant part of the procurement market, applying the principles set out in article 7 (see commentary to that article, at ...).

18. In multisupplier framework agreements, each supplier or contractor party will wish to know the extent of its commitment both at the outset and periodically during operation of the framework agreement (such as after a purchase is made under the framework agreement). Enacting States may therefore wish to encourage procuring entities to inform the suppliers or contractors about the extent of their commitments

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<sup>3</sup> The provision of guidance to the Secretariat on the mechanism of award of procurement contracts under multi-supplier closed framework agreement without second-stage competition is requested. Possible rotation schemes, disclosed in the framework agreement, were mentioned as an example in the Working Group. They are to be considered in the light of other provisions of the Model Law and in the light of the risks of creating oligopolies.

<sup>4</sup> The provision of guidance to the Secretariat is requested on whether all jurisdictions will be permitted to take advantage of this provision under their administrative law.

[commentary about the extent/duration of commitment, and cross-references to second-stage notice provisions are to be added].

#### **Article 59. Establishment of an open framework agreement<sup>5</sup>**

1. The purpose of the article is to set out the procedure for the first stage of an open framework agreement procedure. By comparison with the provisions for closed framework agreements, which are concluded through the use of a procurement method under chapter III, IV or V of the Model Law, an open framework agreement procedure is a self-contained one,<sup>6</sup> and this article provides for the relevant procedures. An open framework agreement is described at paragraphs ... above, and the guidance to this and the following article of the Model Law makes cross-reference to that description where necessary.

2. Paragraph (1) records the requirement that the agreement be established and maintained online. This provision is a rare exception to the approach of the Model Law that its provisions are technologically neutral, and is included because seeking to operate an open framework agreement in traditional, paper-based format would defeat the administrative efficiency that lies at the heart of open framework agreement procedures, in that it relies on the use of Internet-based, electronic means of communication. The procedure is designed to involve a permanently open web-based procurement opportunity, which suppliers or contractors can consult at any time to decide whether they wish to participate in the procurements concerned, without necessarily imposing an administrative burden in the provision of individual information to those suppliers or contractors, with consequent delays in response times, as is further explained in paragraphs ... below. Responses to opportunities and requests to participate are intended to be provided in a time frame that only online procurement can accommodate.

3. Paragraph (2) provides the mechanism for solicitation of participation in the open framework agreement procedure. It applies the provisions of article 32 by reference;<sup>7</sup> it is self-evident that solicitation to become a party to an open framework agreement must itself be open. The solicitation must also be international, unless the exceptions referred to in article 32(4) and article 8 by cross-reference apply (guidance as to which is found at ... above). It is recommended that the invitation also be made permanently available on the website at which the framework agreement will be maintained (see, also, the guidance to article 60(2) below, regarding ongoing publicity and transparency mechanisms, including periodic re-publication of the initial invitation).

4. Paragraph (3) sets out the requirements of the invitation that solicits participation in the procedure, and tracks the requirements for an invitation to tender in open tendering proceedings, with certain deviations necessary to accommodate

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<sup>5</sup> The provision of guidance to the Secretariat is requested on whether these framework agreements should be compared with electronic catalogues and request for quotations.

<sup>6</sup> The provision of guidance to the Secretariat is requested on whether this technique should be classed as a separate procurement method and listed in article 26 (1) accordingly. The same point is raised in the commentary to article 26.

<sup>7</sup> The provision of guidance to the Secretariat is requested on the need to amend the wording in article 59(2) to read “following the requirements of article 32” instead of the current wording “in accordance with article 32”, to reflect more accurately that article 32 in fact applies.

the conditions of an open framework agreement. The provisions are also consistent, so far as possible, with those applicable to closed framework agreements. Thus, the commentary to solicitation in closed framework agreements should be consulted on the provisions equivalent to those contained in paragraphs (3)(b), (3)(c) and (3)(f) (subparagraphs (b) and (c) are intended to make it clear that the procedure involves an open framework agreement)<sup>8</sup> and the commentary to solicitation in open tendering proceedings should be consulted on the provisions equivalent to those in paragraphs (3)(e)(i), (3)(g) and (3)(h). Guidance on issues particular to open framework agreement procedures appears in the following paragraphs.

5. Paragraph (3)(a) requires the names and addresses of the procuring entities that will be parties to the open framework agreement or that otherwise can place orders (procurement contracts) under it to be recorded.<sup>9</sup> The provision is therefore flexible in terms of allowing procuring entities to group together to maximize their purchasing power, and in allowing the use of centralized purchasing agencies, but the framework agreement is not open to new purchasers. The reason for both the flexibility and the limitation is to provide adequate transparency and to support value for money: suppliers or contractors need to know the details of the procuring entities that may issue procurement contracts if they are to be encouraged to participate and to present submissions that meet the needs of the procuring entity, and the efficacy of the procedure is to be ensured. In addition, the requirements of contract formation in individual States will vary; some may not permit procuring entities to join the framework agreement without significant administrative procedures, such as novation. The provision should be read together with the definition of “procuring entity”, in article 2(l), which allows more than one purchaser in a given procurement to be the “procuring entity” for that procurement. In the context of framework agreements, the entity that awards a procurement contract is by definition the procuring entity for that procurement; the framework agreement itself allows for several potential purchasers at the second stage. However, one agency will be responsible for establishing and maintaining the framework agreement, and it will be identified as the “procuring entity” for that purpose, as provided for in paragraph (3)(a).

6. Paragraph (3)(d) requires the languages of the framework agreement to be set out in the invitation, and includes other measures to promote transparency and consequently to enhance access to the framework agreement once it has been concluded. The website at which the open framework agreement is located should be easy to locate, as an example of the general considerations regarding effective transparency in electronic procurement (see guidance at ... above). The invitation is also required to set out any specific requirements for access to the framework agreement; guidance on ensuring effective market access to procurement is provided in the commentary to article 7 above.

7. Paragraph (3)(e) contains a mixture of provisions of general applicability, and provisions concerning framework agreement procedures alone, which together provide the terms and conditions under which suppliers or contractors can become

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<sup>8</sup> The Commission may wish to consider that paragraph 3 (c) of article 59 of the draft Model Law is redundant and may be deleted, in the light of the provisions of paragraph (3)(b) of the same article.

<sup>9</sup> The provision of guidance to the Secretariat on operation of this flexibility in practice is requested.

parties to the framework agreement. Paragraph (3)(e)(i) requires the standard declaration as to whether participation is to be restricted on the basis of nationality in the limited circumstances envisaged by article 8. Paragraph (3)(e)(ii) is an optional provision (accordingly presented in brackets) permitting a maximum number of suppliers or contractors parties to the framework agreement to be set. As the accompanying footnote explains, the provision need not be enacted by States where local technical constraints do not so require, and in any event should be read in conjunction with the limited scope of this permission in paragraph (7) of this article (as explained in the commentary to that paragraph of the article below), so as to provide essential safeguards against abuse and undesirable consequences. The paragraph requires the procedure and criteria that are to be followed in selecting any maximum to be disclosed, consistent with equivalent provisions elsewhere in the Model Law (guidance as to the general issues arising is found in the commentary to [restricted tendering], at .... above). [A cross-reference to similar considerations in the context of ERAs is to be added.]

8. Paragraph (3)(e)(iii) addresses the manner in which applications to become parties to the framework agreement are to be presented and assessed, and it tracks the information required for tendering proceedings under article 38. The provision refers to “indicative submissions”, a term used to reflect that there will always be second-stage competition under an open framework agreement, so that the initial submissions are merely, as their name suggests, indicative. Moreover, while the qualifications of suppliers or contractors are assessed, and their submissions are examined against the relevant description to assess responsiveness (see paragraphs (5) and (6) of the article), by comparison with initial submissions in closed framework agreements, there is no evaluation of indicative submissions (i.e. no competitive comparison of submissions, such as is provided for in article 42). Also by contrast with the position in closed framework agreements, and as is explained in the guidance to paragraph (6) of the article below, all suppliers or contractors presenting responsive submissions are eligible to join the framework agreement, provided that they are qualified.

9. Paragraph (3)(e)(iv) requires the invitation to include a statement that the framework agreement remains open to new suppliers or contractors to join it throughout its duration (see paragraph (4) of the article for the related substantive requirement), unless the stated maximum of suppliers or contractors parties to the agreement is exceeded and unless the potential suppliers or contractors are excluded under limitations to participation imposed in accordance with article 8 of the Model Law. The invitation should also set out any limitations to new joiners (which might arise out of capacity constraints, as described above, or as a result of imposition of limitations under article 8 of the Model Law), plus any further requirements, for example as regards qualifications of parties to the agreement and responsiveness of their indicative submissions.

10. Paragraph 3(f) requires all the terms and conditions of the framework agreement (themselves governed by article 60) to be set out in the invitation, to include, among other things, the description of the subject matter of the procurement and evaluation criteria. The requirements for those terms and conditions are discussed in the commentary to article 60 below.

11. Paragraph (4) sets out the substantive requirement that the framework agreement be open to new suppliers or contractors throughout the period of its

operation. [As is noted in the general commentary to this chapter,] this provision is a key feature of open framework agreements.

12. Paragraph (5) requires indicative submissions received after the establishment of the framework agreement to be assessed promptly, in order that the framework agreement remains open to new joiners in reality; this is a critical feature in the context of an online open framework agreement, which may be designed for small-scale and regular purchases. All responsive submissions from qualified suppliers or contractors must be accepted and the suppliers or contractors concerned admitted to the framework agreement, as provided for in paragraph (6), subject to any capacity constraints justifying rejection imposed under paragraphs (3)(e)(ii) and (7) as set out in the invitation to become a party to the agreement, or other restrictions (where the procurement is domestic, for example; see the relevant discussion above).

13. Paragraph (7) is linked to paragraph (3)(e)(ii), both of which are put in brackets as an optional text to be considered for inclusion in the law by an enacting State. They concern imposition of the maximum number of suppliers or contractors parties to the agreement because of technical constraints. In addition to the considerations raised in connection with the similar provisions appearing in the context of ERAs (see commentary to article 52(1)(k) and (2) in ... above), there are additional considerations that an enacting State should keep in mind in considering enacting these provisions. Because the salient difference between closed and open framework agreements is that the latter remain open to new suppliers or contractors throughout their operation, any imposition of a maximum number of suppliers or contractors parties may effectively turn the framework into a closed agreement. This situation may be exacerbated in that the benefits of a fluctuating pool of suppliers or contractors may be lost if suppliers or contractors that cease to participate in second-stage competition remain, from a technical point of view, parties to the framework agreement and block new joiners. Paragraph (7) therefore permits such a maximum number of supplier or contractors parties only where technical capacity constrains access to the systems concerned (e.g. the software for the framework agreement may accommodate only a certain maximum number). However, enacting States should be aware that such capacity constraints are declining at a rapid rate, and the provision is likely to become obsolete within a short period.

14. Even though a maximum number, where needed, is likely to be of a reasonable size, the procuring entity is required to be objective in the manner of selecting the suppliers or contractors parties up to that maximum. An example, it can follow the approach of restricted tendering used on the ground of article 28(1)(b) (see commentary to that article in ... above), limiting the number on the basis of random selection, or “first come first served”, etc. (see paragraphs ... above). As the selection decision will be subject to challenge under the provisions of chapter VIII,<sup>10</sup> enacting States should ensure that the procurement regulations, or other applicable rules, provide sufficient guidance to procuring entities.

15. Enacting States will observe that there is no evaluation of the indicative submissions provided for in this article. The nature of an open framework

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<sup>10</sup> The provision of guidance to the Secretariat is requested on how non-discrimination is to be ensured given the silence of the Model Law on this point. Addressing the matter only in regulations in the absence of the requirement to be objective in the Model Law itself, may not be sufficient.

agreement is that the indicative submissions are indicative only and, as is explained in paragraph ... above, all responsive submissions from qualified suppliers or contractors are accepted. As is further explained in the guidance to article 61 below, price competition is largely absent at the first stage, and so ensuring genuine competition at the second stage is critical.

16. The provisions of paragraph (8) are designed to provide transparency in decision-making and to allow a supplier or contractor to challenge the decision of the procuring entity not to accept the supplier or contractor in the framework agreement procedure if desired. The inclusion of such provision in the context of the open framework agreement is justified because safeguards of the standstill period notification would not be applicable to indicative submissions but only to submissions presented in response to the specific purchase orders placed under the agreement (the second-stage submissions). It is therefore essential for the supplier or contractor to know whether it is the party to the agreement without which it would not be able to learn about purchase orders placed under the agreement and present second-stage submissions. However, in the case of the challenge of the procuring entity's decision, the policy considerations regarding delaying the execution of a procurement contract to allow an effective challenge and allowing the procurement contract to proceed are different in the open framework agreement context from the norm (the general policy considerations are set out in the guidance to article 21 above). In the case of open framework agreements, any aggrieved supplier or contractor whose submission was rejected as non-responsive or that was not admitted because of disqualification will be able to be admitted to the framework agreement for future purchases if a challenge is resolved in its favour, the harm occasioned by the delay in participation was considered as unlikely to override the interest in allowing an effectively limited portion of procurement contracts in open framework agreements to proceed.

#### **Article 60. Requirements of open framework agreements**

1. This article mirrors article 58 regarding closed framework agreements, governing the terms and conditions of the open framework agreement and the award of contracts under it. As was also the case for closed framework agreements, the law of the enacting State will address such issues as the enforceability of the agreement in terms of contract law, and such issues are therefore not provided for in the Model Law. Suppliers or contractors that join the framework agreement after its initial conclusion will need to be bound by its terms; they may be so bound automatically upon joining the agreement, but enacting States should ensure that the law makes appropriate provision in this regard.

2. Paragraph (1) records the requirement that the award of procurement contracts under the open framework agreement must be carried out through a competition at the second stage of the framework agreement procedure. Subparagraphs (c) to (f) set out the terms and procedures of the second-stage competition. They are similar to the provisions in paragraph (1)(d) of article 58, guidance for which is found at paragraphs ... above. The differences reflect the nature of the subject matters envisaged to be procured through open framework agreements (simple standardized items, as explained in ... above).

3. Paragraph (1)(a) requires the duration of the framework agreement to be recorded in that agreement. By comparison with closed framework agreements,

there is no reference to any maximum duration imposed under the procurement regulations: the fact that the agreement is open to new suppliers or contractors throughout its period of operation lessens the risks of choking off competition as described in the context of closed framework agreements in paragraph (...) above. However, in order to allow for new technologies and solutions, and to avoid obsolescence, the duration of an open framework agreement should not be excessive, and should be assessed by reference to the type of subject matters being procured. (See, also, the general guidance at paragraph ... above on the importance of a periodic reassessment of whether the framework agreement continues to reflect what is currently available in the relevant market.) In addition, suppliers or contractors may be reluctant to participate in an agreement of unlimited duration.

4. Paragraph 1(b) requires the terms and conditions of the procurement that are known at the stage when the open framework agreement is established to be recorded in the framework agreement (and under article 59 will have been provided in the invitation to become a party to the open framework agreement). This provision is similar to article 58(1)(b) regarding closed framework agreements, but as noted above, some deviations are justified in the light of the nature of subject matters intended to be procured through the open framework agreements. Their nature would not require establishing any terms and conditions of the procurement at the second stage but only the refinement of the established ones, for example as regards the quantity, place and time frame of the delivery of the subject matter. Although the nature of an open framework agreement tends to indicate that the description of the procurement will be framed in functional and broad terms so as to allow refinement to the statement of the procuring entity's needs at the second stage, it is important that it is not so broad that the open framework agreement becomes little more than a suppliers' list. If that were the case, the procuring entity or entities using the framework agreement would be required to conduct or re-conduct stages of the procurement at the second stage (fuller reconsideration of qualifications and responsiveness as well as the evaluation of second-stage submissions), thus defeating the efficacy of the procedure. In addition, the extent of the change in the initial terms of solicitation at the second stage is subject to limitations of article 62. On the other hand, sufficient flexibility is required to allow for changes in the regulatory framework, such as regarding environmental requirements or those pertaining to sustainability.

5. Paragraph (2) requires the periodic re-advertising of the invitation to become a party to the open framework agreement. The invitation must be published, at a minimum, once a year, in the same place as the initial invitation. Nonetheless, enacting States may consider that more frequent publication will encourage greater participation and competition. The electronic operation of the open framework agreement implies purely online publication, including at the first stage under article 32,<sup>11</sup> thus keeping the costs of publication to a reasonable level. The invitation must contain all information necessary for the operation of the framework agreement (including the relevant website, and supporting technical information). The paragraph also requires the procuring entity to ensure unrestricted, direct and full access to the terms and conditions of the framework agreement; the agreement

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<sup>11</sup> The provision of guidance to the Secretariat is requested on whether this understanding is correct, or when the open framework agreement is established, the notice may be required to be published in paper-based media as well.

operates online, which means that such information must be available at a website indicated in the invitation. It should also include the names of all suppliers or contractors parties<sup>12</sup> and, as noted above, all procuring entities that may use the framework agreement. Second-stage competitions should also be publicized on that website, as further explained in paragraphs ... below.

#### **Article 61. Second stage of a framework agreement procedure**

1. This article governs second-stage competition under both closed and open framework agreements. Some of its provisions, such as in paragraph (3) intend to accommodate differences in the award of procurement contracts under closed framework agreements without second-stage competition and closed framework agreements with second-stage competition.

2. As paragraph (1) notes, the framework agreement sets out the substantive criteria and certain procedures governing the award of procurement contracts under the framework agreement, and the provisions of this article record the other elements of the award procedures. Thus there is a requirement for full transparency as regards both the award criteria and the procedures themselves.

3. The procedures are aimed at allowing effective competition at this second stage of the procedure, while avoiding excessive and time-consuming requirements that would defeat the efficiency of the framework agreement procedures. These considerations are particularly important in open framework agreements, in which there have been indicative, rather than initial, submissions at the first stage and there has been no evaluation of those submissions.

4. Paragraph (2) records that a procurement contract can be awarded only to a supplier or contractor that is a party to the framework agreement. This may be self-evident as regards closed framework agreements, but in the context of open framework agreements, the provision underscores the importance of swift examination of applications to join the framework agreement itself, and the utility of relatively frequent and reasonable-sized second-stage competitions to take advantage of a competitive and dynamic market. In practice, a second-stage competition will probably be announced on the website for the framework agreement itself, with a relatively short period for presenting final submissions in the second-stage competition. New joiners may wish to present their indicative submissions in time to be considered for the second-stage competition but may be able to participate only in subsequent competitions. The interaction between final submission deadlines, the time needed to assess indicative submissions and the frequency and size of second-stage competitions should be carefully assessed when operating the framework agreement.

5. Paragraph (3) records that article 21 on the award of the procurement contract applies to closed framework agreements without second-stage competition, save as regards the application of a standstill period required under paragraph (2) of that article. The reason for not applying standstill period provisions in the context of

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<sup>12</sup> The need to disclose the identity of all suppliers or contractors parties to the framework agreement under article 22 may need to be reconsidered in the light of the elevated risks of collusion.



closed framework agreements without second-stage competition are [to be completed; see the relevant query in the commentary to article 21(3)(a)].

6. Paragraph (4) sets out the procedures for the second-stage competition. Subparagraph (a) requires the issue of an invitation to the competition to all parties of the framework agreement or only those then capable of meeting the needs of the procuring entity in the subject matter of the procurement. This notice is provided in accordance with the terms and conditions of the framework agreement which may, for instance, allow for automated invitations for efficiency reasons. Best practice is also to provide a copy of the invitation on the website at which the framework agreement itself is located; this may also encourage new suppliers or contractors to participate in the procedure where possible (i.e. in open framework agreements).

7. The provisions of subparagraph (a) require all suppliers or contractors parties to the framework agreement to be invited to participate or, where relevant, only those “capable” of fulfilling the procuring entity’s requirements. The latter should be understood in a very narrow sense, in the light of the terms and conditions of the framework agreement and terms and conditions of initial or indicative submissions, to avoid allowing much discretion on the procuring entity as regards the pool of suppliers or contractors to be invited, which may lead to abuse, such as favouritism. For example, the framework agreement may permit suppliers or contractors to supply up to certain quantities (at each second-stage competition or generally); initial or indicative submissions may state that certain suppliers or contractors cannot fulfil particular combinations or certain quality requirements. The assessment of suppliers or contractors that are “capable” in this sense is therefore objective; all suppliers or contractors parties to the agreement must be presumed to be capable unless the framework agreement or their initial or indicative submissions provide to the contrary.<sup>13</sup> The objectives of this provision are two-fold: first, to avoid abuse or misuse in the award of contracts to favoured suppliers or contractors and, secondly, to limit submissions to those that are capable of fulfilling them to enhance efficiency. The procuring entity should include an explanation in the record of the procurement as to why any suppliers or contractors parties to the agreement are not invited to participate in the second-stage competition; the publication of the invitation on the relevant website will allow for any such exclusion to be challenged.<sup>14</sup> These safeguards are considered critical to ensure that second-stage competition is effective, recalling that experience in the use of framework agreements indicates that this stage of the process is a vulnerable one from the perspective of participation and competition. Vulnerability increases even further

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<sup>13</sup> The guidance reflects the current wording of article 61 (4)(a). However, the suggestion was made in the Working Group that suppliers or contractors should be able to improve their initial submissions, for example by increasing quantities in their second-stage submissions. They would not however have such a chance if they are considered as not capable on the basis of the terms and conditions of their initial/indicative submissions and would be excluded on that ground from participation in the second-stage competition. The provision of guidance to the Secretariat is therefore requested on how the procuring entity will be able to determine objectively which suppliers or contractors are capable and which are not to fulfil purchase orders without knowing the content of second-stage submissions of all suppliers or contractors parties to the framework agreement.

<sup>14</sup> There is not however a substantive requirement in the Model Law to make an invitation to the second-stage competition public. See the immediately following footnote for further explanation.

since the provisions on the standstill period (article 21(2)) will apply in the case of framework agreements with second-stage competition only to suppliers or contractors that presented second-stage submissions (but not to all parties of the framework agreement).

8. Paragraph (4)(b) regulates the content of the second-stage invitation. Subparagraphs (iii) to (xi) repeat provisions from article 38 on the contents of solicitation documents, guidance on which is found in ... above. In the context of framework agreements, it is important to provide a suitable deadline for presenting submissions: in the context of open framework agreements, for example, it may be expressed in hours or a day or so. Otherwise, the administrative efficiency of the procedure will be compromised, and procuring entities will not avail themselves of the technique. The period of time between the issue of the invitation to present second-stage submissions and the deadline for presenting them should be determined by reference to what sufficient time to prepare second-stage submissions will be in the circumstances (the simpler the subject matter being procured, the shorter the possible duration). Other considerations include how to provide a minimum period that will allow a challenge to the terms of solicitation. The time requirement will be in any event qualified by the reasonable needs of the procuring entity, as explicitly stipulated in article 14(2) of the Model Law, which may in limited circumstances prevail over the other considerations, for example, in cases of extreme urgency following catastrophic events. (See also the relevant considerations in paragraph ... above.)

9. Enacting States will observe, however, that there is no requirement to issue a general notice of the second-stage competition, reflecting the presumption that the first stage of framework agreement will have included an open invitation since the default rule under articles 27 and 57(1) is to resort to open tendering. This presumption is however invalid when resort to alternative methods of procurement involving direct solicitation is made for the award of the framework agreement.<sup>15</sup>

10. Subparagraph (i) requires the information that sets the scope of the second-stage competition to be included in the invitation, a vital transparency requirement. Where the invitation is issued electronically (which must be, for example, in open framework agreements), procuring entities may wish to incorporate the required restatement of the existing terms and conditions of the framework agreement by hyperlink (i.e. by cross-reference), provided that the link is adequately maintained. The invitation must also include both the terms and conditions of the procurement that are the subject of the competition and further

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<sup>15</sup> The need for requiring in the Model Law to give an advance notice of purchase orders placed under framework agreements to all parties of the framework agreement is nevertheless to be considered. This should be considered as an essential safeguard against abuses. This would make the safeguards in the context of framework agreements consistent with those applicable in restricted tendering where ex ante notice of procurement is required to be made public under article 33 (5) of the draft Model Law. Such notice enables suppliers or contractors to challenge their exclusion from the procurement proceedings when resort to restricted tendering is made in particular on the ground listed in article 28(1)(a) (i.e. an assumption by the procuring entity that there is only a limited number of suppliers or contractors capable of delivering the subject matter of the procurement, which may be similar to the assessment by the procuring entity under article 61 (4)(a) of capability of suppliers or contractors parties to the framework agreement to deliver the subject matter).

details thereof where necessary. This provision should be read together with articles 58(1)(d)(i) and (60)(1)(c), which requires the framework agreement to set out the terms and conditions that may be established or refined through second-stage competition. The flexibility to engage in such refinement is limited by application of article 62 which provides that there may be no change to the description of the subject matter of the procurement that is governed by article 10, and that other changes may be made only to the extent permitted in the framework agreement. Where modifications to the products, or technical substitutions, may be necessary, they should be foreshadowed in the framework agreement itself, which should also express needs on a sufficiently flexible and functional basis (within the parameters of article 10) to allow for such modifications. Other terms and conditions that may be refined include combinations of components (within the overall description), warranties, delivery times, and so forth. [In practice, the extent of refinement under closed framework agreements is likely to be lesser than that under open framework agreements.]<sup>16</sup> The balance of allowing sufficient flexibility to permit the maximization of value for money and the need for sufficient transparency and limitations to avoid abuse should form the basis of guidance to procuring entities in the use of framework agreements.

11. Subparagraph (ii) requires a restatement of the procedures and criteria for evaluation of submissions, as originally set out in the framework agreement. Again, this provision is aimed at enhancing transparency, and should be read together with articles 58(1)(d)(iii) and 60(1)(f), which allows the relative weights of the evaluation criteria (including sub-criteria) to be varied within a range set out in the framework agreement itself. Appropriate evaluation criteria and procedures at this second stage are critical if there is to be effective competition, objectivity and transparency, and their importance and application are explained in the guidance to article 58 above (see paragraphs ...).

12. Paragraph (4)(c) is derived from the general requirements in article 11(6), requiring objectivity and transparency in the evaluation of submissions by not permitting any previously undisclosed criteria or procedures to be applied during the evaluation.

13. Paragraph (4)(d) recalls the requirements of article 21 regarding notices and associated formalities when the successful submission is accepted (for guidance on those provisions, see ... above). The notice provisions would require that the price of each purchase be disclosed to the suppliers or contractors that presented second-stage submissions, so as to facilitate any challenge by unsuccessful supplier or contractors. It is considered to be good practice to give notice to unsuccessful parties to the framework agreement, such as by individual notification in electronic systems or, in paper-based closed framework agreements without large numbers of participants, as well as by a general publication. In the context of framework agreements, this manner of notification is not only efficient, but can be effective where repeated procurements can benefit from improved submissions, particularly when the notices are accompanied by explanations of why the submissions were unsuccessful or by debriefing procedures. The requirements of article 22, requiring publication of the award, also apply (allowing smaller purchases to be grouped

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<sup>16</sup> The provision of guidance to the Secretariat on accuracy of the statement is requested.

together for publicity purposes, as set out in that article and discussed in the accompanying guidance).

**Article 62. No material change during the operation of the framework agreement<sup>17</sup>**

1. This article is intended to ensure objectivity and transparency in the operation of the framework agreement. It first provides that there can be no change in the description of the subject matter of the procurement, because allowing such a change would mean that the original call for participation would no longer be accurate, and a new procurement would therefore be required. The need for flexibility in the operation of framework agreements, such as permitting refinements of certain terms and conditions of the procurement during second-stage competition, means that changes to those terms and conditions (including to the evaluation criteria) need to be possible. The article therefore provides that such changes are permitted, but only to the extent that they do not change the description of the subject matter of the procurement, and with the transparency safeguard that changes are possible only to the extent permitted in the framework agreement. (This policy objective — ensuring objectivity and transparency in the procurement process — also underlies the provisions of article 15(3), which require a re-advertisement of the procurement and an extension of the submission deadline where the solicitation documents are modified to the extent that there is a material inaccuracy in the original advertisement.) As a result, the description of the subject matter of the procurement will commonly be framed in a functional or output-based way, with minimum technical requirements, so as to allow for product modifications or technical substitutions as described in the guidance to the previous articles of this chapter.

**C. Points regarding framework agreements procedures proposed to be discussed in a section of the Guide to Enactment addressing changes from the 1994 text of the Model Law**

The 1994 Model Law did not make provision for the use of framework agreements. Their use has increased significantly since the date of the adoption of the 1994 Model Law, and in those systems that use them, a significant proportion of procurement may now be conducted in this way. Some types of framework agreement can arguably be operated without specific provision in the Model Law. UNCITRAL considers that the use of framework agreements could enhance efficiency in procurement and in addition enhance transparency and competition in procurements of subject matters of small value that in many jurisdictions fall outside many of the controls of a procurement system. Indeed, the grouping of a series of smaller procurements can facilitate oversight. UNCITRAL therefore has made specific provision for them, to ensure their appropriate use and to ensure that the particular issues that framework agreements raise are adequately addressed.

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<sup>17</sup> The need for changing the title of the article to reflect more accurately the content of the article is to be considered.

### III. SECURITY INTERESTS

#### A. Report of the Working Group on Security Interests on the work of its eighteenth session (Vienna, 8-12 November 2010)

(A/CN.9/714)

[Original: English]

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## I. Introduction

1. At its present session, Working Group VI (Security Interests) began its work on the preparation of a text on the registration of notices with respect to security rights in movable assets, pursuant to a decision taken by the Commission at its forty-third session, in 2010.<sup>1</sup> The Commission's decision was based on its understanding that such a text would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of a security rights registry.<sup>2</sup>

2. At its forty-second session in 2009, the Commission noted with interest the future work topics discussed by Working Group VI at its fourteenth and fifteenth sessions (A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126, respectively). At that session, the Commission agreed that the Secretariat could hold an international colloquium early in 2010 to obtain the views and advice of experts with regard to possible future work in the area of security interests.<sup>3</sup> In accordance with that decision,<sup>4</sup> the Secretariat organized an international colloquium on secured transactions (Vienna, 1-3 March 2010). At the colloquium several topics were discussed, including registration of notices with respect to security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions. The colloquium was attended by experts from governments, international organizations and the private sector. The papers presented at the colloquium are available at [www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html](http://www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html).

3. At its forty-third session in 2010, the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at the colloquium. The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources. However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.<sup>5</sup>

4. The Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the UNCITRAL Legislative Guide on Secured Transactions ("the Guide"), texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the Guide.<sup>6</sup>

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<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 17* (A/65/17), para. 268.

<sup>2</sup> *Ibid.*, para. 265.

<sup>3</sup> *Ibid.*, *Sixty-fourth session, Supplement No. 17* (A/64/17), paras. 313-320.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, *Sixty-fifth session, Supplement No. 17* (A/65/17), paras. 264 and 273.

<sup>6</sup> *Ibid.*, paras. 266-267.

## II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its eighteenth session in Vienna from 8 to 12 November 2010. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Belarus, Bolivia (Plurinational State of), Botswana, Brazil, Bulgaria, Canada, China, Colombia, Czech Republic, El Salvador, France, Germany, India, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Mexico, Nigeria, Norway, Philippines, Poland, Republic of Korea, Russian Federation, Spain, Sri Lanka, Thailand, Turkey, Uganda, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Belgium, Democratic Republic of the Congo, Dominican Republic, Guatemala, Indonesia, Ireland, Lithuania, Malawi, Panama, Portugal, Romania, Slovakia, Slovenia, Tunisia, United Republic of Tanzania and Yemen.

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

(a) *United Nations system*: The World Bank and World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: League of Arab States;

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Center for International Legal Studies (CILS), Commercial Finance Association (CFA), European Brands Association (AIM), Fédération Internationale des Associations de Distributeurs de films (FIAD), National Law Center for Inter-American Free Trade (NLCIFT), New York City Bar (NYCB), the European Law Students' Association (ELSA) and the Union Internationale des Avocats (UIA).

8. The Working Group elected the following officers:

*Chairman*: Mr. Rodrigo LABARDINI FLORES (Mexico)

*Rapporteur*: Mr. Cyprian KAMBILI (Malawi)

9. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.43 (Provisional Agenda), A/CN.9/WG.VI/WP.44 and Addenda 1 to 2 (Registration of security rights in movable assets).

10. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Registration of security rights in movable assets.
5. Other business.
6. Adoption of the report.

### III. Deliberations and decisions

11. The Working Group considered a note by the Secretariat entitled “Registration of security rights in movable assets” (A/CN.9/WG.VI/WP.44 and Addenda 1 to 2). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to prepare a revised version of the text reflecting the deliberations and decisions of the Working Group.

## IV. Registration of security rights in movable assets

### A. General (A/CN.9/WG.VI/WP.44, paras. 1-5)

12. At the outset, broad support was expressed in the Working Group for a text on the registration of a notice of security rights in movable assets. It was stated that empirical evidence clearly demonstrated that a secured transactions law could achieve its objectives only if complemented with an efficient registration system. It was also observed that, while there were regional texts on such registration systems, there was a need for an international text that would usefully complement the Commission’s work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of such registration systems.

13. As to the specific form and structure of the text to be prepared, recalling the views expressed at the forty-third session of the Commission,<sup>7</sup> the Working Group adopted the working assumption that the text would be a guide on the implementation of a registry of notices with respect to security rights in movable assets. In addition, the Working Group generally agreed that the text could include principles, guidelines, commentary and possibly recommendations with respect to registration regulations. The Working Group also agreed that the text should be consistent with the Guide, while, at the same time, taking into account the approaches taken in modern security rights registration systems, national and international. In that connection, it was stated that, in line with the recommendation of the Guide on the implementation of an electronic registration system “to the extent possible” (see recommendation 54, subpara. (j)), the text should discuss a modern, electronic registry, while taking into account the need to accommodate a hybrid registration system in which parties could, at least, register a paper-based notice. It was also observed that the issue of coordination among registries would also be an important issue that should be discussed. In that connection, the Working Group took note with interest of the draft model regulations contained in document A/CN.9/WG.VI/WP.44/Add.2. It was felt that the model regulations could be used as a good starting point for the discussion.

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<sup>7</sup> *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 17 (A/65/17)*, para. 266.



**B. Introduction (A/CN.9/WG.VI/WP.44, paras. 6-18)**

14. With regard to paragraph 14, it was suggested that:

(a) The “legal efficiency”, referred to in subparagraph (a), should not be limited to aspects related to registration and searching but should also cover all related services of the registry (for example, the issuance of certificates); and

(b) The phrase “equality of treatment” in subparagraph (c) might be better replaced with language along the lines of “balancing the interests of all constituents”.

15. It was agreed that, for reasons of consistency with the terminology used in the Guide, reference should be made in the text to the term “notice”, while it could be explained that it referred to information, a point that could be reiterated in the appropriate places in the text. It was also agreed that, as registration of a notice of a security right may be a new concept in many legal systems, it would need to be explained in some detail.

16. In response to a question, it was noted that, under the Guide, the registrar might request evidence of the identity of the registrant but not require verification of the registrant’s identity or authorization of the registration by the grantor as part of the registration process (see recommendation 54, subpara. (d), and 55, subpara. (b)). It was stated that the Guide took that approach because involvement of the registrar or the grantor in the registration process would reduce the efficiency of registration, while abuse of the system could be dealt by other law with damage claims and penalties.

**C. Purpose of a security rights registry (A/CN.9/WG.VI/WP.44, paras. 19-60)**

17. Several suggestions were made, including the following:

(a) In paragraph 19, reference should be made to the law recommended in the Guide rather than generally to modern secured transactions regimes;

(b) In paragraphs 22 (and 36), in view of the fact that the Guide referred to security rights as rights created by agreement, reference should be made to statutory preferential claims or a similar term, rather than to statutory security rights, and the paragraph should be revised to make it clear that it stated an example of an approach taken in some legal systems rather than making a recommendation that such statutory preferential claims should be included in the scope of the registry;

(c) In paragraph 24, reference to fictional pledges might not be necessary and the last sentence should be clarified by explaining that dispossession of the grantor could also result in ensuring that the assets would not be damaged or decrease in value;

(d) In paragraph 25, it should be clarified that a possessory pledge was only “possible” (rather than “practical”), if the asset was capable of physical delivery, and that assets such as inventory would be difficult to be used as circulating assets if the secured creditor took possession of them;

(e) In paragraph 28, reference should be made to the problem of lack of “transparency” or “certainty” (rather than “secrecy”), posed by non-possessory security rights;

(f) In paragraph 29, a cross-reference should be added to the discussion of rights to assets subject to specialized registration and the reference to the maximum amount of the secured obligation should be aligned with recommendation 57, subparagraph (d), which referred to it as a possible option;

(g) In paragraph 34, reference should be made that, in practice, for a creditor to obtain an acquisition security right in inventory, the consent of an inventory financier on record might be needed (although, under the law recommended in the Guide, registration of a notice and mere notification of inventory financiers were sufficient);

(h) In paragraph 37, it should be clarified that, while priority among competing security rights would be determined according to the order of registration or the order in which they were made effective against third parties by possession, pre-registration of a security right was also possible;

(i) In paragraph 40, to clarify the relationship between the ordinary-course-of-business priority rule and inventory, a cross-reference should be included to the discussion on the registration of serial number assets;

(j) In paragraph 44, no reference should be made to the possibility that States could exclude assets subject to specialized registration from the scope of the registry as such a suggestion would be inconsistent with specific recommendations of the Guide (see recommendations 4, subpara. (a), 38, 77 and 78);

(k) In paragraph 47, reference should be made to the law applicable to a security right in intellectual property (see recommendation 248) and examples could be included to explain the various rules;

(l) In paragraph 48, it should be clarified that the issue was whether a transferee of an asset with actual knowledge of the existence of an unregistered security right should take the asset free of the security right;

(m) Paragraph 49, which was an exception to the ordinary-course-of-business priority rule, should be deleted as it addressed a different matter that was discussed in paragraph 40;

(n) In paragraph 50, it should be clarified that, while registration resulted in deemed notice to third parties, the priority of a security right should be based on a straight forward priority rule and not on notions of constructive notice (in other words, presumed knowledge);

(o) In paragraph 51, reference should be made to registration resulting in effectiveness of a security rights against third parties, including judgment creditors and the grantor’s insolvency representative, and that failure to not only register but also otherwise make the security right effective against third parties would result de facto in a secured creditor being treated in the grantor’s insolvency as an unsecured creditor;

(p) In paragraph 54, last sentence, it should be explained that a notice referred to a “possible” security right because notice could be registered before a

security right was created (see recommendation 68) or be on record even after the secured obligation was discharged;

(q) In paragraph 56, it should be clarified that failure to register or otherwise make a security right effective against third parties would reduce de facto the secured creditor to the status of an unsecured creditor;

(r) In paragraphs 56 and 57, reference should be made to the scope of the law recommended in the Guide which could include assets, rights in which were subject to specialized registration or not (see recommendation 4, subpara. (a)), to the priority given to a security right registered in a specialized registry as a way of coordination among registries, to common searching systems as another way of coordination among registries and to the fact that the Guide did not recommend specialized registries but simply dealt with coordination matters if such registries existed in one State or another;

(s) In paragraph 59, it should be explained that notice registration was different from document registration and the statement about registration of notice of security rights in movable assets and in immovable property in the same registry should be further explained or deleted; and

(t) In paragraph 60, reference should be made to whether a buyer of immovable property would take the property free of the security right unless it was registered in the immovable property registry and also to the draft regulation relating to registration of a security right in an attachment to immovable property.

#### **D. Key characteristics of an effective security rights registry (A/CN.9/WG.VI/WP.44, paras. 61-73)**

18. Several suggestions were made, including the following:

(a) In paragraph 62, it should be clarified that the registry provided a record of a “possible” security right on whatever asset the grantor had at that time or would acquire in the future, as well as that the grantor could have ownership of, or simply the power to encumber, the encumbered assets; and

(b) In paragraphs 63, it should be clarified that registration was normally not required for true leases and that with respect to true leases registration was merely a protective measure against the possibility that a court might find that what appeared to be a true lease was really a secured transaction.

19. During the discussion of paragraphs 64-68, differing views were expressed as to whether registrations with respect to certain types of asset (such as motor vehicles and other high-value equipment with respect to which there was a secondary resale market) should be indexed and retrieved by reference to a serial number. One view was that such an approach was inconsistent with recommendation 54, subparagraph (h), which referred to notices being indexed and retrieved by searchers according to the identifier of the grantor. It was stated that serial number identification had a drawback as it imposed an additional burden on the registrant and limited the possibility of registering notices with respect to future assets and a changing pool of assets (such as inventory) as the secured creditor would need to amend the registration and enter the serial number of assets every

time the grantor acquired such assets. In response, it was stated that the registration text did not recommend serial number registration for inventory.

20. Another view was that the commentary of the Guide discussed the possibility of supplementary asset-based indexing with respect to high-value, durable assets for which there was a resale market (but not inventory; see the Guide, chapter IV, paras. 34-36), and thus the commentary of the registration text should also discuss the matter in a way that would be consistent with the Guide. It was stated that the main advantage of asset-based indexing and searching by serial number would be that it would allow a searcher to identify security rights created by the predecessors in title of a transferee from the original grantor, which would otherwise be difficult as a notice would contain only the original grantor's name and not the name of the current transferee.

21. It was also observed that the discussion in the commentary should refer to the consequences of the failure of a registrant to include in the registration the serial number of the encumbered assets. However, with respect to that matter also, differing views were expressed. One view was that failure of the registrant to refer to the serial number of the encumbered assets should not render the registration ineffective nor have any priority consequences. Another view was that, if such an approach was followed, reference to the serial number would be of no use, registrants would not refer to it and the problem of identifying security rights created by the grantor's predecessors in title could not be addressed. It was stated that the registration text should discuss the approach taken in some legal systems whereby: (a) failure to include the serial number of the encumbered assets made the security right ineffective against a buyer of the assets; and (b) a subsequent secured creditor that included in the registration the serial number of the encumbered assets should have priority over a prior secured creditor that did not include such information in its notice. It was observed that such an approach was followed with respect to motor vehicles and high-value equipment for which there was a secondary resale market in legal systems that did not have a title certification system allowing a security right to be made effective against third parties by a notation on the certificate.

22. In addition, with respect to paragraphs 64-68, the following suggestions were made:

(a) Reference should be made to possible coordination between grantor-based registries and asset-based registries that permitted serial number indexing;

(b) Reference should be made to alphanumerical identification as serial numbers included numbers as well as letters;

(c) Reference to serial numbers should be expanded to include other alphanumerical methods for identifying assets (for example, an asset could have an identification number which would not necessarily be a serial number);

(d) With regard to intellectual property, other information (for example, the title of the work) might be provided as, in some cases, the intellectual property would have a longer life span than the grantor and some discussion should be included in the commentary as an intellectual property right could have multiple identifiers (for example, with respect to patents and trademarks, one number was

assigned at the time of the application and a different number at the time of the grant);

(e) In paragraph 68, the last sentence should be deleted as it was inconsistent with the Guide which always required the grantor's identifier.

23. After discussion, the Working Group requested the Secretariat to revise paragraphs 64-68, taking into account all the suggestions made, for a decision on serial number indexing and searching to be made by the Working Group at a later stage.

24. With regard to paragraphs 69-73, several suggestions were made, including the following:

(a) In paragraph 71, reference should be made to the possibility of notice registration increasing transaction costs for third-party searchers since the registry contained only minimal information; in response, it was stated that the Guide had adopted notice registration since it would reduce transactions costs for both registrants (because they did not need to register all the security documentation) and for third-party searchers (because they would not extend credit unless the grantor provided any additional information required);

(b) In paragraph 72, it should be clarified that an unauthorized registration did not give any right to the unauthorized or fraudulent registrant, the Guide provided a procedure for the grantor to cancel or amend such registration and any other measures (such as damages or penalties) were left to other law; and

(c) In paragraph 73, last sentence, expiry of a registration should be explained by reference to recommendation 69 and cancellation should be explained by reference to recommendations 72 and 73.

## **E. Legal rules applicable to the registration and search process (A/CN.9/WG.VI/WP.44/Add.1, paras. 1-68)**

25. Several suggestions were made, including the following:

(a) In paragraph 2, reference should be made to "existing or future security rights" and the reference to the establishment of the registry facilitating job creation should be deleted or toned down as, for cost reasons, an efficient registry should operate with a limited number of staff;

(b) In paragraphs 2-7, some discussion should be included as to who would be entitled to register in the case of joint creditors;

(c) In paragraph 3, the statement that the initial registrant might cancel or amend a registration should be qualified by reference to some legal systems;

(d) In paragraph 4, the parenthetical in the second sentence should be revised to refer to an agreement entered before the security agreement, as the security agreement constituted sufficient authorization and the last sentence should be deleted as it was inconsistent with recommendation 71 and, in any case, establishing a communication line between the registry and the grantor might add cost and complexity;

(e) In paragraph 7, unauthorized or mistaken cancellations or amendments of registrations should be discussed by reference to recommendations 72-74 and 96, as well as other approaches taken in legal systems to the problem of the priority of a security right whose registration was reinstated after an interruption as against intervening secured or other creditors;

(f) In paragraph 9, reference should be made to the cancellation or amendment of a registration by the secured creditor pursuant to a request by the grantor;

(g) In paragraph 10, last sentence, reference should be made to the need for multiple registrations where a security agreement mentioned a maximum amount of the obligation secured and to an amendment that, under recommendation 70, would be effective as of the time it was made;

(h) In paragraph 12, it should be clarified that description by reference to a serial number was not suitable for a changing pool of assets such as inventory and that the address in the registry may not be sufficiently reliable for serving legal notices to the grantor;

(i) In paragraph 13, it should be clarified that the grantor's address was one of the elements that should be included in a notice under recommendation 57, subparagraph (a), and the reasons for that approach might need to be explained;

(j) In paragraph 14, the statement about the need to include in a notice the name of the grantor (rather than a third-party debtor) should be reinforced;

(k) In paragraphs 16 and 17, it should be clarified that there was only one database for individuals and legal entities and reference should be made to names in a way that would be suitable irrespective of the different naming conventions in one country or another;

(l) In paragraphs 18-26, it should be clarified that the discussion for the identification of the grantor was descriptive (rather than prescriptive), that ultimately it would be up to each State to determine how a grantor (whether an individual or legal entity) would ultimately be identified and that, under recommendations 57, subparagraph (a), and 58, an inaccurate identification of the grantor would render a registration ineffective only if the notice could not be retrieved by a searcher using the correct identifier;

(m) In paragraph 22, it should be clarified that, if the additional information required for the identification of the grantor was inaccurate, the registration should not be rendered ineffective and that, if the identifier used by a searcher was not correct, whether the search would return several similar names (and the searcher would have to use additional information to narrow down the possibilities) or no name at all was a matter of the design of the registry;

(n) In paragraph 24, reference should be made to legal entities or persons and their identification should be left to national corporate law; and

(o) In paragraphs 25 and 26, syndicates, trusts and sole proprietorships should not be equated with legal entities and the reference to the insolvency representative should be deleted as, even in the case of insolvency, a legal entity should be identified with its name and not that of the insolvency representative.

26. In addition, with respect to paragraphs 24-59 the following suggestions were made:

- (a) With respect to identifiers for trusts and insolvency estates, paragraph 25 should be aligned with article 22 of the draft model regulations;
- (b) In paragraphs 27 and 28, it should be clarified that:
  - (i) The former stated the approach recommended in the Guide and the latter another approach;
  - (ii) The issues of what constituted an error and who might raise the issue should be discussed separately; and
  - (iii) In the former, reference should be made to the “correct” (rather than the “legal”) grantor identifier and, in the latter, the term “software” should be replaced with the term “search logic”;
- (c) In paragraph 29, reference should be made to the branch of the bank or other financial institution that gave the loan rather than to the bank or other financial institution as a whole;
- (d) Paragraph 30 should be revised to emphasize that the description of an encumbered asset was an essential component of registration and clearly set out the reasons supporting that statement;
- (e) Paragraph 30 should provide guidance on the meaning of the description of encumbered assets recommended in the Guide and also illustrate ways of describing assets both in a generic and a specific way;
- (f) Paragraph 32 should stress that the description of the encumbered assets in the notice should correspond with their description in the security agreement and address the consequences in situations where the description of the assets in the notice was broader than that authorized by the grantor (for example, the effectiveness of such a notice, remedies available to the grantor and possible measures against the secured creditor);
- (g) In paragraph 33, reference should be made to alphanumeric identifiers and to assets of high value for which there was a resale market and the text should be generally in line with the discussion of the text on supplementary asset-based indexing (see paras. 19-21 above);
- (h) Paragraphs 37 and 38 should be revised to reflect more clearly the approach recommended in the Guide (see recommendations 39 and 40 and the relevant commentary);
- (i) Paragraphs 39 and 40 should be aligned more closely with recommendations 64 and 65 on incorrect statements or insufficient descriptions of assets in a registration, and explain how those recommendations would apply in the case of a registration relating to a security right in proceeds;
- (j) In paragraph 43, reference should be made to the possibility of combining the statutory term and the self-selected term (which was consistent with the Guide) and that the sliding tariff for the registration fees was an escalating one to discourage parties from registering overly long duration;

(k) With respect to incorrect statements in the notice as to the duration of registration, new text should be added to track the text of recommendation 66 (with respect to the protection of third parties that relied on such notices) and the relevant commentary of the Guide (see chapter IV, paras. 89-91);

(l) In paragraphs 44 and 45, it should be clarified that:

(i) The Guide in recommendation 14, subparagraph (e) left it to States to determine whether the maximum amount for which the security right could be enforced should be indicated in the notice;

(ii) The maximum amount registered in the notice was the maximum amount for which the security right could be enforced, and not the maximum amount of the secured obligation;

(iii) The purpose of indicating that maximum amount in the notice was to simply allow grantors to gain access to additional credit and to protect subsequent secured creditors that relied on such indication, as noted in recommendation 66;

(iv) In circumstances where the maximum amount referred to in the notice was greater than the amount of the secured obligation, the security right would be enforceable only up to the amount actually owed (for capital, interests and expenses under the security agreement); and

(v) In circumstances where the maximum amount referred to in the notice was less than the amount of the secured obligation, the security right would be enforceable only up to that maximum amount so as to protect third parties that relied on that amount (however, as between the secured creditor and the grantor, the security right would be enforceable up to the full amount of the secured obligation);

(m) In paragraph 46, it should be clarified that, as an accessory right, the security right could be transferred only together with the secured obligation and that another reason for updating the registration in such a case was that otherwise the transferor (and not the transferee) could amend or cancel the registration;

(n) In paragraph 47, it should be clarified why a notice needed to be registered with respect to a subordination agreement that could not affect the interests of third parties, that the amendment of a registration to record a subordination agreement was not addressed in the Guide and thus the paragraph introduced a new suggestion for States to consider, and that the subordinated secured creditor would be the one entitled to register the amendment;

(o) In paragraphs 48-49, reference should be made to recommendation 62 and to the relevant commentary of the Guide along with relevant examples;

(p) In paragraph 50, it should be clarified that new assets could be added to the encumbered assets mentioned in the registered notice either by way of an amendment or a new notice, and that, in either case, the registration of the amendment or the new notice with respect to the additional encumbered assets would be effective as of the time the amendment or the new notice was registered and became available to searchers;



(q) In paragraph 51, reference should be made to an approach combining the two approaches recommended in the Guide (see recommendation 69), which was not inconsistent with the recommended approaches and under which the registrant could select the duration of the registration up to a maximum number of years (see subpara. (j) above);

(r) In paragraph 52, it should be clarified that, under recommendations 47 and 96, in the case of an erroneous lapse or cancellation of the registration, a new registration had to be made and the priority of the security right would date as of the time of the new registration;

(s) In paragraphs 53-54, it should be clarified that:

(i) In cases where a paper notice was submitted to the registry, there would be a time lag between the time of the registration and the time the notice became available to searchers;

(ii) In such a case, if the registration was effective at the time of registration, the risk of loss would be on third-party searchers (that could not retrieve the registration until it was entered into the record), while, if the registration was effective at the time the registration became available to searchers, the risk of loss would be shifted to the secured creditor (whose security right could be junior in priority to security rights created after, but registered before, the security right of the initial secured creditor); and

(iii) The last three sentences of paragraph 54 should be revised or deleted;

(t) In paragraph 56, the text should track more closely the language of recommendation 72; and

(u) In paragraph 58, the text should be aligned with the Guide, which, having recommended registration without verification of the existence of authorization for registration by the grantor, advance registration and registration relating to possible security rights in future assets and assets not identified specifically, to protect the interests of the grantor, gave emphasis to summary administrative proceedings that could be administered by the registrar or another administrative body (see chapter IV, para. 108).

27. In addition, with respect to paragraphs 60-68, the following suggestions were made:

(a) In paragraph 60, last sentence, it should be clarified that asset description (whether by serial number or registration number) was not a search criterion;

(b) In paragraph 62, while emphasizing the privacy concerns of States, it should be clarified that the approach, followed in some States, of requiring authorization for searches (as provided in the last three sentences) was not consistent with the Guide;

(c) In paragraph 65, while illustrating the usefulness of registration numbers as a search criterion, it should also be clarified that registration numbers were not necessarily available to third parties;

(d) In paragraph 66, the term “global amendment” and the role of service providers would need to be further clarified, and it should be emphasized that, if the

secured creditor requested a global amendment, the registry staff would have to implement it without exercising any discretion;

(e) In paragraph 68, reference should be made to other relevant issues (foreign enterprises, multinational corporations, use of special characters, entities that might be identified in two or more languages) and to practical solutions, while a cross-reference could be made to the discussion in the text of the issues relating to the grantor's identifier.

## **F. Registry design, administration and operation (A/CN.9/WG.VI/WP.44/Add.1, paras. 69-88)**

28. Several suggestions were made, including the following:

(a) Paragraph 69 would need to be further elaborated to explain the registry design, administration and operation issues as discussed in the Guide;

(b) In paragraphs 70 and 71, a discussion of best practices could be included;

(c) In paragraph 73, the term "specialized communications systems" should be clarified by reference, for example, of direct networking systems;

(d) In paragraph 75, it should be clarified that, to preserve the integrity of the registry database, users should be able to access the registry interface but not the registry database, and that infrequent users should be treated in equal terms as frequent users;

(e) Paragraph 76 should be qualified to explain that the method provided therein was only an example of an approach taken in some legal systems;

(f) In paragraph 79, it should be clarified that database storage capacity depended on the design of the system to accommodate paper-based or only electronic notices and that the availability of such capacity had increased in view of recent technological developments;

(g) Paragraph 80 should be revised to:

(i) Refer to "security breaches" rather than "hacking";

(ii) Clarify that database programs might be either commercial or publicly available and that gathering of statistical data should not be limited to registrations and searches; and

(iii) Emphasize the principle of technological neutrality;

(h) In paragraph 83, it should be clarified that a registry operated with a primary and a secondary server where data were recorded concurrently and in addition there was a back-up server for cases when both servers failed (see also para. 41 below);

(i) With respect to the liability of the registry and its staff, in paragraphs 84-85, it should be clarified that:

(i) Paragraph 84 was subject to the statement in the last part of paragraph 91, referring to removing any contact of registry staff with cash fee payments;

- (ii) The general law of that State on liability would generally govern such matters (including when the functions were delegated to a private entity);
- (iii) A distinction needed to be made between the liability of the registry and that of its staff (also depending on whether there was supervision);
- (iv) In any case, it would be quite burdensome to pursue liability against the State;
- (v) There was no reason to limit the liability to “verbal” advice or information as provided in paragraph 85 (lack of access should also be covered);
- (vi) The issue should be discussed in more detail by reference to the relevant commentary of the Guide; and
- (j) In paragraph 86, it should be emphasized that the registry fees should be kept at a minimum, cost-recovery level, because fees, transaction taxes and other ancillary costs (for example, notarization) levied on the registration as well as other formal requirements would significantly deter utilization of the registry and limit its potential beneficial impact on the availability and the cost of credit.

29. In the context of its discussion of the liability of the registry, the Working Group discussed the priority consequences of events that could not be attributed to the secured creditor, but were caused, for example, by system malfunction. While differing views were expressed as to whether recommendation 47 applied in such a case, the Working Group agreed that system malfunction was a rare occurrence and, therefore, there was no need to attempt to address that matter, at least, at its present session.

#### **G. Additional issues (A/CN.9/WG.VI/WP.44/Add.1, paras. 89-93)**

30. With respect to paragraph 90, it was suggested that it might not be necessary as the identification of a security right in the notice as an acquisition security right would be useful only to secured creditors that had already registered a notice with respect to their security rights and any secured creditors that registered subsequently would have a lower priority status.

#### **H. Draft model regulations (A/CN.9/WG.VI/WP.44/Add.2)**

31. The Working Group engaged in a discussion of the key concepts and issues addressed in the draft model regulations.

32. Several suggestions were made, including the following:

- (a) Definitions should be included in the draft model regulations, in particular, on terms not addressed in the terminology of the Guide, which should be incorporated in an appropriate way;

- (b) The draft model regulations should provide flexible guidance with alternatives to accommodate the various approaches taken by States that were consistent with the law recommended in the Guide;

(c) Article 3 should provide that the deputy registrar had the same powers as the registrar;

(d) Article 6 and subsequent articles should provide that registry users could obtain access to the registry from any computer facilities and that an agreement might be required for access for the purpose of registration but not searching;

(e) Article 7 should provide alternatives with respect to fees, taking into account, in particular, the notion of cost recovery, whether the registry was operated by the State or a private entity and the purpose for conducting a search;

(f) Article 8 should be aligned with recommendations 54, subparagraph (d), and 56, include alternatives;

(g) Article 9 should be revised to state the principle of third-party effectiveness by registration of a notice with respect to a security right;

(h) Article 10 should be revised to state the time when a registration was effective and that the registry should assign to each registration a date and time;

(i) Article 11 should be aligned with recommendation 69;

(j) In article 14 and subsequent articles, reference should be made to the grantor's identifier for reasons of consistency with the terminology used in the law recommended in the Guide;

(k) Article 15 should be revised to cover the situation where the registry system was designed to remove notices automatically when they expired or were cancelled;

(l) Article 18 should be revised to clarify that the contents and the accuracy of information registered was the responsibility of the registrant, and not the registry;

(m) Article 19, subparagraph (d), should be aligned with recommendation 69;

(n) Article 20, paragraph 1, should be aligned with recommendation 58;

(o) Articles 21 and 22 should be retained but revised to provide alternatives to accommodate naming conventions and rules followed in various States;

(p) Registration forms might be included in the draft regulations that might simplify the drafting of articles referring to identifiers of grantors and secured creditors, as well as to the description of encumbered assets;

(q) Article 21, paragraph 4, might need to be revised to avoid any inconsistency with recommendation 59;

(r) Article 21, paragraph 6, should refer to the time of registration, as registration could take place in advance of the transaction and refer to multiple future transactions;

(s) Article 22, subparagraph 2 (b), should provide alternatives to accommodate both a system where abbreviations were used in the names of corporations and a system where such abbreviations might be automatically omitted by the system to ease the burden for both registrants and searchers;

(t) Article 22, subparagraph 2 (g), should clarify that the term “insolvency representative” was used as defined in the Guide to include both a natural and a legal person;

(u) Article 22, subparagraphs 2 (g) and (h), should be clarified to ensure that the grantor was the insolvent person and that it should be described in accordance with insolvency law of each State; and

(v) In article 22, at the end a timing provision should be added along the lines of article 21, paragraph (6).

33. The Working Group requested the Secretariat to revise all draft model regulations, taking into account the views expressed and the suggestions made during the discussion of the regulations and the commentary of the registration text. States were invited to submit written comments.

## **I. Coordination with UNCITRAL texts on electronic communications**

34. It was noted that, as the Guide was consistent with the guiding principles of UNCITRAL e-commerce texts<sup>8</sup> (such as the principle of functional equivalence and media neutrality), the text on registration should also be consistent with those texts. It was also noted that, in order to achieve that result, the terminology of the UNCITRAL e-commerce texts could be taken into account in the formulation of the text on registration. With respect to policy matters, it was noted that the UNCITRAL e-commerce texts could provide a starting point for the discussion and, if the Working Group found that a different rule would be more appropriate, it could provide a reason for such departure. There was broad agreement in the Working Group that Guide was consistent with the UNCITRAL e-commerce texts and that it was important to maintain consistency also with respect to the text on registration.

35. The Working Group went on to consider specific issues arising in the text on registration. It was noted that a clear distinction should be drawn between the term registry “system”, used in the Guide in a broad sense to refer to the various sets of legal rules as well as devices and equipments, and the term “system” used in the registration text in a narrow sense, to refer to a set of computer devices, equipments and programs used together to constitute an electronic security rights registry. The Working Group generally agreed with that approach.

36. In addition, it was noted that in discussing the impact of error in registration information (see A/CN.9/WG.VI/WP.44/Add.1, paras. 27-29 and 39-42), article 14 of the United Nations Convention on the Use of Electronic Communications in International Contracts (“ECC”) on “error in electronic communication” might provide incentives for registry systems to include a mechanism for correcting input errors and also make it easier for registrants to correct such errors, without having to go through the process of registering a cancellation or amendment notice. It was widely felt that article 14 of the ECC was not relevant for the text on registration. It was stated, while in a contractual context like that contemplated by the ECC it was

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<sup>8</sup> UNCITRAL texts on e-commerce include the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (ECC), the UNCITRAL Model Law on Electronic Commerce, 1996 (MLEC), and the UNCITRAL Model Law on Electronic Signatures, 2001 (MLES).

appropriate for a person to informally correct errors in electronic communications, it was not appropriate in the text on registration, since once the notice was submitted it was relied upon by third parties. In addition, it was observed that, to avoid undermining the reliability of the registry, correction of such a notice should take place only through registration of a notice of cancellation or amendment, which, in an electronic context, did not raise any difficulty. Moreover, it was pointed out that, in any case, modern security rights registry made it possible for registrants to do an edit check of the notice before submitting it.

37. Moreover, it was noted that, in discussing the effective time of registration (see A/CN.9/WG.VI/WP.44/Add.1, paras. 53-54 and A/CN.9/WG.VI/WP.44/Add.2, article 10), article 10 of the ECC on “time and place of dispatch and receipt of electronic communications” might provide guidance to the meaning of “entered into the registry records so as to be available to searchers of the registry record”. It was widely felt that article 10 of the ECC and the notions of dispatch and receipt would not apply to the time of effectiveness of a registration with respect to a possible security right. While there was a call for a flexible approach in that regard, it was generally felt that the issue had been discussed and resolved in the Guide through recommendation 70, according to which the time of effectiveness of a registration was the time when the registered notice became available to searchers. It was explained that that time was the time when the notice was entered into the registry index and searchers were able to retrieve it.

38. Moreover, it was noted that a time lag (see A/CN.9/WG.VI/WP.44/Add.1, para. 54) might also occur in an electronic registry system in the sense that the time the notice was entered into the electronic record through an online platform might still be different from the time that information was searchable by a third party through a similar online platform, and as a result, the issue might arise as to who should bear the risk in such circumstances. It was widely felt that no real problem arose in that regard. It was stated that, as mentioned in the Guide, in a fully electronic system, the time when a notice was registered and the time when it became available to searchers was virtually simultaneous and the problem of a time lag was virtually eliminated. It was also observed that, in registration systems that permitted the registration of paper-based notices, there would inevitably be some delay, but such delay should not cause a problem as long as searchers were informed of the possibility of such delays and notices became available to searchers in the order they were registered.

39. It was also noted that, with respect to storage of information (see A/CN.9/WG.VI/WP.44/Add.1, para. 70; see also recommendation 54 (j) (i) of the Guide), reference might be made to article 10 of the UNCITRAL Model Law on Electronic Commerce (“MLEC”) which discussed the retention of data messages. There was general agreement in the Working Group that, as both the Guide (see recommendation 74) and the registration text referred to preservation of notices, whether they were paper-based or electronic, there was no inconsistency between the Guide or the registration text and article 10 of the MLEC, which could usefully be referred to (provided that reference was made mainly to the time the notice became available to searchers, and not the time it was sent or received).

40. It was also noted that the method of using access codes and passwords was only one example to preserve the security and integrity of the registry database and should not be construed as the only recommended method

(see A/CN.9/WG.VI/WP.44/Add.1, para. 76). The Working Group agreed that that approach was in line with the views expressed in the discussion of that matter at the present session (see para. 28, subpara. (e) above).

41. It was also noted that the statement that electronic records were less vulnerable than paper-based records should be qualified as the nature of electronic records made them more vulnerable to unauthorized access and duplication (see A/CN.9/WG.VI/WP.44/Add.1, para. 83). It was agreed that that statement could be revised to emphasize that, to protect data from being lost or interfered with, there should be back-up servers. It was also agreed that, while electronic records were less vulnerable to physical damage than paper-based records, they were more vulnerable to unauthorized access and interference than paper-based records.

42. It was noted that in article 8, subparagraph (b), of the draft model regulations caution should be exercised so that it would not deter the utilization of electronic registries. It was widely felt that article 8, subparagraph (b), was consistent with recommendation 56 and accurately reflected modern approaches with regard to electronic security rights registries.

43. It was noted that, with regard to article 10 of the draft model regulations, reference might be made to article 10 of the ECC. The Working Group referred to a decision with respect of the commentary of the registration text (see para. 37) and agreed that such a reference was not necessary and could even be confusing as article 10 of the ECC referred to the time of registration, while recommendation 70 referred to the time a notice became available to searchers.

44. It was noted that, with regard to articles 16 and 17, the question might arise whether separate rules based on the purpose of accessing the registry (one for registration and one for searches) would be necessary as the registry system might be designed to provide general access for multiple purposes. The Working Group agreed that separate rules were necessary because of the different security requirements applicable to registration and searches.

45. It was noted that an assignment of a user identification number and a password by the registry, in article 16 of the model registrations, as the only mode to access the registry might be contrary to the technological neutrality principle as there were many other methods for verifying the identification of the person accessing the registry, including, for example, a third-party verification system. The Working Group agreed that article 16 reflected standard approaches taken in security rights registries and did not violate the principle of technological neutrality. It was stated that, if there was another relevant method, it could be referred to, but third-party verification was not relevant as the verification process had to be under the control of the registry.

46. It was noted that, in articles 21 and 22 of the draft model regulations, caution should be exercised so as to avoid limiting the methods through which grantor information might be entered into the registry record, as this could be contrary to the technological neutrality principle. The Working Group agreed that articles 21 and 22 were appropriate in that they took into account the requirements of the registry, without violating the principle of technological neutrality.

47. It was noted that, in article 30, the term “notice” was different from the term “notice” of the security right which was subject to registration and might simply

be replaced with the words “verification (notification)” or “acknowledgment (notification)”. It was also noted that, in that context, the Working Group might wish to consider whether article 14 of the MLEC on the acknowledgement of receipt may be applicable in an electronic registry context. The Working Group agreed that article 30 could be revised to use terms consistent with the terminology of the Guide and in particular, recommendation 55, subparagraphs (d) and (e). It was stated that referring to article 14 of the MLEC was not necessary and could even be confusing as that article referred to the time of receipt rather than the time when a notice became available to searchers, as provided in recommendation 70.

## **V. Future work**

48. The Working Group noted that its nineteenth session was scheduled to take place in New York from 11 to 15 April 2011.



**B. Note by the Secretariat on registration of security rights in  
movable assets, submitted to the Working Group on Security Interests  
at its eighteenth session**

(A/CN.9/WG.VI/WP.44 and Add.1-2)

[Original: English]

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## Background information

1. At its forty-second session (Vienna, 29 June-17 July 2009), the Commission noted with interest the future work topics discussed by Working Group VI at its fourteenth and fifteenth sessions (A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126, respectively). At that session, the Commission agreed that the Secretariat could hold an international colloquium early in 2010 to obtain the views and advice of experts with regard to possible future work in the area of security interests.<sup>1</sup> In accordance with that decision,<sup>2</sup> the Secretariat organized an international colloquium on secured transactions (Vienna, 1-3 March 2010). At the colloquium several topics were discussed, including registration of security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions. The colloquium was attended by experts from governments, international organizations and the private sector.<sup>3</sup>

2. At its forty-third session (New York, 21 June-9 July 2010), the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at the colloquium. The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session on the basis

<sup>1</sup> Ibid., *Sixty-fourth session, Supplement No. 17* (A/64/17), paras. 313-320.

<sup>2</sup> Ibid.

<sup>3</sup> For the colloquium papers, see [www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html](http://www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html).

of notes to be prepared by the Secretariat within the limits of existing resources. However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.<sup>4</sup>

3. In that connection, it was widely felt that a text on registration of security rights in movable assets would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of security rights registries. It was stated that secured transactions law reform could not be effectively implemented without the establishment of an efficient publicly accessible security rights registry. It was also emphasized that the *UNCITRAL Legislative Guide on Secured Transactions* (the "*Guide*") did not address in sufficient detail, the various legal, administrative, infrastructural and operational questions that needed to be resolved to ensure the successful implementation of a registry.<sup>5</sup>

4. The Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the *Guide*, texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the *Guide*. After discussion, the Commission decided that the Working Group should be entrusted with the preparation of a text on registration of security rights in movable assets.<sup>6</sup>

5. The present note is a preliminary discussion draft intended to assist the Working Group in its deliberations. Once the Working Group has reached a working assumption as to the form and structure of the text to be prepared, it may wish to consider requesting the Secretariat to prepare that text.

## I. Introduction

6. The *Guide* reflects global recognition of the economic importance of a modern legal framework to support financing against the security of movable assets. The establishment of a registry in which information about the potential existence of security rights in movable assets may be made public is an essential feature of the law recommended in the *Guide* and of reform initiatives in this area generally.

7. Chapter IV of the *Guide* already contains commentary and recommendations on many aspects of a security rights registry system. However, in order to understand the requirements and legal effects of registration, as well as the scope of the registry, the reader would need to have a rather thorough understanding of the *Guide* as a whole. Thus, a text on registration could usefully begin with an integrated concise summary of the legal function of a security rights registry for States that have adopted or wish to adopt a modern legislative framework for secured lending along the lines of that recommended in the *Guide*. This text would be particularly useful not only to those involved in the registry implementation process, who are not legal experts but who will need to have a basic understanding

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<sup>4</sup> Ibid., *Sixty-fifth session, Supplement No. 17 (A/65/17)*, paras. 264 and 273.

<sup>5</sup> Ibid., para. 265.

<sup>6</sup> Ibid., paras. 266-267.

of the legal context of the registry in order to carry out their work knowledgeably, but also to the registry clientele and others (see para. 16 below).

8. In addition, a security rights registry differs fundamentally from the kinds of registries for recording title and encumbrances on title in immovable property and high-value equipment, such as ships, with which many States are most familiar.<sup>7</sup> Thus, a text on registration could usefully elaborate on the key characteristics of a security rights registry that mark it apart from other types of registries and contribute to its efficient operation, including such concepts as notice registration, and grantor-based indexing.

9. Moreover, the statutory framework governing secured transactions typically leaves the detailed legal rules applicable to the registration and search process to be dealt with in subordinate regulations, ministerial guidelines and the like. Chapter IV of the *Guide* provides recommendations on the general policy issues associated with these legal issues. However, a text on registration could provide concrete examples of the types of legal rules, regulations, guidelines and forms for submitting registrations and search requests that must be drafted as part of the implementation process.

10. Furthermore, chapter IV of the *Guide* does not address, or does not address in every detail, the myriad of technological, administrative, and operational issues involved in developing and running an effective and efficient security rights registry. Thus, a text on registration could usefully complement the *Guide*, first, by addressing these practical issues in a more specific and expanded fashion and, second, by explaining the need for a team-based implementation strategy, incorporating different types of specialists.

11. It should also be noted that the experience of States that have instituted the kind of comprehensive registry system contemplated by the *Guide* demonstrate how advances in computer technology can vastly improve the efficiency of operation of security rights registries. Thus, particularly in relation to the technical aspects of registry design and operation, a text on registration could usefully draw on these national precedents to provide valuable guidance to other States.

12. In addition to the *Guide* itself and particularly chapter IV, the text on registration could also usefully consolidate and refine the analysis and approaches of other international sources, including the following:

(a) The European Bank for Reconstruction and Development (EBRD) *Publicity of Security Rights: Guiding Principles for the Development of a Charges Registry* (2004);

(b) *Publicity of Security Rights: Setting Standards* (2005);

(c) The Asian Development Bank (ADB) *Guide to Movable Registries* (2002);

(d) The Draft Common Frame of Reference (DCFR) of the Principles, Definitions and Model Rules of a European Private Law: Section 3 of Chapter 3

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<sup>7</sup> It should be noted, however, that there are registries in some States in which both security rights in movable assets and encumbrances on immovable property may be registered in one registry. The requirements for the description of the encumbered asset and the legal consequences of registration may be different in each case, but the basic concept of notice as opposed to document registration is the same.

(Effectiveness as Against Third Parties) (Registration) of Book IX (Proprietary Security in Movable Assets) (2010);

(e) The Organization of American States (OAS) Model Registry Regulations under the Model Inter-American Law on Secured Transactions (October 2009);

(f) The International Finance Corporation (World Bank) Secured Transactions Systems and Collateral Registries (January 2010);

(g) The Organisation pour l' Harmonisation du Droit des Affaires en Afrique (OHADA) Treaty: recent developments in relation to the establishment of a regional security rights registry; and

(h) The Convention on International Interests in Mobile Equipment (Cape Town, 2001) and its Protocols, establishing international registries (which although are asset-based and cover also transactions other than secured transactions, are notice based and registration results in third-party effectiveness and priority).

13. The national and international sources referred to above do not always accord with the recommendations in chapter IV of the *Guide* on registration-related issues. Consequently, the text on registration could explain the policy rationale for UNCITRAL's preferred approach relative to other possible approaches.

14. In addition, a text on registration could include overarching principles that should guide the registry implementation process. A discussion of principles could, for example, focus on the following:

(a) Legal efficiency: the legal and operational guidelines for registration and searching should be simple, clear and certain;

(b) Operational efficiency: the registration and search process should be designed to be as fast and inexpensive as is compatible with ensuring the security of the information in the registry; and

(c) Equality of treatment of constituents and users: grantors, secured creditors, and potential competing claimants all have an interest in the extent and scope of information that is published in a security rights registry and in the efficient availability of that information; thus, the legal and operational framework of the registry should be designed to fairly balance the interests of all its potential constituents and users.

15. A text on registration could also include commentary, sample rules dealing with the legal and practical aspects of the registration and searching process (for the law or regulations) and sample forms.

16. The potential readership of a text on registration comprises all those who are interested or actively involved in the design and implementation of a security rights registry as well as those who may be affected by its establishment, including:

(a) Registry system designers, including technical staff charged with specifying or fulfilling the hardware and software requirements for the registry;

(b) Registry administrators and staff;

(c) Registry clientele (in addition to credit providers, credit reporting agencies and insolvency representatives, all members of the public whose legal

rights may be implicated by market transactions involving movable assets potentially subject to a security right);

(d) The general legal community (including judges, arbitrators and practicing lawyers); and

(e) All involved in secured transactions law reform and law reform assistance (such as the World Bank, the EBRD, the ADB and the Inter-American Development Bank).

17. Not all of these potential readers will be versed in the intricacies of secured credit law or even have legal training. Accordingly, the text on registration should ideally be drafted in an accessible “plain language” style and employ “reader-friendly” graphic aids (for example, summary checklists, implementation timelines, textboxes giving concrete factual examples).

18. Like the *Guide*, the text on registration could also be drafted in a fashion that enables it to be adopted by States with diverse legal traditions. Consequently, to the extent that the text provides model rules and forms for registration and searching, these should use neutral generic terminology that can be adapted readily to each State’s domestic legal tradition and drafting style as well as to local legislative conventions regarding which types of rules must be incorporated in principal legislation and which may be left to subordinate regulations or ministerial or administrative guidelines. In any case, a text on registration must clearly indicate the scope of the legal and technical terms it uses, pointing out where these have a different meaning from similar terms in the *Guide*.

*[Note to the Working Group: The Working Group may wish to note that, as a matter of drafting, while reference is made in the note to a “notice”, a term used in the Guide, where possible, reference is also made to “information in the registry” or “information registered”. The reason for this approach is that a registrant does not register a security right or a notice of a security right. The registrant transmits “information” to the registry in order to effect a “registration”. What is entered into the registry database is not a notice but the “information” with the result that a “registration” is created. In the appropriate circumstances, a “registration” (not a notice of registration) is amended or discharged. A searcher searches the registry database in order to determine whether a registration (not a notice) relating to a grantor exists. Thus, the Working Group may wish to consider whether: (a) in line with the terminology used in the Guide, the term “notice” should be used in the text on registration with appropriate explanation of its meaning along the lines mentioned above; or (b) instead of the term “notice”, a term along the lines of “information in the registry”, “registered information” or “registration information” should be used, again with appropriate explanation that the new term refers to the substance of the term “notice”.]*

## II. Purpose of a security rights registry

### A. Introduction

19. A security rights registry does not exist in a vacuum. It is an integral component of the overall legal and economic context of secured financing regime in

a particular State. Yet those who are involved in the design and implementation of a security rights registry, as well as the potential clientele of the registry, may not be familiar with the intricacies of secured financing. Therefore, a text on registration could provide an overview of secured credit and the legal function of registration within a modern legislative framework for secured financing. This is the goal of this chapter.

## **B. Function of a security right**

20. Although the legal terminology may vary, the basic idea of a security right is much the same everywhere. A security right is a type of property right given to a creditor to secure payment of a loan or other obligation (see the term “security right” in the introduction to the *Guide*, sect. B). A security right mitigates the risk of loss resulting from a default in payment by entitling the creditor to claim the value of the assets encumbered by the security right as a back-up source of repayment. For example, if a business that borrows funds on the security of its equipment fails to repay the loan, its secured creditor will be entitled to have the equipment seized and sold in order to pay off the outstanding balance. The central feature of a security right is that it generally enables a creditor to appropriate the value of encumbered assets by preference over other competing claimants. As the risk of loss from a debtor default is mitigated, the terms of the credit agreement may be more favourable for the debtor (for example, the interest rate may be lower, the amount of the credit may be higher and the repayment period may be longer).

21. Security is generally created by a contract (security agreement) in which the grantor of the security right consents to have specified assets stand as security for a specified obligation. Sometimes, the specified obligation is a loan, sometimes it is a credit facility such as a line of credit typically offered by financial institutions. In other instances, it may be an extension of credit in conjunction with the acquisition of goods by the grantor. For example, a seller may reserve ownership in assets sold on credit in order to secure payment of the purchase price (for the treatment of retention of title in a modern secured transactions regime, see the *Guide*, chap. IX; see also paras. 23 and 24 below).

22. Sometimes security rights are created by the law itself rather than by the voluntary agreement of the parties. For example, in many States, a security right arises by operation of law in assets of persons who are indebted to a government agency resulting from unpaid taxes or levies. In addition, in other States, a person that obtains a judgment is entitled by operation of law to a security right in the judgment debtor’s assets to secure payment of the judgment debt. Moreover, in some States, persons that repair tangible assets (e.g. vehicles) are given a statutory security right in those assets to secure payment of the unpaid repair charges upon surrender of possession of the assets to the customer.

## **C. Reasons for secured credit**

23. Commercial enterprises typically require some form of financing to support their start-up and expansion costs and to enable them to acquire or produce the equipment, inventory and services from which they hope to generate profits.

Consequently, credit performs an important role in financing productive business development. Consumers as well may require access to credit to enable them to acquire assets such as household appliances and motor vehicles. As already mentioned, a creditor that is forced to rely solely on a borrower's promise to repay is likely to extend only a small amount of credit for a short period of time, at a high interest rate and then only to a borrower that has an established credit record. Security tends to enhance access to credit at lower cost and for a longer duration because of the additional protection it offers financiers against the risk of default in payment. Indeed, many consumers and small and medium sized businesses are unable to access credit at all unless they are able to offer security in their assets (see introduction to the *Guide*, paras. 1-11).

#### **D. Possessory and non-possessory security rights**

24. Legal systems have long recognized security rights in the form of the classic possessory pledge (see the *Guide*, chap. I, paras. 51-59). In a pledge transaction (leaving aside fictional pledge transactions and pledge transactions in which actual possession does not change hands), the grantor typically delivers actual possession of the encumbered asset to the secured creditor. The requirement for delivery of possession means that the secured creditor can be confident that the debtor has not already encumbered the asset in favour of another creditor. Dispossession of the grantor also alerts potential buyers and other transferees that the grantor no longer has unencumbered title to the asset.

25. However, possessory pledges are practical only if the asset is capable of physical delivery. This excludes many types of movable asset, including the grantor's future assets (that is, assets acquired by the grantor or produced after the creation of a security right; see the *Guide*, chap. I, para. 8), as well as its intangible assets, such as receivables and intellectual property rights. Even when delivery of possession is feasible, the secured creditor normally will not be in a position to store, maintain and insure bulky assets or assets that are constantly circulating, such as inventory. Finally, giving up possession may defeat the purpose of the financing. An enterprise needs to retain possession of its equipment, inventory and other business assets in order to generate the income to pay the secured obligation. Similarly, postponement of delivery of tangible assets purchased on secured credit terms would deprive consumers of the present benefit of use and enjoyment of the assets (for a discussion of the advantages and disadvantages of possessory pledges, see the *Guide*, chap. I, paras. 51-59).

26. In view of the limitations of possessory security, modern secured transactions laws generally permit security to be granted without the need for a delivery of possession of the encumbered asset to the secured creditor. A legal regime that recognizes non-possessory security rights also tends to increase access to credit by expanding the range of assets that a business can offer as security. An enterprise can encumber its intangible assets in addition to its tangible assets, and its future assets (most significantly, its receivables and its inventory) in addition to its present assets (for the assets that may be subject to a security right, see the *Guide*, recommendation 17; in particular for security rights in all assets of a grantor, see the *Guide*, chap. II, paras. 61-70). Non-possessory security also enhances consumer



access to credit since it enables the consumer to take immediate possession of assets purchased with a loan or credit facility.

## **E. Legal risks of non-possessory security rights**

27. It is inherent in the very idea of a security right as a property right that the secured creditor has the right in the event of the grantor's default to claim the value of the encumbered asset in preference to the claims of competing claimants, including subsequent buyers and secured creditors, as well as the grantor's unsecured creditors and insolvency representative (see the terms "competing claimant" and "priority" in the introduction to the *Guide*, sect. B). However, the recognition of non-possessory security rights poses information challenges for third parties. It is important for potential buyers or secured creditors to be certain that assets in a person's possession are not subject to a prior security right. It is equally important for unsecured creditors and the grantor's insolvency representative to be able to determine which of the grantor's assets are already encumbered and therefore potentially not available to satisfy their claims. In the face of these information challenges, legal systems may be reluctant to permit the holder of a non-possessory security right to pursue its security right against competing claimants that acquire a right in the encumbered asset without actual knowledge of the existence of the security right. On the other hand, the value of a security right to a creditor is diminished to the extent that rules protecting third parties without knowledge of a pre-existing security right enable them to take their rights in the encumbered assets free of the pre-existing security right in those assets.

## **F. How a registry may resolve legal risk**

28. The establishment of a security rights registry enables States to resolve the "secrecy" problem posed by non-possessory security rights in a manner that protects the rights of both secured creditors and third parties. If registration is made a condition of the effectiveness of a security right against competing claimants, third parties can protect themselves by searching the registry in advance of dealing with the grantor's assets. Secured creditors in turn are assured that if they register in time, their security rights will be effective against subsequent competing claimants. Registration also offers a transparent and fair method of ranking of security rights where the grantor has created security rights in the same asset in favour of more than one secured creditor.

29. To achieve these benefits, the establishment of a registry must be complemented by a supportive legal framework. In particular, the secured transactions law under which the registry is established will need to incorporate the three basic rules of a registry-based secured transactions law. First, registration is a precondition to the effectiveness of a non-possessory security right against third parties (see the *Guide*, recommendations 29 and 32). Second, the holder of a registered non-possessory security right is entitled, in the event of the grantor's default, to the value of the encumbered asset up to the maximum amount of the obligation as indicated in the registered notice as against subsequent competing claimants (see the *Guide*, recommendation 98). Third, priority among registered non-possessory security rights in the same asset is determined by the order of

registration (see the *Guide*, recommendation 76, subpara. (a)). Although these represent the baseline rules, a modern secured transactions law invariably will recognize some qualifications in the interests of facilitating other policy objectives. The next section offers some typical examples.

## **G. Transactional scope of the registry**

### **1. General approach: substance over form**

30. Subject to the qualifications just noted, modern registry-based secured transactions regimes are comprehensive in scope, covering all transactions that in substance operate as security regardless of the form of the transaction, the type of encumbered asset or the secured obligation, or the status of the parties (see the *Guide*, recommendation 2). So, for example, if a debtor transfers title to an asset to a creditor under a “sale”, but retains possession on the understanding that title may be redeemed on payment of the outstanding obligation, the sale will be regulated by the same registration and priority rules that apply to nominal security rights. This approach is necessary to avoid undermining the risk reduction and priority ordering benefits of establishing a registry.

31. It should be noted that this approach does not mean that title transactions covered by the registration regime are re-characterized as secured transactions. For example, as noted below, outright transfers of receivables are normally subject to registration and some of the secured transactions rules apply to those transactions as well (see the *Guide*, recommendation 3); however, this does not make an outright transfer of a receivable a secured transaction as this result would be undesirable and harmful for important practices relating to outright sales of receivables such as factoring or securitization (see the *Guide*, chap. I, paras. 25-31).

### **2. Outright assignments of receivables**

32. An outright assignment of a receivable creates the same problem of information inadequacy for third parties as a non-possessory security right. A potential secured creditor or assignee has no efficient means of verifying whether the receivables owed to a business already have been assigned. While inquiries could be made of the debtors of the receivables, this is not practically feasible where the transaction covers present and future receivables generally. To address this concern, secured transactions law often extends the registration requirements applicable to non-possessory security rights to outright sales of receivables, with priority among successive assignees or secured creditors of the same receivables determined by the order of registration.

### **3. Title retention security devices**

33. Some States that adopt a “substance over form” approach to the characterization of a device as a security device for the limited purposes of secured transactions law limit this approach to transactions that involve the creation of a security right in assets already owned by the grantor. Transactions in which a creditor retains title to an asset for the purpose of securing payment of its acquisition price in instalments by the debtor (for example, title reservation sales and financial leases) are treated as conceptually distinct from security devices.

However, even in these States, it is generally recognized that these transactions raise the same publicity concerns as non-possessory security rights. In the absence of a registration requirement, a third party would have no means of objectively verifying whether assets in a person's possession may in fact be subject to the ownership rights of a seller or lessor. Consequently, a modern secured transaction registry regime often also brings reservation of title within its scope, requiring registration as a precondition to the seller or lessor setting up its ownership rights against third parties.

34. In recognition of the importance of supplier credit, however, a modern secured transactions law will normally exclude the seller or lessor from the application of the first-to-register priority rule (in other words, give the supplier a special priority position). Otherwise, a prior registered secured creditor that had taken security over the future assets of a grantor would be able to claim the assets in priority to the seller or lessor. This would be inappropriate for the same reasons that justify an exception to the first-to-register priority rule for the holders of acquisition security rights. First, the debtor acquired the asset as a result of the seller or lessor's extension of credit, not the credit extended by the prior registered secured creditor. Second, giving priority to a prior registered security right would discourage access to sales and lease financing credit. Consequently, a modern secured transactions regime protects the seller or lessor provided registration has been made in a timely fashion (see, for example, the *Guide*, recommendation 180).

#### **4. True leases and consignments for sale**

35. True long-term leases and consignment sales of movable assets do not operate to secure the acquisition price of assets. However, they create analogous publicity problems for third parties since they necessarily involve a separation of a property right (the ownership of the lessor or consignor) from actual possession (which is with the lessee or consignee). To address this concern, some States expand the scope of the registration and priority regime, which is applicable to acquisition security rights, transfer and title retention security devices, to these types of transaction.

#### **5. Non-consensual security rights**

36. A registry of security rights in movable assets is designed primarily to accommodate the registration of consensual non-possessory security rights in such assets. However, as noted earlier, a security right can also be created by operation of law. In principle, the same registration and priority rules that apply to consensual security rights may apply to security rights created by operation of law. In some States, however, certain types of non-consensual security right may be given a special priority over even prior-registered consensual security rights. This is the case, for example, with security rights arising by operation of law to secure revenue obligations owing to the State. In this situation, the State does not need to register since the usual first-to-register priority rule does not apply.

## **H. Exceptions to registration-based third-party effectiveness and priority rules**

### **1. Possessory security rights**

37. Although most secured transactions involve non-possessory security rights, the possessory pledge is still used commonly for certain types of asset, such as luxury personal assets, negotiable instruments, negotiable documents and certificated securities. States that have implemented a registry system almost invariably permit taking possession as an alternative to registration as a means of achieving third-party effectiveness of a security right (see the *Guide*, recommendation 37). It is felt that dispossession of the grantor constitutes sufficient practical notice to third parties that the grantor's title is unlikely to be unencumbered. In these cases, priority is generally determined by the respective order of registration or possession. However, with respect to certain types of asset, such as negotiable instruments or negotiable documents, a security right made effective against third parties by possession has priority even over a previously registered security right (see the *Guide*, recommendations 101 and 109).

### **2. Acquisition financing**

38. A first-to-register rule of priority means that a security right in the future assets of an enterprise (that is, assets that are acquired or come into existence after the security right is created), a notice of which is registered, will have priority over security rights in the same assets, a notice of which is registered later. This is reasonable, as a general rule, since a subsequent secured creditor could and should protect itself by searching the registry before extending credit. However, most modern secured transactions laws recognize that there should be an exception where the subsequent secured creditor is financing the grantor's acquisition of new assets (for example, consumer goods, equipment or inventory). As these new assets would not have formed part of the grantor's asset base but for the new financing, it is considered fair that the acquisition financier (the later-registered secured creditor) should have priority with respect to the value of those assets over of the earlier-registered creditor. Giving priority to acquisition security rights also benefits the grantor by giving it access to diversified sources of secured credit to finance new acquisitions (see the *Guide*, chap. IX).

### **3. Ordinary-course-of-business transactions**

39. In many States, a buyer that acquires an encumbered asset without actual knowledge that it is subject to a security right ("a good faith buyer") takes the asset free of a registered security right. Under this approach, a potential buyer is not only under no obligation to search the registry to determine whether the asset in which it is interested is subject to a security right, but has also a positive incentive not to search. This extensive level of protection for buyers based on subjective knowledge standards is incompatible with a modern registry system aimed at facilitating publicity of security rights and establishing clear and objective rules for resolving contests between competing claimants. Consequently, modern secured transactions regimes typically enable a secured creditor in such cases to follow the asset into the hands of buyer from the grantor (for the effect of actual knowledge on third-party effectiveness and priority, see also paras. 48 and 49 below).

40. However, the secured creditor's general right to enforce its security right against an encumbered asset in the hands of a buyer is subject to an important qualification. Modern secured transactions laws almost invariably provide that a buyer that purchases an encumbered asset in the ordinary course of the grantor's business acquires the asset free of any security right in it, whether registered or not (see the *Guide*, recommendation 81). It is not realistic to expect buyers buying assets from a commercial enterprise which routinely sells the type of asset in which the buyer is interested, for example, computer equipment, to check the registry before entering into the transaction. It should be noted that the ordinary-course-of-business exception typically protects a buyer even when the buyer had actual knowledge of the existence of the registered security right but not when the buyer additionally knew that the sale violated the rights of the secured creditor under the security agreement. This approach is consistent with the reasonable commercial expectations of both the grantor and the secured creditor. A secured creditor that takes a security right in a grantor's inventory will normally have done so on the understanding that the inventory may be sold free of the security right in the ordinary course of the grantor's business. After all, the grantor's ability to sell its inventory is necessary to generate the funds necessary to pay back the secured loan.

41. Secured transactions laws typically extend similar protection to transferees and competing secured creditors to whom money is paid or in whose favour negotiable documents (such as a bill of lading) or negotiable instruments (such as a cheque) are negotiated (see the *Guide*, recommendations 101 and 109). Here, the policy of preserving the negotiable quality of the encumbered asset, the document covering, or the instrument relating to, the encumbered asset, in the market place is considered to outweigh the risk to the priority position of the registered secured creditor.

#### **4. Bank accounts and securities**

42. In the interest of facilitating transactions by large financial institutions in the securities lending, repurchase and derivatives markets, legal systems often create exceptions to registration-based priority ordering for security rights in bank accounts and, at least, certain types of securities (it should be noted though that securities and payment rights arising under or from financial contracts and foreign exchange contracts are excluded from the scope of the *Guide*; see recommendation 4, subparas. (c)-(e)). Under the typical approach, secured creditors have the option of taking "control" of the bank account or certain types of securities in lieu of registration; and secured creditors with "control" have priority even over earlier-registered security rights (with respect to bank accounts, see the term "control" in the introduction to the *Guide*, sect. B, and recommendation 103).

#### **5. Assets subject to specialized registries**

43. Other exceptions may be based on the decision to retain existing well-functioning alternatives to registration in the general security rights registry. Some States, for example, have adopted a system for recording security rights on the title certificates for motor vehicles. If this system works well, the State may choose to exclude security rights in the assets covered by this system from the scope of the registration regime or simply give priority to security rights registered in a specialized registry (for the latter approach, see the *Guide*, recommendations 77 and 78).

44. In addition, a State may already have in place specialized registries for recording rights, including security rights, in specific types of movable asset, notably, ships, aircraft and intellectual property. To the extent that these registries may serve broader goals than simply publicizing security rights in the relevant assets, a State may decide to exclude from the scope of the security rights registry security rights in assets to which specialized registration applies or simply give priority to security rights registered in a specialized registry (for the latter approach, see the *Guide*, recommendations 77 and 78).

45. Finally, States parties to international treaties, such as the Convention on International Interests in Mobile Equipment and its Protocols will require registration in the international registry for security and other rights in the types of asset to which these treaties apply (for example, aircraft frames and engines, and railway rolling stock).

## **6. Other exceptions**

46. The extent to which other exceptions are recognized depends on the particular social and economic context of each State. Some States, for example, may wish to protect buyers of relatively low-value consumer assets, whether or not purchased in the ordinary course of the seller's business. Here, the theory is that it is unrealistic to expect them to undertake a registry search in advance of the transaction. Statutory security rights that should ideally be registered are also often excluded.

## **I. Territorial scope of the registry**

47. Secured creditors require clear guidance on where a security right must be registered in situations where the transaction involves parties and assets located in different States. Typically, this guidance is found in a State's conflict-of-laws rules for determining the law applicable to the third-party effectiveness and priority of a security right. Under the approach adopted in most modern conflict-of-laws regimes, the applicable law turns on the nature of the assets. For security rights in tangible assets, the law of the location of the encumbered asset applies (see the *Guide*, recommendation 203). Where the encumbered assets are located in multiple States, it follows that multiple registrations will be needed. For security rights in intangible assets, as well as mobile goods of a kind that are commonly used in multiple States, the law of the State in which the grantor is located applies (see the *Guide*, recommendations 204 and 208).

## **J. Effect of actual knowledge on third-party effectiveness and priority**

48. The question arises whether a third party that acquires an encumbered asset with actual knowledge of an unregistered security right should take the asset free of that security right. In general, modern regimes stipulate that actual notice or knowledge of the existence of a security right is not a substitute for registration and that acquiring an encumbered asset with knowledge of the existence of an unregistered security right does not constitute bad faith. This approach enables third parties to place full confidence in the registry system to determine whether or

not they are bound by any security rights the grantor may have given in its assets. It is not unfair to secured creditors since they could have protected themselves by timely registration.

49. Knowledge that a transfer, lease or licence violates the rights of an existing secured creditor is a different matter. Such knowledge on the part of a buyer, lessee or licensee may result in that party acquiring its rights in an encumbered asset subject to a pre-registered security right, even if the relevant transaction is in the ordinary course of business of the seller, lessor or licensor (see the *Guide*, recommendations 81 and 106, and the *Supplement*, recommendation 245).

## **K. Registration and the doctrine of constructive notice**

50. Traditional legal regimes for secured lending sometimes treat registration as a constructive notice of a security right. Under the constructive notice doctrine, everyone that deals with an asset subject to a registered right is deemed to have knowledge of the existence of that right even if they have not in fact consulted the registry. The doctrine of constructive notice is irrelevant in a modern secured transactions legal framework in which the priority consequences of registration and failure to register are set out directly and comprehensively in the applicable legislation. For the most part, these priority rules do not depend on the knowledge of the existence of a security right, deemed or otherwise, of third parties that acquire rights in assets subject to a registered right. In the limited number of cases where knowledge is relevant, it is actual not constructive or deemed knowledge that is important and it refers to knowledge of different facts, not the existence of the security right (see para. 49 above).

## **L. Registration and insolvency**

51. Modern secured transactions laws generally make registration a pre-condition to the effectiveness of a security right against the grantor's unsecured judgment creditors and the grantor's insolvency representative (see the *Guide*, recommendations 238 and 239). Failure to register, or to register in time, means that the secured creditor is effectively demoted to the status of an unsecured creditor.

52. This rule:

- (a) Encourages prompt registration by secured creditors;
- (b) Enables the grantor's insolvency representative to efficiently determine which of the grantor's assets are encumbered;
- (c) Enables judgment creditors to determine at any given time the extent to which the grantor's assets are encumbered, thereby enabling them to determine whether it is worthwhile to commence judgment enforcement proceedings; and
- (d) Enables potential creditors to determine the possible extent of secured indebtedness of their potential debtors at any given time, knowledge that may contribute to their overall assessment of creditworthiness of a potential debtor.

53. Timely registration does not, however, protect a secured creditor from challenges on the basis of general insolvency law policies, such as rules avoiding

preferential or fraudulent transfers and rules giving priority to certain protected classes of creditors (see the *Guide*, chap. XII, and recommendation 239; see also recommendation 88 of the UNCITRAL Legislative Guide on Insolvency Law).

#### **M. Registration and creation of a security right**

54. In a modern secured transactions regime, registration is not an element of the creation of a security right (see the *Guide*, recommendation 33). Rather the security right takes effect and becomes enforceable between the grantor and the secured creditor as soon as a security agreement that meets minimal formalities such as writing and evidence of the grantor's consent to encumber its assets is concluded (see the *Guide*, recommendations 13-15). Registration is purely a precondition to the third-party effectiveness of the security right. In addition, what is registered is not the security agreement itself but rather a separate notice (that is, information relating to a potential security right), typically entered into the registry in electronic form, that sets out only basic information about the security right (see the *Guide*, recommendation 32). The registration does not constitute evidence that the security right to which it refers actually exists. It is the off-record security agreement that evidences the security right. Registration merely alerts third-party searchers of the possible existence of a security right in the described assets.

#### **N. Registration and enforcement**

55. Some legal regimes require secured creditors to register a notice of the initiation of enforcement action. This is usually the case in legal systems in which registry staff are required to notify prior registered secured creditors that hold a security right in the same asset of the pending enforcement action. In other legal systems, the burden is on the enforcing secured creditor to search the registry and to give advance notice to the holders of competing registered security rights of the particular enforcement remedy that it seeks to exercise (see, for example, the *Guide*, recommendation 151).

#### **O. Penalties for failure to register**

56. Modern secured transactions laws do not impose monetary penalties or other administrative sanctions on secured creditors that fail to register the required information in relation to a security right. The inability to enforce the security right against third parties under the secured transactions law is a sufficient legal sanction in itself since failure to register effectively reduces the secured creditor to the status of an unsecured creditor.

#### **P. Relationship between the security rights registry and specialized movable property registries**

57. Modern secured transactions and registry regimes deal with the relationship between a State's security rights registry and specialized movable property registries (for example, for ships, aircraft or intellectual property). Where specialized



registries exist and permit the registration of security rights in movable assets with third-party effects (as is the case with the international registries under the Convention on International Interests in Mobile Equipment and its Protocols), modern secured transactions and registry regimes deal with matters related to the coordination of registrations in the two types of registry.

58. For example, information registered in one registry may be forwarded to the other registry. Alternatively, information registered in one registry may be simultaneously entered into the other registry through a common gateway. Either one of these approaches would require coordination of registration systems. For example, the registry regimes should provide for both grantor and asset indexing and searching and accept notice rather than document registration. However, as already mentioned, the description requirements and the legal consequences of registration may be different (for the coordination between registries, see the *Guide*, chap. III, paras. 75-82, chap. IV, para. 117; see also the *Supplement*, paras. 135-140).

#### **Q. Relationship between the security rights registry and immovable property registries**

59. Immovable property registries invariably exist in most, if not in all, States. With the introduction of security rights registries in modern secured transactions regimes, the issue or the relationship between the two types of registry needs to be addressed. In most States, the two types of registry are separate. In some States, however, information relating to security rights in movable assets and to encumbrances on immovable property may be registered in one registry. As already mentioned, the requirements for the description of the encumbered asset and the legal consequences of registration may be different in each case, but the basic concept of notice registration as opposed to document registration is the same.

60. The issues discussed above (section P) are relevant in this context as well. In addition, issues will arise with respect to where information relating to security rights in attachments to immovable property should be registered. Modern secured transactions and registry regimes provide that such registrations made be made in the general security rights registry or in the immovable property registry (see the *Guide*, recommendation 43). The choice between the two types of registration has priority consequences. Most States provide that an encumbrance registered in the immovable property registry has priority over a security right registered in the security rights registry (see the *Guide*, recommendation 87).

### **III. Key characteristics of an effective security rights registry**

#### **A. Introduction**

61. Most States have established registries for recording title and encumbrances on titles for transactions involving immovable property as well as certain types of high-value movable assets, such as ships and aircraft. It is essential for the implementation of an effective security rights registry that its very different characteristics be well understood by those responsible for its design and by its potential clientele. Therefore, a text on registration should explain the key

characteristics of an effective modern security rights registry. This is the goal of this chapter (additional key characteristics that are typically addressed in legal rules or relate to the registry design are addressed in A/CN.9/WG.VI/WP.44/Add.1, chapters IV and V respectively).

## **B. Determining title to encumbered assets**

62. A title registry, such as the typical land or ship registry, operates to disclose both the current owner of a particular asset and any encumbrances on the owner's title. A security rights registry generally does not record the existence or transfer of title to the encumbered asset or guarantee that the person named as grantor is the true owner. It is purely and simply a record of security rights on whatever property right the grantor has or may acquire in the encumbered assets. Whether the grantor owns the encumbered assets described in a registration instead depends on the effectiveness of the off-record contract transactions under which the grantor claims title. It would not be administratively practical or cost effective to attempt to establish a reliable ownership record for the great bulk of tangible and intangible movable assets that are the subject of security rights.

63. As explained earlier, in the case of title retention devices, as well as true leases and consignments, the registration refers not to a security right but to the ownership right of the seller, lessor or consignor. Similarly, in the case of an outright assignment of receivables, registration refers to the ownership right acquired by the assignee. However, registration even in these cases does not establish or evidence ownership.

## **C. Grantor versus asset indexing**

### **1. Generally**

64. The very different nature of movable assets as compared to immovable property and secured lending relating to these respective assets leads to a second point of distinction between title registries for immovable property and security rights registries for movable assets. This point is the manner in which registrations are indexed in the registry record. Immovable property has a sufficiently unique geographical identifier to enable registrations to be indexed and searched by reference to the asset. Most types of movable asset lack a sufficiently specific or unique objective identifier to support asset-based indexing. Moreover, a modern secured transactions law must accommodate the creation of an effective security right in pools of present and future assets such as the grantor's equipment, inventory and receivables. Asset indexing would require an item by item specific description making the registration process unbearably cumbersome and prone to errors in descriptions.

65. For both these reasons, registrations in a security rights registry are generally indexed by reference to the identifier of the grantor (the grantor's name or other identifier such as a State-issued identification number) as opposed to the asset (see the *Guide*, chap. IV, paras. 31-33 and 70). Grantor indexing greatly liberates the process of registration. Secured creditors can register a security right in a grantor's present and future movable assets, or in generic categories, through a single one-time registration.

## 2. Supplementary asset-based indexing

66. Grantor indexing has one drawback. If the grantor transfers the encumbered asset and the initial registration of the security right remains effective against transferees, third parties that deal with the asset in the hands of a transferee cannot protect themselves by conducting a search of the registry using the name of the transferee. Suppose, for example, the grantor sells an asset subject to a registered security right outright to a third party that, in turn, proposes to sell or grant security in it to a fourth party. Assuming the fourth party is unaware that the third party acquired the asset from the original grantor, he or she will search the registry using only the third party's name. That search will not disclose the registered notice.

67. In response to this problem, some security rights registry systems provide for registration and asset-based indexing in respect of "serial number goods" for which reliable numerical identifiers are available. Asset-based indexing is usually limited to movable assets for which there is significant re-sale market and which have a sufficiently high value to justify the additional legal complexity and reduced flexibility (for example, motor vehicles, trailers, mobile homes, aircraft frames and engines, railway rolling stock, boats and boat motors, although security rights in some of these types of asset are registered in specialized registries; see the *Guide*, chap. IV, paras. 34-36).

68. In fact, in some modern registry systems, both the grantor's identifier and serial number of assets (including consumer household appliances) may be entered and both grantor and serial number indexing is possible. Both grantor's identifier and serial number may be search criteria (there may even be a third search criterion, registration number). This approach enables a search to be undertaken on the specific serial number of an asset or on the grantor's identifier, and either of these search criteria would detect the registration. In some cases, however, if the encumbered assets are consumer goods and are described and indexed by serial number, the grantor's identifier may not be revealed (for privacy reasons).

## D. Notice versus document registration

69. Registry systems for recording title and encumbrances on title to specific parcels of land or specific movable assets, such as ships, typically require registrants to file or tender for scrutiny the underlying documentation. This is because registration generally is considered to constitute evidence or at least presumptive evidence of title and any property rights affecting title.

70. Some traditional security rights registries still require submission of the underlying security documentation. However, modern secured transactions regimes invariably adopt notice registration. A notice-registration system does not require the actual security documentation to be registered or even tendered for scrutiny by registry staff. All that need be registered is a separate notice of the security right in standard form, setting out only the basic information necessary to alert a searcher that a security right may exist in the asset described in the notice. It follows that registration does not mean that the security right to which it refers necessarily exists; only that one may exist in the future (see, the *Guide*, recommendation 57).

71. By dramatically reducing the quantity of information that must be transmitted to the registry, notice registration:

- (a) Reduces transaction costs for both registrants and third-party searchers;
- (b) Reduces the administrative and archival burden on registry system operators;
- (c) Reduces the risk of registration error (since the less information that must be submitted, the lower the risk of error); and
- (d) Enhances privacy and confidentiality for secured creditors and grantors.<sup>8</sup>

72. As already mentioned, modern secured transactions and registry regimes provide that notice registration does not create a security right; it simply makes a security right effective against third parties if it exists at the time of registration or, in the case of advance registration, comes into existence later (see the *Guide*, recommendations 32, 33 and 67). In addition, such regimes foresee that, while a notice is not effective unless authorized by the grantor in writing, authorization given in the security agreement is sufficient and may be given even after registration, independently of the identity of the registrant (see the *Guide*, recommendations 55, subpara. (d), and 71). Moreover, to protect grantors from unauthorized registrations that may prevent them from utilizing their assets to obtain credit, such regimes recognize the right of a grantor to seek cancellation or amendment of a registration through a summary administrative or judicial procedure (see the *Guide*, recommendations 55, subpara. (c), and 72, subpara. (b)). Any additional sanctions aimed at protecting grantors against unauthorized registrations depend on the judgment in each State about the extent of the risk of unauthorized and fraudulent registrations relative to the cost of administering prescriptions of this nature (see the *Guide*, chap. IV, para. 20).

## **E. The role of the registry with respect to registered notices**

73. The registry envisioned by the *Guide* is one that serves as a repository of information received by it, with the legal effect of that information determined by the substantive rules of the secured transactions regime. Accordingly, no information submitted by registrants would be subject to verification or substantive change by those administering the registry. Similarly, any changes in information that a registrant wishes to become part of the record would be submitted separately and would not have the effect of deleting any earlier-received information. In other words, change is not effected by deleting the currently registered information and replacing it with new one. Instead, an amendment is added to the registration so that the searcher will be able to find and examine both the originally registered information as well as the new information subsequently registered. Neither registrants nor registrars are able to replace any registered information, and registry systems should be programmed as such. All registrations are indexed in the registry database and may be removed only when their effectiveness is terminated or when they expire.

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<sup>8</sup> For a discussion of related issues such as advance registration, the notion that one registration can cover multiple agreements, the benefits of electronic transmission and the required content of the notice, see A/CN.9/WG.VI/WP.44/Add.1, chap. IV.

## (A/CN.9/WG.VI/WP.44/Add.1) (Original: English)

**Note by the Secretariat on registration of security rights in movable assets, submitted to the Working Group on Security Interests at its eighteenth session****ADDENDUM****CONTENTS**

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## IV. Legal rules applicable to the registration and search process

### A. Introduction

1. In the interest of legal certainty, a State establishing a security rights registry will need to develop a set of legal rules and forms to govern the registration and search process. The goal of this chapter is to identify the issues that the Working Group may wish to address in a text on registration of security rights in movable assets. The recommendations of the *Guide* (in particular, chapter IV) provide the foundation for the treatment of these issues. Accordingly, this discussion is based on those recommendations and they are referred to throughout this note.

### B. Entitlement to register

2. Usually the secured creditor is entitled to effect a registration with respect to its security right, directly or through an agent such as a law firm, intermediary or other service provider (once a registry is established these service providers create a new business, which is an additional benefit of reform, that facilitates job creation

and new economic development activities). In some common law systems, however, the company-grantor is actually the only one that is permitted to register security rights (“charges”) in the company registry.

3. Similarly, usually the initial registrant may cancel or amend a registration. If a personal identification number is assigned by the registry to the initial registrant, any person in control of the number may register a cancellation or amendment.

4. Secured transactions laws often require grantor authorization for the secured creditor to register information relating to a security right (the *Guide* refers to registration of a “notice”). However, this requirement typically may be satisfied by an agreement (entered into before or after the security agreement itself is entered into) that does not need to be included in the registered information. In addition, the security agreement in itself is often considered to be sufficient authorization for registration. This is the approach recommended in the *Guide* (see the *Guide*, recommendation 71). With the development of electronic communications, grantor authorization is less of a problem as the grantor may include its authorization in the registry record in advance or the registry record may automatically request it upon registration by the registrant.

5. In contrast, some registry systems require the grantor’s consent to be evidenced on the registry record itself. For example, this is the approach recommended in the European DCFR. This requirement adds considerable cost and time to the registration process since it requires reliable verification of the fact that the person giving consent is in fact the grantor named in the registration. Grantor identification may not be a problem if the grantor may be identified with a unique number (as in the case of registered companies or grantor with a number identification card), but is a real problem with respect to other types of grantor.

6. Systems that require the grantor’s authorization to appear on the record may be influenced by an inappropriate analogy with title registries. In a title registry, such a requirement makes sense insofar as the rights of the true owner may be lost if an unauthorized transfer is entered on the record and the person named as the new owner then proceeds to dispose of the asset. However, in a security rights registry, registration merely provides notice of the possible existence of a security right in the described assets. This is prejudicial to the person named as grantor in the registration only insofar as it impedes that person’s ability to deal freely with the assets described in the registration until the registration is cancelled.

7. Accordingly, the problem of unauthorized registrations can more efficiently be dealt with by establishing a summary procedure to enable a person named as grantor in an unauthorized registration to quickly and inexpensively cancel or amend an unauthorized registration (see the *Guide*, recommendations 54, subparagraph (d), and 72). Such a procedure is dealt with later in this chapter (see paras. 55-59 below). Additional security against unauthorized registrations can also be achieved by incorporating some form of registrant identification into the registration process. That way, the system has a record of the responsible party (see paras. 73-76 below). An additional way to minimize the unauthorized registrations is to require that the registrant notify the grantor of an initial registration and the registry notify the grantor of any subsequent changes (see the *Guide*, recommendation 55, subparas. (c) and (d)).

### **C. Advance registration**

8. Modern registry systems typically provide for advance registration, that is, registration made before a security agreement between the grantor and the creditor is concluded or a security right has come into existence (see the *Guide*, recommendation 67). Advance registration enables a potential secured creditor to establish a first-ranking priority position against subsequently registered security rights at an early stage in the negotiations with the potential grantor. This in turn eliminates the delay in extending credit to the grantor that would otherwise result if registration could be made only after the security agreement had been concluded.

9. If the negotiations are aborted and no security agreement is ever entered into between the parties named in the registration, the creditworthiness of the person named as grantor in the registration may be adversely affected. This risk, like the risk of unauthorized registrations generally, can be controlled by ensuring that: (a) the grantor would be notified in a timely manner about the registration (see the *Guide*, recommendation 55, subpara. (c)); and (b) the grantor could compel the cancellation of the registration through a summary procedure (see the *Guide*, recommendations 54, subpara. (d), and 72 and paras. 55-59 below).

### **D. One registration for multiple security agreements**

10. In a modern registry system (in which what is registered does not include the security documentation), a single registration is sufficient to give third-party effectiveness to security rights arising under successive or amended security agreements between the same parties that involve the same encumbered assets (see the *Guide*, recommendation 68). In such a case, the registration is effective only to the extent the registered information reflects the new or amended security agreements. For example, if a new security agreement covered assets not described in the prior registration, a new registration would be needed.

11. The advantages of a system which permits a single registration to relate to multiple security agreements include: (a) reduced registration costs; (b) reduced priority risk for secured creditors; and (c) greater flexibility for grantors and secured creditors to adjust their lending relationship as circumstances evolve.

### **E. Required content of registration**

#### **1. Grantor information**

##### **(a) General**

12. Inasmuch as only certain types of encumbered asset have a serial number or a similar identifier, in modern secured transactions and registration regimes, the grantor's name or other identifier is the main available criterion for searching the records of a security rights registry in order to discover all information registered with respect to security rights that may have been created by a particular grantor in most types of asset. As such, the rules applicable to registration make it clear that inclusion of this information is an essential component of an effective registration. The grantor's address should also be included, both to assist in grantor



identification, and to enable interested parties to communicate with the grantor for the purposes of obtaining further information or to send legal notices.

13. In some registry systems, the grantor's address does not need to be included in the registration. This is due to privacy concerns. Thus, interested parties are required to contact the secured creditor and obtain further information about the grantor. In addition, those potential third-party financiers are likely to already be in contact with the grantor. It should be noted that, if the required grantor identifier is reliable and unique (for example, a national identification number), the grantor's address may not be really essential, because: (a) with a unique identification number, the address is not needed to identify the grantor; (b) a potential creditor presumably knows how to reach the potential grantor and obtain the necessary information; and (c) a potential creditor will need to contact the secured creditor on record in any case to confirm any information provided by the grantor.

14. The grantor may have created a security right in its rights to secure an obligation owed by a third-party debtor. Since the object of registration is to disclose the possible existence of a security right in the asset described in the registration, the rules typically provide that the person whose name must appear on the registration is the grantor, not the third-party debtor (or a mere guarantor of the obligation owed by the third-party debtor).

15. To provide legal certainty for registrants and third-party searchers, modern registration regimes also provide explicit guidance on what constitutes a valid grantor identifier. Otherwise, a secured creditor cannot be confident that its registration will be effective and searchers cannot confidently rely on a search result (see the *Guide*, recommendations 58-60).

**(b) Individual versus enterprise grantors**

16. A modern registry system is usually designed to allow registration of information affecting enterprise and individual grantors in a manner that permits the system to identify which grantors are individuals and which are enterprises (separate data fields for registration purposes and separate databases for storage purposes). This design feature recognizes that different identifier rules will be required for the two categories of grantors. It also enhances the efficiency of the search process. For example, the search logic for enterprise grantors can utilize normalized versions of the enterprise name that, in sequence: (a) remove all punctuation, special characters and case differences; (b) concatenate groups of free-standing characters; (c) remove selected words or abbreviations that do not make a name unique (such as articles of speech and indicia of the type of enterprise such as "company", "partnership" "LLC" and "SA"); and (d) concatenate the resulting words into a character string for comparison with the normalized versions of names in the index.

17. This design feature has implications for the rules applicable to the registration and searching process. Modern registration regimes make it clear that an effective registration requires registration of the grantor name (first name, middle name and last name) in the appropriate fields. It is critical that registry users understand the importance of accuracy in this respect, since a search of the individual grantor database would not disclose a security right registered against an enterprise grantor, and the converse is also true.

**(c) Individual grantor identifier**

18. Some registry systems designate a government issued identification number as the required identifier for individual grantors, while other systems use the name of the grantor (see the *Guide*, recommendation 59).

19. Whether a government issued identification number is a suitable identifier depends on two principal considerations. First, whether the public policy of the State (for example, privacy or security concerns) prevents the use of identification numbers for legal purposes other than that for which the number was issued. If that is not the case, the next question is whether the system under which the numbers are issued is sufficiently reliable to ensure that each individual is assigned a unique number.

20. If the grantor's name must instead be used as the relevant identifier, it is important to have clear rules specifying what constitutes the grantor's "legal" name and what components of the name are required (for example, surname, first given name, middle initials). These rules are needed even when a State-issued identification number is the general grantor identifier if the grantor is not a citizen or resident of the State and therefore has not been issued an identification number. The following three approaches may be envisaged: (a) all grantors may be identified by a number; (b) all grantors may be identified by a name; and (c) some grantors (citizens) may be identified by a number and some (non-citizens) by a name. Ideally, all grantors should be identified by a number.

21. While the rules for the legal name of the grantor depend on the general naming conventions of each State, often reliance is placed on State-issued documentary sources. A rule incorporating this approach might, for example, provide for alternative sources in order to accommodate the particular circumstances of different grantors (including a change of circumstances as, for example, where at a certain time a grantor has only a foreign passport, but later obtains the citizenship and identification card of the State of the registry):

<b>Grantor Status</b>	<b>Documentary Source of Name</b>
Born in enacting State	Birth certificate
Born in enacting State but birth not registered in enacting State	(1) Current passport; (2) If no passport, current social insurance/social security card; (3) If no passport or card, current foreign passport from jurisdiction of habitual residence
Born in enacting State but birth name subsequently changed pursuant to change of name legislation	Name as it appears on change of name certificate or equivalent document (such as a marriage certificate)
Naturalized citizen of enacting State	Citizenship certificate
Not born in enacting State and not a citizen of enacting State	(1) Current foreign passport issued by the jurisdiction whose citizenship the grantor has; (2) If no current foreign passport, current visa issued by enacting State; (3) If no visa and no foreign passport,

	governmental birth certificate issued at grantor's birth place
None of the above	Name as it appears on any two documents issued by the enacting State, if those names are the same (for example, a current motor vehicle operator's licence and a current government medical insurance identification card)

22. In jurisdictions where a certain name is a very common one shared by many individuals, there may be a benefit to requiring additional information, for example, date of birth in order to permit closer identification of the grantor. So, where a search result discloses many grantors having the same surname, the given names and the addresses associated with each grantor may assist third parties to determine which if any of the grantors is the one in which they are interested. There is on the other hand, the need for restraint in demanding supplementary information since the more detail that is required to be included, the greater the risk of registrant error and the greater the privacy concerns (see the *Guide*, recommendation 59).

**(d) Enterprise grantor identifiers**

23. To determine the correct identifier for enterprise grantors, modern registration regimes often first designate the types of entity that are to be considered enterprises for the purposes of registration. In addition to legal persons such as corporations, the list includes unincorporated entities with a legal identity separate from that of its owners (such as partnerships, syndicates and joint ventures, trade unions, trusts, and estates of deceased or insolvent persons).

24. The relevant rules also provide guidance on what constitutes the legal name or other identifier of the entity for registration purposes. For corporations and other entities whose organization is required to be established and disclosed in a public record, the name set out in that record is used (or the registration number of the entity in a company registration or similar record). For other entities that do not have a separate legal identity from that of its owners, such as unregistered partnerships, reliance usually is placed on the name set out in the instrument constituting the entity (see the *Guide*, recommendation 60). However, third parties may not have access to that instrument and it may be desirable to require inclusion of additional grantor identifiers, for example, the entry in the individual grantor field of the identifiers of the partners of an unregistered partnership.

25. Where a syndicate or joint venture is the grantor, the names of all of the participants in the syndicate or joint venture or a person or corporation appointed to act for the syndicate or joint venture are normally entered. Where a trade union is involved, the grantor identifier would typically be the official name of the trade union; where a trust is involved, it would be the name(s) of the trustee(s); where an estate of a deceased is involved, it would be the name of the estate administrator identified as such; and where an insolvent debtor's estate is involved, it would be the name of the insolvency representative.

26. In the case of sole proprietorships, even though the business may be operated under a different business name and style other than that of the proprietor, registry rules typically require entry of the proprietor's name or other identifier in

accordance with the rules applicable to individual grantors (because it is the individual that is the grantor) in addition to entry of the name of the business in the enterprise grantor field. It should be noted that, in some States, most types of legal entity have a registration or other unique number and thus their identification for registration purposes is simplified.

**(e) Impact of error in grantor identifier on the effectiveness of registration**

27. Since the grantor's name or other identifier is the search criterion for retrieving notices, modern registration regimes provide guidance on the circumstances in which an error in the identifier that was entered will render a registration ineffective with the result that third-party effectiveness of the security right is not achieved. The relevant rules make it clear that the test is not whether the error appears to be minor or trivial in the abstract but whether it would cause the registration not to be retrieved during an official search of the record (that is, not a random search or a search of the service provider records) using the legal grantor identifier. It should also be made clear that the test is an objective one, that is to say, the person challenging the effectiveness of the registration should not have to show that it suffered any actual prejudice as a result of the error (see the *Guide*, recommendation 58). The rules by which the record may be searched should be published in a regulation or other authoritative publication on which users can rely.

28. In some registry systems, software is used that returns close matches to the correct grantor identifier. Such systems may allow a registration to be considered effective even though the registrant has made a minor error in entering the grantor identifier so long as the searcher would consider it likely that the grantor whose name appears on the search result as an inexact match is nonetheless the relevant grantor. Whether this is the case depends on such factors as how long the list of inexact matches is and whether a searcher would be able to readily identify the correct grantor by referring to other information, such as address and first name (a searcher after all should not have to chase down many grantors that may or may not be the relevant one).

**2. Secured creditor information**

29. The rules and forms applicable to the registration process invariably require entry of the identifier of the secured creditor, or the secured creditor's representative, along with its address. The applicable identifier rules should be the same as for the grantor. There may be one exception to this approach. Whereas a numeric identifier for the grantor should be known by the registrant and a searcher, that may not be necessarily true of the secured creditor's numeric identifier. The purpose of providing information on the secured creditor is to permit a searcher to make further inquiries if it is considering extending credit secured by the encumbered asset. Therefore, the name may be the only appropriate identifier for the secured creditor or its representative. In any case, since the secured creditor identifier is not a search criterion or an element that determines the effectiveness of registration, accuracy is not as essential to the effectiveness of the registration. Substantial accuracy is still important as a practical matter since searchers will rely on the registry record for the purposes of communicating with the secured creditor to obtain further information concerning the security agreement underlying the registration or for sending legal notices (see the *Guide*, recommendation 64).

Accordingly, a registration that states the name or other identifier of the secured creditor with substantial accuracy should be sufficient even though the standard is higher with respect to the name or identifier of the grantor.

### **3. Description of encumbered assets**

#### **(a) General**

30. It is important to include in a registration a description of the encumbered assets. The absence of a description would limit the grantor's ability to sell its encumbered assets or create security rights in them. Prospective buyers and secured creditors would require some form of protection (for example, a release from the secured creditor) before entering into transactions involving any of the grantor's assets. The absence of a description would also diminish the information value of the registry record for insolvency representatives and judgment creditors. For these reasons, a description of the encumbered assets is invariably a mandatory component of registration (see the *Guide*, recommendations 57, subparagraph (b)).

31. A description of an encumbered asset is generally considered sufficient, for the purposes of both the security agreement and registration, as long as it reasonably identifies the assets encumbered by the security right (see the *Guide*, recommendation 63). Where the security right covers generic or sub-generic categories of a grantor's assets, registration rules often explicitly state that a description of the relevant category is sufficient, for example, "all of the grantor's movable assets" or "all of the grantor's inventory and receivables." The rules also provide that such a description is assumed to cover future assets within the relevant category unless expressly stated otherwise. For example, a reference to "receivables" would include both present and future receivables.

32. A registration may sometimes include a description of a type of asset (for example, through an online drop-down menu of types of asset) even though the security agreement to which the agreement relates covers only certain specific items within the relevant category. For example, the registration may describe the encumbered assets as "all tangible assets" whereas the security agreement creates a security right only in certain specifically described items of equipment. This approach enables the secured creditor to enter into new security agreements encumbering additional assets as the grantor's financing needs evolve while still being able to rely on the existing registration for third-party effectiveness and priority purposes. However, to address situations where the grantor has not authorized a description in a registration that is broader than the actual range of assets in which a security right has been created or is contemplated, modern secured transactions and registration regimes typically provide that: (a) the secured creditor has to appropriately amend the registration shortly after receipt of the grantor's request; (b) the grantor is entitled to seek an appropriate amendment through a summary judicial or administrative procedure (see the *Guide*, recommendations 54, subparagraph (d), and 72).

#### **(b) Description of serial number assets**

33. Many modern registry systems allow asset-based searching for specific types of asset that have a reliable serial number or similar identifier, and have clear rules for determining the relevant asset identifier (for example, motor vehicles licensed

for use on the public roads, major items of industrial, agricultural or construction equipment or household equipment). As in such systems the serial number constitutes an additional search criterion, there is an additional obligation on registrants to enter the serial number in the registration space or field designated specifically for serial number descriptions. Some registration regimes provide that third-party effectiveness against other secured creditors can be achieved without entering the serial number, but to protect against buyers, the serial number must be indexed. The rationale is that a buyer does not have access to all of the information that a secured creditor will have in the course of its due diligence, so it needs the serial number to be sure that title is clear before agreeing to buy.

34. Serial number registration limits the ability of a secured creditor to make a security right effective against third parties in future serial number assets through a single registration. A new registration will have to be made (or the existing registration would need to be amended) to record the serial number of each new item as it is acquired by the grantor (unless future serial numbers are known before production of the assets and the registration system permits registration of multiple serial numbers). It is important, therefore, that the rules also confirm that a serial number description is not required where the serial number assets are held by the grantor as inventory. For the following reasons, serial number identification of inventory is unnecessary to protect third parties. First, buyers that acquire inventory from the grantor in the ordinary course of the grantor's business take the inventory free of the security right in any event (see A/CN.9/WG.VI/WP.44, paras. 39-41). Second, a generic description of encumbered assets simply as "inventory" is sufficient to enable third-party secured and unsecured creditors to reasonably identify the encumbered assets.

35. Where there are several acceptable serial numbers for specific assets, there should be clear rules as to which serial number should be included in a registration and those rules should also apply to searches. For example, in some States, a motor vehicle can be described by a Vehicle Identification Number (VIN), assigned in accordance with the national Motor Vehicle Standards Act; if there is no VIN, the chassis number can be entered; if there is no VIN or chassis number, the manufacturer's number can be entered. In those States, a searcher has to search first against the VIN, and only if the VIN is not found, should a searcher refer to the next relevant number.

**(c) Description of proceeds**

36. In the event that the encumbered assets are disposed of by the grantor, the underlying secured transactions law typically allows the secured creditor to claim an automatic security right in the proceeds of disposition.

37. When the proceeds described in a generic way in the registration consist of money or a right to payment, modern secured transaction and registration regimes generally provide for automatic continuation of third-party effectiveness of the security right in such proceeds. However, where the proceeds are not money or a right to payment and are not otherwise encompassed in the indication of encumbered assets in the existing registration, the security right in the proceeds is effective without registration of an amendment for a short fixed period of time after the proceeds arise. If an amendment is registered within that period, third-party effectiveness will be continuous from the date of the initial registration (see the

*Guide*, recommendations 39 and 40). An amendment of the registration is necessary in such cases because simply including a general reference to “proceeds” in the registration would not be sufficient, since it would not enable a third party to identify which categories of assets in the grantor’s possession might constitute the relevant proceeds. Where this is the case, the rules applicable to registration make it clear that the same description requirements that apply to the original encumbered assets also apply to the proceeds.

38. In some modern registry systems where registration takes place online, the term “proceeds” has as default value the broadest possible description “all present and future assets”. This default proceeds description can be overwritten by the registrant.

**(d) Impact of erroneous or insufficient asset description on the effectiveness of registration**

*(i) General*

39. A registrant’s failure to describe an asset in a registration means that the registration is ineffective to the extent of the omission with the result that the security right in that asset is not effective against third parties (this rule applies also to proceeds subject to the qualifications discussed in para. 37 above). However, modern secured transactions and registration regimes make it clear that the registration is ineffective only to the extent of the omitted assets and that the security right is still effective against third parties with respect to the encumbered assets that were described in the registration (see the *Guide*, recommendation 65).

40. Unlike the grantor’s name, the description of the encumbered assets is not a search criterion (with the exception of serial number of assets; see paras. 33-35 above; see also paras. 41, 42 and 63 below). Consequently, modern secured transactions and registration regimes normally clarify that a minor error in the description of the encumbered asset does not make the registration ineffective so long as a reasonable searcher would nonetheless conclude that the description covers the relevant item or kind of encumbered asset (see the *Guide*, recommendation 64).

*(ii) Error in the description of serial number assets*

41. In systems that provide for supplementary asset-based registration and searching for certain serial number assets, the test for whether an error renders a registration ineffective should be the same as for an error in the grantor identifier, that is, whether the error would cause the registration not to be retrieved on a search using the correct number.

42. Guidance is also given on the result where the serial number is correctly entered in the registry, but there is an error in the grantor identifier sufficient that the registration would not be retrieved using the grantor identifier as the search criterion. In principle, a third-party searcher should be entitled to place full confidence in either a grantor or a serial number search. However, not all searchers will necessarily have ready access to the serial number of particular assets of the grantor. In addition, the imposition of what effectively would be mandatory serial number searching might result in excessive cost and inconvenience for searchers, for example, where the grantor holds many items that qualify as serial number

assets. Consequently, the rules should specify that an error in the serial number makes the registration ineffective if it would cause the registration not to be retrieved using the serial number search criterion even if the grantor identifier is correctly entered (see the *Guide*, recommendation 63). It should be noted that, in some registration regimes, a buyer may rely on either the identifier of the grantor or the serial number of the asset, while a potential secured creditor may rely only on a search according to the grantor's name or other identifier.

#### **4. Duration of registration**

43. Two approaches to the duration of a registration are possible (see the *Guide*, recommendation 69). First, the secured transactions law could specify that all registrations are subject to a standard statutory term (for example, five years) with the obligation then being cast on the secured creditor to ensure that the registration is renewed before the expiry of that term. Alternatively, the law may permit secured creditors to self-select the desired term of the registration. In the latter event, entry of the relevant term will be a legally essential component of an effective registration. In systems that adopt this second approach, it may be desirable to base registration fees on a sliding tariff related to the length of the registration life selected by the registrant in order to discourage the selection of excessive registration terms. It may also be desirable to design the system in a way that would not permit registration for too short a period of time (for example, two weeks) or clear the record automatically to avoid registrations that never expire. It should be noted, however, that modern registration regimes typically provide that an error in the duration of the registration does not render the registration ineffective (see the *Guide*, recommendation 66).

#### **5. Maximum amount of secured obligation**

44. Some secured transactions and registration regimes require a registrant to include a statement of the maximum amount of indebtedness secured by the security right (this is a possibility left open in the *Guide*; see recommendation 57, subparagraph (d)). As a result, the security right is not effective against third parties with respect to any amounts exceeding the maximum amount of the secured creditor (in any case, the secured creditor cannot claim more than it is actually owed for capital, interests and any agreed expenses). The aim of this requirement is to facilitate access to additional sources of secured financing by the grantor based on the residual value of the asset over and above what is needed to satisfy the obligation secured by the earlier registered security right.

45. The parties are always free to agree to a maximum sum that is sufficiently high to accommodate any foreseeable need for a later increase in the value of the secured obligation. However, if the secured creditor has sufficient bargaining power as against the grantor to insist on stating an inflated estimate, the objective of the requirement is undermined. In any event, where this approach is adopted, entry of the relevant amount will be an essential component of an effective registration. It should be noted, however, that, as in the case of errors in the duration of registration, modern registration regimes typically provide that an error in the maximum amount of the secured obligation does not render the registration ineffective (see the *Guide*, recommendation 66). It should also be noted that the



inclusion of the maximum amount of the obligation secured in the registration information raises other issues of confidentiality and competition.

## **F. Registration of subsequent changes**

### **1. Transfer of a security right**

46. If a secured creditor transfers a security right made effective against third parties by registration, it should not be mandatory to update the registration to reflect the name of the new secured creditor since the relevant search criterion is the grantor identifier, not the secured creditor identifier. However, entry of such an amendment should be possible since the original secured creditor will usually not wish to have to continue to deal with requests for information from third-party searchers and since the new secured creditor will wish to ensure that it receives any legal notices or other communications relating to its security right (see the *Guide*, recommendation 75). In addition, the original secured creditor should be under a legal obligation to disclose the new secured creditor's identity to at least the grantor in order for the grantor to be able to obtain current information relating to the registered security right and the obligation to which it relates.

### **2. Subordination of priority**

47. Where a secured creditor agrees to subordinate a registered security right to the right of another secured creditor, the secured creditor should be entitled to amend the registration to disclose the subordination. However, disclosure should be optional to the extent that the subordination only affects the relative priority position of the subordinating secured creditor and the beneficiary of the subordination (see the *Guide*, recommendation 94).

### **3. Change in grantor identifier or transfer of encumbered asset**

48. A change in the name or other identifier of the grantor, or the transfer by the grantor of its right in the encumbered asset may undermine the publicity function of registration. The grantor's identifier is the principal search criterion and a search using the grantor's new identifier or the identifier of the grantor's transferee will not disclose a right registered against the old identifier or the identifier of the original grantor.

49. States take varying approaches to the issue of whether and when a secured creditor should have to amend a registration in these circumstances. To the extent disclosure is required, modern registration regimes provide guidance provided on what constitutes a change of identifier in the context, in particular, of corporate amalgamations and the effect of not making an amendment in these circumstances (see the *Guide*, recommendation 61).

### **4. Addition of new encumbered assets**

50. After the conclusion of the original security agreement, the grantor may agree to grant a security right in additional assets not already described in the security agreement. In such a case, the question arises whether a new registration would be required or whether the addition could be made by amending the original

registration. If the latter option is chosen, modern registration regimes make it clear that the security right in the additional assets takes effect against third parties and acquires priority status only from the time of registration of the amendment (see the *Guide*, recommendations 70 and 73).

## **5. Continuation**

51. Modern registration regimes provide that the duration of an existing registration may be extended by way of amendment at any time before the expiry of the term of the initial registration so as to avoid a lapse of the initial third-party effectiveness. If a new registration were instead required this would undermine the secured creditor's original priority status and the continuity of the effectiveness of its security right against third parties. As with regard to the initial duration of the registration, the term for which a registrant may continue a registration may be set in the law or selected by the registrant. If the duration is set in the law, the extension period should be equal with the initial period. If the law permits the registrant to select the duration of the registration, the extension period would be the one selected by the registrant. In the latter case, a registrant may select, for example, five years for the initial registration and three years for the continuation (see the *Guide*, recommendation 69).

## **6. Correction of erroneous lapse or cancellation**

52. In the event that a secured creditor fails to renew a registration in a timely fashion or inadvertently registers a cancellation, some systems permit the secured creditor to revive its registration at any time. In such a case, the effectiveness of registration is reinstated as of the time it was re-established (see the *Guide*, recommendation 47); and the priority derived from such a reinstated registration dates from the time of reinstatement (see the *Guide*, recommendation 96). As a result, if there is a time difference between the lapse and the reinstatement of registration, the original priority is lost but only as against competing claimants whose right arose during the period after the lapse and before the reinstatement of the registration.

## **G. Effective time of registration**

53. Where the registration information is electronically transmitted, the registry system typically is programmed to assign a time of registration only when the registration information has successfully been entered into the registry record. This means that the effective time of registration is concurrent with the time at which the registration becomes searchable by third parties.

54. In systems that offer the option of submitting registrations in paper form, approaches vary. In some States, the time of registration is assigned as soon as the paper statement is physically received in the offices of the registry. However, the resulting time lag between the effective time of registration and the time as of which the registration becomes available to a searcher creates a priority risk for third parties that may find themselves bound by a registration that has not yet appeared on the public record. To deal with this problem, search results can be programmed to indicate a "file currency time" that is earlier than the real time of the search. The

file currency time means that the search result is only designed to disclose the state of registrations up to that time. It follows that interested third parties, after conducting a first search and making a registration to ensure their priority position, will have to conduct a second search before being confident in advancing funds or otherwise acting in reliance on the registry record. The better practice is to assign the time of registration only upon entry of the registration information into the registry system so as to make registration and the ability to search temporally coincident (see the *Guide*, recommendation 70). Quick entry of the registration information is made easier through technological advances. As a result, instances where delays occur because an excessive amount of information has to be entered into the record are becoming increasingly rare. Where such delays occur, access to credit may be unduly delayed by obsolete technology or by the fact that electronic registration is not available.

## **H. Mandatory cancellation and amendment of registration**

55. A registration may not reflect, or may no longer reflect, an existing security relationship between the parties named in the registration. This may happen because, after the registration, a contemplated secured loan may not have materialized or because the secured lending relationship represented by the registration may have come to an end. In such a case, the continued presence of the registration on the records of the registry will limit the ability of the person named as grantor to sell or create a new security right in the assets described in the registration.

56. Ordinarily, a secured creditor will be willing to register a cancellation of the registration on the request of the person named as grantor. However, if the secured creditor refuses, a summary judicial or administrative procedure should be established to compel cancellation of the registration (see the *Guide*, recommendation 72). The procedure should be quick and simple, in particular if it requires an action by the registrar as the registrar is not an adjudicatory body that is designed to weigh evidence and consider competing legal arguments.

57. Similar issues arise when a registration contains inaccurate information that may be prejudicial to the ability of the person named as grantor to deal with its assets in favour of other secured creditors or buyers; for example, the description of the encumbered assets in the registration may include items that are not in fact covered by an underlying security agreement. Accordingly, the procedure should be crafted in a way that also allows the named grantor to bring about an amendment of the information in the registration to reflect the actual status of the relationship between the parties.

58. To address these issues, some modern registration regimes permit the grantor, and any person with a right in the assets described in a registration to send a written notice to the secured creditor named in the notice to cancel or amend the registration if: (a) all the obligations under the security agreement to which the registration relates have been performed; (b) the secured creditor has agreed to release all or part of the assets described in the registration from the security right; (c) the description of the encumbered assets in the registration includes assets that are not encumbered under a security agreement between the parties; or (d) no security agreement exists between the parties. If the secured creditor does not comply with

the request within a certain number of days, the person making the demand may request a court or the registrar to register the cancellation or amendment on proof that the request was made and not met after notice to the secured creditor. The registration may be cancelled or amended as requested unless within a certain number of days of being notified of the request to the court or the registrar, the secured creditor obtains a court order maintaining it (see the *Guide*, recommendation 72). Caution should be exercised to avoid requiring the registrar to weigh evidence and consider arguments as if it was an adjudicatory body.

59. A secured creditor should always be in a position to amend or cancel a registration at any time (see the *Guide*, recommendation 73). Once a registration has been cancelled, it should be removed from the record available to searchers. However, in modern registry systems, the registration information is preserved in an archive record that is not open to searchers for future reference, if necessary. Retrieval of the information may be necessary, for example, to establish the priority of a security right at a particular point of time in the past (see the *Guide*, recommendation 74).

## **I. Entitlement to search**

60. To achieve its publicity objectives, a modern security rights registry must be publicly accessible by third-party searchers (see the *Guide*, recommendation 54, subpara. (f)). A searcher does not need to justify the reasons for the search (see the *Guide*, recommendation 54, subpara. (g)). Registrations are normally indexed and can be retrieved by searchers according to the identifier of the grantor (see the *Guide*, recommendation 54, subpara. (h)). These rules apply to all types of search, irrespective of the search criterion (grantor identifier, asset description or serial number, or registration number).

61. A search report should normally disclose the information available in the public record of the registry (identifier of the grantor and the secured creditor or its representative, description of the encumbered asset, and if required the maximum amount of the secured obligation; see the *Guide*, recommendations 54, subpara. (a) and 57). The fees for registration and searching, if any, should be no higher than the fees necessary to recover the cost of the development and operation of the registry (see the *Guide*, recommendation 54, subpara. (i)). To the extent possible, the registration and searching process should be electronic (see the *Guide*, recommendation 54, subpara. (j)). Finally, the registry should be designed so as to be accessible continuously except for brief periods to undertake routine scheduled maintenance (see the *Guide*, recommendation 54, subpara. (l)).

62. In the name of privacy, some States restrict access to searchers with a demonstrated existing interest in the grantor's affairs. In those States, the searcher has to demonstrate that it has a justifiable reason for searching, and the registrar has to make a decision. This is the result of a misunderstanding of the purpose of establishing the registry which is to enable third parties that are contemplating to acquire a right in a particular asset (by way, for example of sale, security or judgment enforcement proceedings) to determine the extent to which the grantor's assets may already be encumbered. In addition, requiring searchers to demonstrate an interest in the grantor's commercial affairs would require the establishment of an administrative process and the intervention of registry staff. This approach would be

inconsistent with the efficient and transparent operation of a modern registry system. In some States, a searcher has to have an authorized purpose only for a search relating to an individual grantor. The reason for this approach is the need to protect the privacy of individual grantors. In those States, however, prospective buyers or lenders are authorised to search against an individual grantor's details.

## **J. Search criteria**

63. The grantor's identifier and, in systems that recognize supplementary serial number asset registration, the serial number or other numerical asset identifier are the commonly recognized search criteria and the applicable legal rules and search forms will need to set this out explicitly. Since the registration and search criteria are mirror images, it should be made clear that the rules applicable to grantor and asset identifiers for the purposes of registration also apply to the search process.

64. Where a registry permits registration of both the identifier of the grantor (whether a name or a number) and the serial number of the encumbered asset, both should be registered. This would facilitate searching as a search against either of these two search criteria would capture the registration.

65. The registration number assigned by the registry to a registration and given to the secured creditor and the grantor (a registry system may be designed to do that automatically) also constitutes a commonly available search criterion. The aim is to give a registrant or searcher an alternative means to retrieve a registration. It should be noted that some registry systems are designed to allow searches only by initial registration numbers, while other registry systems are designed to allow searches by registration numbers assigned to amendments.

66. Many registries also create an index of the names of secured creditors. What actually happens is that the registry software is designed so as to provide a query tool that permits a registrar to find information according to a number of different criteria, including the secured creditor's name. This enables registry staff, on behalf of a secured creditor, to efficiently register a global amendment when the secured creditor changes its name or address. Many service companies also provide these "global amendment" services to their clients. A question that would need to be addressed is whether registry staff should be exercising discretion in the form of identifying information to which a global amendment is to be made.

67. In any case, the name or other identifier of the secured creditor is not generally recognized as a search criterion for searching by the public. The identity of the secured creditor has limited relevance to the legal objectives of the registry system (see the *Guide*, recommendation 64). To allow public searching might violate the reasonable privacy expectations of secured creditors, for example, because of the risk that a credit provider might use a search of the registry record to obtain the client lists of its competitors (see the *Guide*, chap. IV, para. 81).

## **K. Language of registration and searching**

68. Modern registry rules also address the language requirements for entering information in a registration. Typically, this will be the official language of the State

under whose authority the registry is maintained. Where a State recognizes more than one official language, registrants typically may effect registrations using any one of them. Search results will display information in a registration in the language used to create the registration (see the *Guide*, chap. IV, paras. 44-46).

## **V. Registry design, administration and operation**

### **A. Introduction**

69. Technical design, administrative and operational issues are crucial components of an effective and efficient registry system. Some of the issues that might usefully be addressed in the text on registration are canvassed in this chapter.

### **B. Electronic versus paper-based registry records**

70. Registry records traditionally were maintained in paper form or were subsequently scanned into electronic form. In some States, this is still the case. The transaction and administrative costs associated with this method of storage are very high. In contrast, registration information in all modern secured transactions registries are entered and stored in electronic form in a centralized computer database (see the *Guide*, chap. IV, paras. 38-43).

71. An electronic registry database offers enormous efficiency advantages over a traditional paper-based record, including:

- (a) A greatly reduced archival and administrative burden (the burden of ensuring the accuracy of the registration information is placed on the secured creditor);
- (b) A reduced vulnerability to physical damage, theft and sabotage;
- (c) The ability to consolidate all registrations in a single record regardless of the geographical entry point of the registration data; and
- (d) The facilitation of speedy low-cost registration and search processes.

### **C. Centralized and consolidated registry record**

72. In modern registry systems, while registrants may choose among multiple modes and points of access to the registry (see the *Guide*, recommendation 54, subpara. (k)), the record is maintained in electronic form in a single centralized database (see the *Guide*, recommendation 54, subpara. (e)). This approach ensures the efficiency, accessibility and transparency of the registry. Equality of access for users in remote locations is achieved through the rapid onward transmission of registered information that is made possible by modern means of communication. In addition, modern means of communication make it possible to establish mechanisms for online access to the centralized and consolidated registry record (see the *Guide*, chap. IV, paras. 21-24).

## **D. User access to the registry record**

73. A computerized registry database enables the system to be designed so that users can enter registration information and conduct searches directly without the need for the assistance or intervention of registry personnel. Accordingly, most modern systems authorize the electronic submission of registration information, and the electronic submission and retrieval of search requests over the internet or via specialized communications systems (see the *Guide*, chap. IV, paras. 25 and 26).

74. Compared with a system in which registration information and search inquiries must be entered by registry staff on behalf of users, a user-administered electronic access system offers the following advantages:

(a) A very significant reduction in the staffing and other day-to-day costs of operating the registry;

(b) Reduced risk of error and reduced opportunity for fraudulent or corrupt conduct on the part of registry personnel;

(c) A corresponding reduction in the potential liability of the registry to users who otherwise might suffer loss as a result of the failure of registry staff to enter registration and search data or to enter it accurately;

(d) User access 24 hours a day and 7 days a week.

75. In light of these advantages, a modern registry system should be designed to permit direct electronic user access for both registration and searching. Under this approach, frequent users (such as financial institutions, automobile dealers, lawyers acting for creditor clients) would be able to access the registry database from their own computer facilities after entering into an account agreement with the registry. Access for infrequent users typically would be made available through public computer terminals located at government service outlets throughout the jurisdiction. In addition, owing to the radically reduced costs associated with direct electronic access, third-party private sector service providers will often be able to perform registration and search services on behalf of users at a minimal surcharge.

76. To preserve the security and integrity of the registry database, all users would be issued unique access codes and passwords. In order to enter registrations, users would either have to have an existing account agreement with the registry or provide identification documents if they are using the public “walk-in” computer terminals. This system virtually eliminates the risk of fraudulent or unauthorized terminations or amendments. It would also permit automatic charging of fees to the users’ registry account and institutional control of the user’s access rights.

## **E. Specific design and operational considerations**

### **1. Establishment of an implementation team**

77. It is critical that the technical professionals responsible for building the registry system are fully apprised of the legal goals that it is designed to fulfil and of the practical needs of the registry personnel who will be entrusted with its administration and of potential registry users. Consequently, it is necessary at the

very outset of the design process to establish an implementation team that reflects technological, legal, administrative and user perspectives and expertise.

## **2. Design and operational responsibility**

78. It will be necessary at an early stage to determine whether the registry is to be designed and operated in-house by a governmental agency or in partnership with a private sector firm with demonstrated technical experience and financial accountability. Even if the partnership option is chosen, States should retain ultimate supervisory and legal responsibility and ownership of registry hardware and software.

## **3. System capacity**

79. The implementation team will need to plan the database capacity of the registry. This assessment will depend in part on whether the registry is intended to cover consumer as well as business secured financing transactions in which event, a much greater volume of registrations can be anticipated. Capacity planning will need to take into account not only the projected database space utilization, but also the potential for additional applications and features to be added to the system (for example, the expansion of the registry database at a later point to accommodate the registration of judgments or non-consensual security rights or the addition of linkages to other governmental databases such as the state's corporate registry or other movable or immovable registries).

## **4. Programming**

80. The programming specifications for the registry will depend on the applicable registration and search criteria and in particular whether grantor-based registration, indexing and searching will be supplemented by serial number registration, indexing and searching. The hardware and software specifications should be robust and secure employing security features that minimize the risk of data corruption, technical error and hacking. In addition to database programmes, software will also need to be developed to manage user communications, user accounts, payment of fees and financial accounting, electronic links between registries, computer-to-computer communication and the gathering of statistical data on registrations and searches.

81. In some States where grantors or assets are often identified by a number, the registry is designed so as to enable it to verify the number with an external registry. For example, a serial number entered can be verified with a relevant external database, where this is possible (for example, with the motor vehicle registry or the company registry). This assists in ensuring that the correct serial number has been entered.

## **5. Data quality**

82. A notice-based secured transactions registry is not intended to guarantee or evidence the existence or effectiveness of the security rights to which registrations relate. However, the system can be designed to ensure a basic level of information quality, while also protecting registrants from their own inadvertent errors by, for



example, incorporating mandatory fields, edit checks, drop-down menus and online help resources.

## **6. Back-up servers**

83. While an electronic registry database is inherently less vulnerable to physical damage and sabotage than a paper record, back-up servers should be established so as to ensure uninterrupted access and service in the event the primary servers fail.

## **7. Role of registry staff and liability**

84. The role of registry staff should essentially be limited to managing and facilitating access by users, processing fees and overseeing the operation and maintenance of the system. If registrants are responsible for verifying the accuracy and entering registration information themselves, they bear sole responsibility for any errors or omissions in the registration information and carry the burden of entering the necessary corrections or amendments.

85. The potential liability of the registry is therefore restricted to: (a) liability for incorrect or misleading verbal advice or information; and (b) liability for loss resulting from erroneous or incomplete search results caused by a system failure. Registry staff should also have responsibility for ongoing monitoring of the way the registry is working (or not working) in practice, including gathering statistical data on the quantity and types of registrations and searches that are being made, in order to be in a position to quickly make any necessary adjustments to the applicable laws or registration and search processes (see the *Guide*, recommendation 56). Each State will need to enact rules stipulating the extent of its responsibility, if any, for these risks.

## **8. Financing initial development and operational costs (registration and search fees)**

86. The implementation of a modern electronic registry requires an initial capital investment to cover the development of the registry, the hardware and the software costs. However, the low cost of operation of an electronic registry means that this investment should be recoverable out of service fees within a relatively short period after the establishment of the registry. Registration and search fees should be set at a cost-recovery level as opposed to being used to extract tax revenue. Otherwise the added transaction costs will undermine the overall success of reform (see the *Guide*, recommendation 54, subpara. (i)).

87. If it is decided to develop and operate the registry in partnership with a software and service provider, it may be possible for the partner to make the initial capital investment in the registry infrastructure on the understanding that it will be entitled to recoup its investment through a transaction fee once the registry is up and running.

## **9. Education and training**

88. To ensure a smooth implementation of the registry system and its active take up by potential users, the implementation team will need to develop education and awareness programmes, disseminate promotional and explanatory literature, and conduct training sessions.

## **VI. Additional issues**

### **A. Supervision and operation of the registry**

89. An overview of current approaches to the question of which government institution would be better prepared to establish and supervise the operation of the registry and the ways in which the registry could be operated could provide useful guidance to States. Under the *Guide*, while the day-to-day operation of the registry may be delegated to a private entity, States would retain the responsibility for ensuring that the registry would be operated in accordance with the established legal framework (see the *Guide*, chap. IV, para. 47 and recommendation 55, subpara. (a)).

### **B. Registration of acquisition security rights**

90. Acquisition security rights have special priority status. One issue that might be discussed is whether the registration should indicate that it relates to an acquisition security right.

### **C. Anti-corruption measures**

91. The registry design must make corruption as difficult as possible. Various measure may be considered including: (a) making it impossible for registry staff to alter time and date of registration, as well as other information entered by a registrant; (b) not permitting registry officials to exercise discretion over whether a registration is accepted or rejected; and (c) removing any contact of registry staff with cash fee payments.

### **D. Transition**

92. Transition and migration of existing data (security rights) when creating a new registry will also need to be discussed. This is a critical point and States will need to have guidance on what to do when modernizing their existing registries.

### **E. Dispute resolution**

93. A dispute resolution mechanism may be considered to settle controversies between the parties involved in registrations relating to security rights. The mechanism should include summary judicial or administrative procedures discussed with regard to the cancellation or amendment of registration (see paras. 55-59 above). It may also include fast and amicable procedures, such as online mediation and arbitration.

## (A/CN.9/WG.VI/WP.44/Add.2) (Original: English)

**Note by the Secretariat on registration of security rights in movable  
assets, submitted to the Working Group on Security Interests  
at its eighteenth session**

**ADDENDUM**

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## **I. General**

### **Article 1: Definitions**

For the purposes of these Regulations:

- (a) “Amendment” means:
  - (i) Extension of registration period (renewal of a registration);
  - (ii) Deletion of a secured creditor where two or more secured creditors are identified in the notice registered;
  - (iii) Addition of a secured creditor;
  - (iv) Deletion of a grantor debtor when two or more grantor debtors are identified in the notice registered;
  - (v) Addition of a grantor;
  - (vi) Deletion of secured assets;
  - (vii) Change of name of the grantor;
  - (viii) Change of name of the secured creditor;
  - (ix) Assignment of the secured claim by the secured creditor;
  - (x) Subordination by the secured creditor;

(xi) Subrogation of secured creditor's right;

(xii) Amendment to the address of a grantor or secured creditor; [and

(xiii) A change in the maximum monetary amount for which the security right may be enforced;]

(b) "Attachment to immovable property" means a tangible asset that is so physically attached to immovable property that, despite the fact that it has not lost its separate identity, it is treated as immovable property under the law of the State where the immovable property is located;

(c) "Inventory" means tangible assets that are held by a person for sale or lease in the ordinary course of that person's business, as well as raw and semi-processed materials (work in progress);<sup>1</sup>

(d) "Motor vehicle" means a mobile device that is propelled primarily by any power other than muscle power, in, on or by which a person or thing may be transported or drawn, and which is designed for use on a road or natural terrain. The term includes a pedal bicycle with a motor attached, a mobile device used in the construction or maintenance of road, as well as a combine or tractor, but does not include a mobile device that runs on rails or machinery designed only for use in farming other than a combine or tractor;

(e) "Notice" means information transmitted to the Registry in order to effect, amend or cancel a registration as provided in these Regulations;<sup>2</sup>

(f) "Serial number" means:

(i) In the case of a motor vehicle, the vehicle identification number marked or attached to the body frame by the manufacturer;

(ii) In the case of a boat, the serial number marked on or attached to the boat by the manufacturer;

(iii) In the case of an aircraft registered under the law of a State that is a party to the Convention on International Civil Aviation, 1944, the registration marks assigned to the airframe by the relevant authority; and

(iv) In the case of any other aircraft, the serial number marked on or attached to the airframe by the manufacturer;

(g) "Password" includes a confidential numerical and alphabetical key issued by or under the authority of the Registry;

(h) "Registrant" means the person who submits information in a notice to the Registry for the purposes of effecting, amending or terminating a registration;

(i) "Registration" includes an amendment to a registration;

(j) "Registration number" is a unique number allocated to each registration by the Registry that is permanently associated with such registration; and

<sup>1</sup> See term "inventory" in the introduction, section B, terminology and interpretation of the *Guide*.

<sup>2</sup> See term "inventory" in the introduction, section B, terminology and interpretation of the *Guide*.

(k) “User identification” (“user ID”) means an identification code the registrar assigns to a secured creditor, a registrant or a grantor pursuant to these Regulations.

*[Note to the Working Group: The Working Group may wish to consider the above-mentioned definitions, as well as additional definitions, building, to the extent possible, on the terminology of the Guide (see the Guide, sect. B, terminology and interpretation). In that connection, the Working Group may wish to note that the terminology used in the text below is to the extent possible consistent with the terminology in the Guide (although the terminology of the Guide is part of the commentary and not the recommendations). For example, the term “notice” is used rather than the term “registration information”, although the latter appears to be more relevant and neutral than the former and the term “notice” is defined in these Regulations in a slightly different way.]*

## II. Registry services

### Article 2: Establishment of Registry

The Ministry of [...] or other entity authorized by the law governing security rights in movable assets of the enacting State (the “Law”) will establish an [electronic] Registry of Security Rights in Movable Assets (the “Registry”) for the purposes of receiving, storing and making available to the public [notices] [information] relating to security rights in movable assets pursuant to the Law and these Regulations.

*[Note to the Working Group: The Working Group may wish to note that recommendation 55, subparagraph (a), of the Guide provides that, while the day-to-day operation of the Registry may be delegated to a private entity, the State retains the responsibility to ensure that the Registry is operated in accordance with the governing legal framework. This does not necessarily mean that the State must “establish” the Registry. In a number of jurisdictions, the Registry is actually established by a private sector entity such as the Chamber of Commerce, and the State only supervises its operation. The Working Group may wish to consider the text within square brackets. The term “electronic” appears within square brackets, since the Guide recommends an electronic registry “if possible” (see the Guide, recommendation 54, subpara. (j)). The terms “notice” and “information” appear within square brackets since, while the Guide refers to “notices”, what is actually registered is information.]*

### Article 3: Appointment of Registrar and Deputy Registrar(s)

1. The Ministry of [...] or other entity authorized by the Law will designate a person as registrar (the “Registrar”).
2. The Registrar may designate one or more persons as deputy registrar(s) (the “Deputy Registrar”).

**Article 4: Duties and powers of Registrar and Deputy Registrar(s)**

1. The Registrar supervises and administers the operation of the Registry and has the powers and duties specified by the Ministry of [...] or other entity authorized by the Law.
2. The duties and powers specified by the Ministry of [...] or other entity authorized by the Law cannot be inconsistent with the Law and these Regulations.
3. A Deputy Registrar has [the same powers and duties as the Registrar, subject to the direction and supervision of the Registrar] [the powers and duties assigned to the Deputy Registrar by the Registrar.]
4. The Registry has no obligation to verify the accuracy of information contained in notices submitted to it. The Registry does not assess the legal sufficiency of the information contained in a notice and does not determine whether it is factually correct or incorrect. The Registry does not determine whether or not registration, amendment or cancellation of a notice has been authorized.<sup>3</sup>

*[Note to the Working Group: The Working Group may wish to consider the alternative text in square brackets in paragraph 3 of this article.]*

**Article 5: Registry to be open to the public**

Any person may have access to the Registry record to effect a registration or to make a search in accordance with the requirements of the Law and these Regulations.<sup>4</sup>

*[Note to the Working Group: The Working Group may wish to note that the commentary might clarify that no one outside the Registry staff should have access to the Registry record or database itself, only to the interface.]*

**Article 6: Hours of access to the Registry**

1. Each office of the Registry is open to the public during the days and hours specified for that office by the Registrar. Registry office locations and opening hours are published on the Registry's website and posted at each office.<sup>5</sup>
- [2. Access to the Registry record by a person who has entered into an agreement with the Registrar that provides for access to the Registry from that person's own computer facilities is generally available 24 hours a day 7 days a week.]
3. Notwithstanding the preceding provisions, the Registrar may suspend access to the Registry or to Registry services in whole or in part for maintenance or servicing purposes, or where circumstances arise that make it impossible or impractical to provide access. Notice of the temporary suspension of access or service and its duration are published on the Registry's website and at the offices of the Registry.

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<sup>3</sup> See the *Guide*, recommendation 54, subparagraph (d).

<sup>4</sup> See the *Guide*, recommendation 54, subparagraph (f).

<sup>5</sup> See the *Guide*, recommendation 54, subparagraph (l).

**Article 7: Conditions of Registry services**

1. Registry services may be provided only to a person who has tendered payment for the service requested or who has a user account with sufficient credit to pay Registry fees.
2. A user account for a person may be created when a contract providing for an account has been entered into between the person and the Registry. Access to Registry services are in accordance with these Regulations and the terms of the contract.
3. A user account owner must deposit money in any designated account of the Registry, which money shall be credited to that person's user account.
4. Upon termination of a user account contract, the Registry must return to the user account owner the amount of any credit in that person's user account.
- [5. The electronic search services of the Registry may be freely available and not subject to payment of a fee. The processing of a paper-based search request shall be subject to a fee.]

*[Note to the Working Group: The Working Group may wish to consider whether articles 6 and 7 are consistent with recommendation 54, subparagraphs (f) and (k), in accordance to which access to the Registry should be open to the public and registrants may choose among multiple modes and points of access. While the recommendations of the Guide provide for access to the Registry by a registrant or searcher only upon payment of a fee (see recommendation 54, subparas. (c)(i) and (i)), and that the Registry may request and maintain the identity of a registrant, it does not provide for user accounts. Articles 6, paragraph 2, and 7, paragraph 5, appear within square brackets as they deal with conditions to the electronic access to the Registry.]*

**Article 8: Liability of the Registry**

The State is [liable] [not liable] for loss or damage suffered by a person as a result of:

- (a) Reliance on an erroneous search result provided by the Registry;
- (b) Malfunction in the operation of the hardware or software of the Registry;
- (c) Unauthorized amendment or cancellation of a registered notice; or
- (d) Incorrect information or advice given by the Registrar, a Deputy Registrar or an employee or agent of the Registry.

*[Note to the Working Group: The Working Group may wish to note that, under recommendation 54, subparagraph (d), of the Guide, and article 4, paragraph 4, of these Regulations, the Registry does not require verification of the identity of the registrant or the existence of authorization for registration of the notice or conduct further scrutiny of the content of the notice. The Working Group may also wish to consider leaving to each enacting State the extent of the liability a State is prepared to assume, if any, for loss or damage resulting from a malfunction in the operation of the Registry, giving effect to an unauthorized amendment or termination of a registration, from a breach of the security of the Registry, or from providing incorrect advice given by Registry personnel. The commentary could clarify that, to*

*the extent any liability is assumed by a State, the Regulations should specify the maximum amount of the liability and the prescription period after which a claim cannot be pursued. The commentary could also discuss various possibilities for the State to obtain insurance to cover the risk of such claims.]*

### III. Registrations

#### Article 9: Notice registration

For the purposes of the Law and these Regulations, a notice relating to a present or future security right may be registered so as to be effective against third parties when the information required by article 19 is entered in the Registry record so as to be available to searchers.<sup>6</sup>

#### Article 10: Date and time of registration

A registration is effected as of the date and time when the information required by article 19 has been entered into the record of the Registry and is available to searchers as provided in these Regulations. Every registration shall be separately identifiable by date and time of effectiveness.<sup>7</sup>

#### Article 11: Period of registration

1. A registration is effective for the period of time indicated in the notice in accordance with paragraph 2 of this article.
2. A registration may be effective:
  - (a) For a number of years, months and days in whole number not exceeding [20] years; or
  - (b) For an unlimited number of years.
3. For purposes of calculating the period of effectiveness of a registration, where the calculation is from the day of registration or from the anniversary of the day of registration, a year runs from the beginning of that day. If the day of registration or an anniversary day falls on the twenty-ninth day of February, the anniversary date in a year that is not a leap year is deemed to be the first day of March.
4. A registration may be renewed at any time before the registration expires and, subject to paragraph 2 of this article, the period of time for which the registration is effective is extended by the renewal period indicated in the notice transmitted to the Registry to renew the registration.<sup>8</sup>

#### Article 12: Advance registration

A notice may be registered before or after the security agreement to which it relates is concluded or the security right to which it relates is created.<sup>9</sup>

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<sup>6</sup> See the *Guide*, recommendations 54, subparagraph (b), 67 and 70.

<sup>7</sup> See the *Guide*, recommendation 70.

<sup>8</sup> See the *Guide*, recommendation 69.

<sup>9</sup> See the *Guide*, recommendation 67.



**Article 13: Registration relating to multiple security rights arising from multiple security agreements**

A notice may relate to one or more than one security rights, whether they exist at the time of registration or are created thereafter and whether they are created by one or more than one security agreement between the same parties.<sup>10</sup>

**Article 14: Indexing of registered notices**

1. Notices relating to present or future security rights in all types of movable asset entered in the Registry record must be indexed according to the name of the grantor as provided in these Regulations and a registration number must be assigned by the Registry to the registration.

[2. Notices relating to security rights in serial number assets must in addition be indexed according to the serial number of the asset.]

3. All amendments and cancellations relating to the registration shall be indexed in a manner that associates them with the registration number.

*[Note to the Working Group: The Working Group may wish to note that paragraph 2 of this provision will apply only when the law of the enacting State requires that some assets be described in notices by serial numbers. The Working Group may also wish to note that the recommendations of the Guide do not refer to serial number as an indexing and search criterion (although the commentary does, see the Guide, chap. IV, paras. 31-36) or require the Registrar to assign a registration number. If a reference to registration numbers is retained, the Regulations may need to provide how registration numbers are to be assigned. The Working Group may also wish to consider whether notices should also be indexed in a manner that makes them retrievable by entering the identifier of the secured creditor for the purposes of internal searches of the registry record by the Registrar or the staff of the Registry.]*

**Article 15: Removal of registered notices from the Registry record**

1. The Registrar may not change, alter or add to any notice entered in the Registry record.

2. The Registrar may remove registered notices accessible to the public from the Registry record only:

- (a) Upon the expiry of the term of the registration; or
- (b) Upon the registration of a cancellation notice.

*[Note to the Working Group: The Working Group may wish to note that a notice that deletes the identifier of one of the secured creditors from an existing notice that lists the identifiers of more than one secured creditor is an amendment rather than a cancellation.]*

3. Notices removed from the Registry record that is accessible to the public must be archived for a period of [20] years in a manner that enables the information in

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<sup>10</sup> See the *Guide*, recommendation 68.

them to be retrieved by the Registrar in accordance with the indexing criteria of the Registry.<sup>11</sup>

## IV. Access to the Registry services

### Article 16: Modes and conditions of access to the Registry

1. A person who wishes to have access to the Registry to effect a registration must:

(a) Apply in person at any office of the Registry for access to the Registry using the computer facilities located at that office or such other method prescribed by the Registrar;

(b) Enter into an agreement with the Registrar that provides for electronic access to the Registry interface using the applicant's own computer facilities on terms and conditions prescribed by the Registrar.

2. The Registrar must assign a user identification number (user ID) and a password to a person referred to in paragraph 1 of this article, provided that:

(a) Arrangements satisfactory to the Registrar have been made for the payment of any fees prescribed under these Regulations; and

(b) Proof satisfactory to the Registrar of the identity of that person has been received by the Registrar.

3. The Registrar must permit a registration to be entered in the Registry record without requiring proof that:

(a) The registrant is the person to whom the Registrar assigned the user ID and password entered by the registrant;

(b) The registrant is authorized by the grantor or secured creditor identified in the registration to enter the registration.

4. The Registry may reject a registration, amendment or cancellation of a registration when a registration requirement of the Law or these Regulations has not been complied with. A message and grounds for rejection must be sent to the registrant as soon as practicable. Without limiting the generality of the foregoing, the Registry may reject a registration when a notice is not communicated to the Registry in one of the prescribed form, or the information in the notice is incomplete, incomprehensible and illegible or otherwise does not comply with the requirements of these Regulations relating to effecting, amending or cancelling a registration.

5. A person whose name is recorded in the Registry as user account owner is deemed to have full authority to transmit notices to effect a registration, amendment or cancellation of a notice that was registered by that person or another person who is also a user account owner of the same account, including a notice in which persons in addition to the user account owner are identified as secured creditors.

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<sup>11</sup> See the *Guide*, recommendation 74.

6. A person who has been assigned a user ID and a password by the Registry and who has complied with these Regulations may have electronic access to the Registry to effect a registration, amendment or cancellation of a notice. Registration, amendment or cancellation of a notice effected using the assigned user ID and password is conclusively deemed to have been effected by the person to whom the user ID and password have been assigned by the Registry.

*[Note to the Working Group: The Working Group may wish to consider whether article 16 is compatible with the recommendations of the Guide relating to free access to the Registry.]*

#### **Article 17: Registry searches**

A person who wishes to have access to the Registry record to obtain a search result from the Registry as provided in chapter VIII must:

(a) Apply for access to the Registry record using the one of the methods provided for obtaining a search result; [and

(b) Enter into an agreement with the Registrar that provides for electronic access to the Registry using the applicant's own computer facilities on terms and conditions that the Registrar considers advisable.]

*[Note to the Working Group: The Working Group may wish to consider whether subparagraph (b) of this provision is compatible with the recommendations of the Guide relating to free access to the Registry.]*

## **V. Registration information**

#### **Article 18: Responsibility of registrants**

For a registration to be effective, a person who provides, enters or attempts to enter information in a notice to the Registry has to ensure that the information required by this chapter is correct and is entered in the correct fields in the Registry form [or screen].

*[Note to the Working Group: The Working Group may wish to consider whether this provision is necessary. It must be obvious in the Law that the correctness of the information provided is the registrant's problem; and the part about using the correct fields says no more than that the registrant must follow the rules.]*

#### **Article 19: Required information**

1. To effect an initial registration, a registrant has to provide in a notice the following information:

(a) The identifier and address of each grantor, as required in articles 21-22;

(b) The identifier and address of the secured creditor or its representative, as required in article 23;

(c) A description of the encumbered assets, as required in articles 24-26;

(d) The period of time for which the registration is to be effective, as required in article 11[; and

(e) The maximum monetary amount for which the security right may be enforced].<sup>12</sup>

2. If the registered notice covers more than one grantor, the registrant must enter the information required for each grantor separately in the notice.

#### **Article 20: Impact of omissions and errors on the effectiveness of a registration**

1. A registration is ineffective if a search of the Registry record using the correct grantor identifier does not disclose the registration.

[2. A registration relating to an encumbered asset that is a serial number asset is ineffective if a search of the Registry using the correct serial number does not disclose the registration. Such registration is ineffective only with respect to the incorrectly identified serial number asset and this ineffectiveness does not affect the effectiveness of the registration with respect to any other assets described in the same registration.]

3. Except as provided in paragraphs 1 [and 2] of this article, the effectiveness of a registration is not affected by a defect, omission or error in the information required to be entered in the Registry under these Regulations, or in the manner of its entry, unless it is seriously misleading.<sup>13</sup>

#### **Article 21: Grantor information (natural person)**

1. If the grantor is a natural person, for a registration to be effective, the registrant must enter the grantor identifier in the appropriate fields in the notice designated for entering “Grantor — natural person” information.<sup>14</sup>

2. If the grantor is a natural person, the registrant must enter:

(a) The Personal Identification Number issued to the grantor by the enacting State and the grantor’s mail address of the grantor (including electronic mail address); or

(b) Where State of residence of the grantor is not the enacting State, the birth date and the name of the grantor in the following form: the last name [or the last two names], followed by the first name, followed by the middle name, if any; and the mailing (and e-mail) address of the grantor.

3. For the purposes of paragraph 2 of this article:

(a) Where the grantor is a natural person whose name includes more than one middle name, the notice must include the first of the middle names; and

(b) Where the grantor is a natural person whose name consists of only one word, the notice must include the name as the last name of the grantor.

<sup>12</sup> See the *Guide*, recommendation 57.

<sup>13</sup> See the *Guide*, recommendations 64-66.

<sup>14</sup> See the *Guide*, recommendations 58 and 59.

4. Where the grantor is a natural person who carries on business, other than as a legal person, under a business name that is not the person's name, the notice must include information referred to in paragraph 2 above and the person's business name.

5. For the purposes of this article, the name of the grantor is to be determined in accordance with the following rules:

(a) If the grantor was born in [the enacting State] and the grantor's birth is registered in [the enacting State] with a government agency responsible for the registration of births, the name of the grantor is the name as stated in the grantor's birth certificate or equivalent document issued by the government agency;

(b) If the grantor was born in [the enacting State] but the grantor's birth is not registered in [the enacting State], the name of the grantor is the name as stated in a current passport issued to the grantor by the Government of [the enacting State];

(c) If the grantor does not have a current passport issued by the enacting State, the name of the grantor is the name stated in the [document] issued to the grantor by the enacting State;

(d) If the grantor was not born in [the enacting State], but is a citizen of [the enacting State], the name of the grantor is the name as stated in the grantor's certificate of citizenship;

(e) If the grantor was not born in and is not a citizen of [the enacting State], the name of the grantor is the name as stated in a current passport issued by the State of which the grantor is a citizen;

(f) If the grantor does not have a current passport, the name of the grantor is the name as stated in the birth certificate or equivalent document issued to the grantor by the government agency responsible for the registration of births at the place where the grantor was born;

(g) In a case not falling within subparagraphs (a) to (f) of paragraph 2 of this article, the name of the grantor is the name as stated in any two of [document] issued to the grantor by the enacting State.

6. For the purposes of this article, the relevant name of the grantor is the name of the grantor at the time of the transaction to which the registration relates, subject to the effect of a change in the grantor's identifier.

*[Note to the Working Group: The Working Group may wish to consider whether this provision should be retained as the Guide does not provide specific rules on the identifier of a grantor who is a natural person other than those in recommendation 59. If the Working Group decides to retain this provision, it may also wish to consider whether, in addition to entering the name of a grantor who is a natural person in accordance with the preceding rules, the registrant may enter any other name of the grantor of which the registrant has knowledge as a separate grantor name.]*

**Article 22: Grantor information (legal person)**

1. If the grantor is a legal person, for a registration to be effective, the registrant must enter the grantor identifier in the appropriate fields in the notice designated for entering “Grantor — legal person” information.

2. If the grantor is a legal person, the registrant must enter:

(a) The registration number assigned to the grantor by the enacting State pursuant to the Law on [...], and the mail address of the grantor (including the electronic mail address);

(b) The name of the entity, as it appears on the public record (including at the discretion of the registrant the abbreviation which is indicative of type of body corporate or entity, such as “Ltd”, “Inc”, “Incorp”, “Corp”, “Co,” as the case may be, or “Limited”, “Incorporated”, “Corporation”, “Company”), and the mail address of the entity (including the electronic mail address);

(c) Where the grantor is a legal person that is the estate of a deceased natural person, the [identification number] and [name] of the deceased person in accordance with the provisions for entering the name of a grantor who is a natural person followed by the word “estate,” and the address of the administrator of the estate;

(d) Where the grantor is a legal person that is a trade union, the name of the trade union, the [identification numbers] [names] of each person representing the trade union in the transaction giving rise to the registration, and the address of the trade union;

(e) Where the grantor is a trustee acting for a legal person in the form of a trust, and the document creating the trust designates the name of the trust, the name of the trust followed by the word “trust” unless the name of the trust already contains the word “trust” and the mail address of the trustee (including the electronic mail address);

(f) Where the grantor is a trustee acting for a legal person in the form of a trust, and the document creating the trust does not designate the name of the trust, the [identification number] [name] of the trustee in accordance with the provisions for entering the name of a grantor who is a natural person followed by the word “trustee,” and the mail address of the trustee (including the electronic mail address);

(g) Where the grantor is an insolvency representative acting for a natural person, the [identification number] [name] of the insolvent person in accordance with the provisions for entering the name of a grantor who is a natural person followed by the words “insolvent” and the mail address of the insolvency representative (including the electronic mail address);

(h) Where the grantor is an insolvency representative acting for a legal person, the name of the insolvent legal person in accordance with the provisions for entering the name of a grantor that is a legal person followed by the words “insolvent” and the mail address of the insolvency representative (including the electronic mail address);

(i) Where the grantor is a participant in a legal person that is a syndicate or joint venture, the name, if any, of the syndicate or joint venture as stated in the document creating it, the address of the syndicate or joint venture, the identifier of

each participant in the manner designated for a grantor of that type, and the mail address of each participant (including the electronic mail address);

(j) Where the grantor is a participant in a legal person other than one already referred to in the preceding rules, the name of the legal person as stated in the document creating it, the address of the legal person, the [personal identification numbers] [names] of each natural person representing the legal person in the transaction to which the registration relates in accordance with the provisions for entering the name of a grantor that is a natural person, and the addresses of the representatives.

3. For the purposes of this article, a representative is a natural person who has power to bind the legal person or its officers or members and who has exercised that power in relation to the transaction to which the registration relates.

*[Note to the Working Group: The Working Group may wish to consider whether all of these provisions should be retained in the Regulations or in the commentary. Some of these provisions may go beyond the recommendations of the Guide (see recommendation 60) and provide only examples as to how these issues might be dealt with.]*

### **Article 23: Secured creditor information**

1. For a registration to be effective, the registrant must enter the identifier of the secured creditor in the appropriate fields in the notice designated for entering “Secured Creditor” information.

2. The registrant must indicate whether the secured creditor is a natural or a legal person.

3. If the secured creditor is a natural person, the registrant must enter the identifier of the secured creditor, in the manner specified in article 21 for entering the identifier of a grantor who is a natural person, and the mail address of the secured creditor (including the electronic mail address).

4. If the secured creditor is a legal person, the registrant must enter the identifier of the secured creditor, in the manner specified in article 22 for entering the identifier of a grantor that is a legal person of that type, and the address of the secured creditor (including the electronic mail address).

5. The registrant may enter instead of the identifier and address of the secured creditor the identifier and address of a representative of the secured creditor to whom inquiries relating to the registration may be addressed.<sup>15</sup>

*[Note to the Working Group: The Working Group may wish to consider whether this provision should be retained. The Working Group may wish to take into account that the Guide does not include specific recommendations on the secured creditor identifier and that this information might not be necessary because the secured creditor identifier is not an indexing or a search criterion (except for internal Registry searches by Registry staff).]*

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<sup>15</sup> See the *Guide*, recommendation 57, subparagraph (a).

#### Article 24: Description of encumbered assets

For a registration to be effective, the registrant must enter a description of the encumbered assets that reasonably allows them to be identified. Unless otherwise provided in the Law, a generic description that refers to all assets within a generic category of movable or to all of the grantor's movable assets includes assets within the specified category to which the grantor acquires rights at any time during the period of effectiveness of the registration.<sup>16</sup>

#### [Article 25: Description of encumbered serial number assets]

If the registration relates to serial numbered assets, other than assets held by the grantor as inventory, for a registration to be effective, the registrant must:

- (a) Enter the serial number in the "Serial Number" field; and
- (b) Describe the serial number assets by type, manufacturer, model, model year or any other particulars in a manner that reasonably identifies them in the "Serial Number Asset Description" field.]

*[Note to the Working Group: The Working Group may wish to consider whether this provision should be retained. If the Working Group decides that this provision should be retained, it may wish to note that enacting States that decide to institute serial number asset indexing and searching will need to consider the type of asset to which this feature should apply and what alpha-numerical identification criteria should be specified for each category of asset. The enacting State will also need to take into account its existing registry regimes for registering property rights in certain of these categories of asset, as well as international regimes, notably the registries for aircraft frames, aircraft engines and railway rolling stock established under the Cape Town Convention on International Interests in Mobile Equipment. With regard to subparagraph (b) of this provision and the definition of the term "serial number", the Working Group may wish to note that parties other than the manufacturer may provide or issue the serial number.]*

#### Article 26: Description of encumbered attachments to immovable property

1. When the registration information relates to attachments to immovable property that are tangible assets, for a registration to be effective, the registrant must enter in the appropriate fields in the notice:

- (a) A description of the tangible assets that reasonably identifies them; and
- (b) A description of the relevant immovable property, to which the attachments are or will be attached, [sufficient under the registry rules for the immovable property of the enacting State] [by reference to the parcel identifier number in the records of the immovable property registry of the enacting State].

2. A secured creditor may register a notice of a security right in attachments to immovable property that are tangible assets in the appropriate immovable property registry office of the enacting State by submitting a notice to that office setting out:

- (a) The identifier information relating to the grantor and secured creditor set out in the manner prescribed by these Regulations;

<sup>16</sup> See the *Guide*, recommendation 63.



- (b) A description of the tangible assets that reasonably identifies them;
- (c) A description of the relevant immovable property, to which the attachments are or will be attached, [sufficient under the registry rules for the immovable property of the enacting State] [by reference to the parcel identifier number in the records of the immovable property registry of the enacting State];
- (d) The name or other identifier of the owner of the immovable property as it appears in the records of the immovable property registry, if different from the name or other identifier of the grantor;
- (e) A statement specifying, in multiples of whole years, the period of time during which the registration of the notice is to be effective[]; and
- (f) A statement of the maximum monetary amount for which the security right may be enforced].

*[Note to the Working Group: The Working Group may wish to note that, while this provision does not refer explicitly to crops or similar types of asset, it may apply to crops or similar types of asset, if a State treats them as attachments to immovable property.]*

#### **Article 27: Amendment of registration**

1. A registrant may amend a registration at any time during the period that the registration to which the amendment relates is effective.
2. Registration of an amendment is effective only from the date and time assigned to the registration of the amendment by the Registry, so that it becomes publicly available to searchers.
3. A registrant who wishes to register an amendment must:
  - (a) Indicate in the appropriate field that the registrant wishes to enter an amendment;
  - (b) Enter the registration number of the registration to which the amendment relates in the appropriate field;
  - (c) Locate the screen displaying the registration that is to be amended;
  - (d) Indicate whether the purpose of the amendment is to add, change or delete a registration;
  - (e) If information is to be added, indicate the additional information in the manner provided by these regulations for entering information of that kind;
  - (f) If information is to be changed or deleted, enter the information to be changed or deleted, and in case of change also enter new information in the manner provided by these regulations for entering information of that kind; and
  - (g) Identify the secured creditor authorizing the amendment.
4. If the purpose of an amendment is to disclose a transfer of the encumbered assets to which the registration relates, the registrant must add the transferee as an additional grantor in the manner provided for entering grantor information in a registration.

5. If the transfer relates to only part of the encumbered assets described in the registration, the registrant must enter, in the field for entering “Additional Information”, a statement describing the part of the encumbered asset that is being transferred and indicating the grantor to whom it is being transferred.

6. If the purpose of the amendment is to disclose a subordination of the security right to which the registration relates, the registrant must enter, in the field designated for entering “Additional Information” a statement specifying the nature and extent of the subordination and the identity of the beneficiary of the subordination.

7. When the amendment has been ordered by a court, the court order must be delivered to the Registry.

8. The registration of an amendment, other than a renewal, does not extend the period of effectiveness of the registration.

*[Note to the Working Group: The Working Group may wish to consider whether paragraphs 5 and 6 of this provision should be retained as they describe a very specific system and many systems do not have “Additional Information” fields.]*

#### **Article 28: Global amendment of secured creditor information**

Upon request of a secured creditor identified in multiple registrations entered in the Registry, the Registry must amend the secured creditor information in all such registrations.

#### **Article 29: Cancellation of registration**

A registration may be cancelled by a registrant by transmitting to the Registry the following information:

- (a) The registrant’s User ID and password;
- (b) The registration number of the registration to which the cancellation relates; and
- (c) The identifier of the grantor identified in the initial registration.

## **VI. Verification and reinstatement**

#### **Article 30: Notice of registration, amendment or cancellation**

1. When a registration is effected, amended or cancelled, the Registry must send a notice verifying the registration, amendment or cancellation to the registrant and to the secured creditor (when not the registrant) at the address(es) set out in the registration.

2. The verification notice [may be in printed or electronic form and] must contain the following related information from the registration:

- (a) The identifier of the secured creditor;
- (b) The identifier of the grantor;

- (c) The description of the encumbered assets;
- (d) The date and time when the initial registration was effected, amended or cancelled, as the case may be; and
- (e) The registration number allocated to the initial registration.

3. [When a registration is cancelled, the verification notice must contain the statement that, if the registrant delivers to the Registry a notice of reinstatement of registration as provided in article 31, the registration will be reinstated.]

4. The registrant must send to each person identified as a grantor in a registration, within [thirty days after the registration is effected], [a printed or electronic] verification statement disclosing the registration information in the registration, except where that person has waived in writing the right to receive it.

*[Note to the Working Group: The Working Group may wish to note that, with respect to changes, recommendation 55, subparagraph (d), of the Guide requires only a notice to the secured creditor. The Working Group may also wish to note with respect to the waiver of rights addressed in paragraph 4 of this provision that, under the recommendations of the Guide, party autonomy applies except where otherwise provided.]*

#### **Article 31: Reinstatement of registration**

A registration that has been cancelled without authorization or in error may be reinstated by submitting to the Registry, within [30] days following the date the Registry sent the notice verifying its cancellation, the following information in a manner identical to that recorded in the cancelled registration:

- (a) The identifier of the secured creditor;
- (b) The identifier of the grantor;
- (c) The description of the encumbered assets;
- (d) The date and time when the registration was effected; and
- (e) The registration number allocated to the registration.

## **VII. Obligations of the secured creditor**

#### **Article 32: Compulsory amendment or cancellation of registration**

1. The person identified in a registration as the secured creditor is obliged to cancel the registration within [30] days after receipt of a written request from the grantor unless the person identified in the registration as grantor consents to its continuation.

2. The person identified in a registration as the grantor, or any person with rights in the encumbered assets described in a registration, may give a written demand to the person identified as the secured creditor in the registration, requiring cancellation or amendment, as appropriate, of the registration if:

- (a) All of the obligations under the security agreement to which the registration relates have been performed;

(b) The description of the encumbered assets in the registration refers to assets that are not encumbered or are no longer encumbered under a security agreement between the person identified as the grantor and the person identified as the secured creditor in the registration; or

(c) No security agreement exists between the person identified as the grantor and the person identified as the secured creditor in the registration.

3. The person identified as the secured creditor will comply with the demand no later than [15] days after its receipt. No fee or expense will be charged or accepted for compliance.

4. If the person identified as the secured creditor does not comply with the demand, the person making the demand may apply to the court for an order maintaining the registration on the basis that the registration information is correct or the registration is authorized.

*[Note to the Working Group: The Working Group may wish to note that, under recommendation 72, subparagraph (b), of the Guide, the grantor bears the burden to prove that the registration must be amended or cancelled.]*

### **Article 33: Grantor's right to demand additional information**

1. A person identified in a registration as the grantor or a person authorized in writing to act as the grantor's agent for this purpose may demand in writing that the person identified in the registration as the secured creditor:

(a) Confirm in writing whether or not there exists a security agreement between the grantor and the secured creditor as of the date of the demand;

(b) Approve or provide a list of the assets encumbered by any security agreement between the identified grantor and secured creditor as of the date of the demand; and

(c) Approve or provide a statement indicating the amount of the obligation secured by the security right to which the registration relates as of the date of the demand.

2. The person making the demand may request that the secured creditor deliver its response to a designated third person.

3. The secured creditor will comply with the demand within [15] days after it is received.

4. If the secured creditor fails to timely respond to the demand without reasonable excuse, the person making the demand may apply to the court with appropriate notice to the secured creditor for an order requiring that the registration to which the demand relates be cancelled. Upon delivery of an order of the court ordering cancellation, the Registrar must cancel the registration.

## VIII. Searches

### Article 34: Search criteria

A search of the Registry record may be requested by any person who has tendered or arranged for payment of the searching fee using one of the following search criteria:

- (a) The identifier of the grantor;
- [(b) The serial number of a serial number asset;] or
- (c) The registration number of a registration.

### Article 35: Search results

1. A search result obtained pursuant to article 34 must either indicate that no registrations were retrieved against the specified search criterion or set out all registrations that exist in the Registry record searchable index at the date and time when the search was performed, as well as the following information with respect to each such registration as set in the registration:

- (a) The identifier of the secured creditor;
- (b) The identifier of the grantor;
- (c) The description of the encumbered assets;
- (d) The date and time when the registration was effected;
- (e) All amendments to the registration and the date and time each amendment was effected;
- (f) The registration number allocated to the registration[; and
- (h) The maximum monetary amount for which the security right may be enforced.]

2. The Registrar must issue a Registry Certificate on the basis of one of the criteria referred to in paragraph 1 to a person who has requested it and who has tendered or arranged for payment of the Certificate fees.

## IX. Fees

### Article 36: Registration and search fees

1. The following fees are payable for registrations and searches in the Registry:  
[...].
2. The Registrar may enter into an agreement with a person establishing an account with the Registrar to enable fees to be charged and paid.

*[Note to the Working Group: The Working Group may wish to wish to note that, under recommendation 54, subparagraph (i), of the Guide “Fees for registration and for searching, if any, are set at a level no higher than necessary to permit cost recovery.” This rule implies that registration and searches may or may not be subject to a fee and that, if there is a fee, it should be aimed at cost recovery]*

*rather than profit level. The Working Group may wish to consider whether the Regulations should provide (at least as an option) that no fee should be charged for: (a) electronic registrations and searches; or (b) registering a notice of cancellation of a registration.]*

## C. Report of the Working Group on Security Interests on the work of its nineteenth session (New York, 11-15 April 2011)

(A/CN.9/719)

[Original: English]

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## I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a text on the registration of security rights in movable assets, pursuant to a decision taken by the Commission at its forty-third session, in 2010.<sup>1</sup> The Commission's decision was based on its understanding that such a text would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of a security rights registry.<sup>2</sup>

2. At its forty-second session in 2009, the Commission noted with interest the future work topics discussed by Working Group VI at its fourteenth and fifteenth sessions (A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126, respectively). At that session, the Commission agreed that the Secretariat could hold an international colloquium early in 2010 to obtain the views and advice of experts with regard to possible future work in the area of security interests.<sup>3</sup> In accordance with that decision,<sup>4</sup> the Secretariat organized an international colloquium on secured transactions (Vienna, 1-3 March 2010). At the colloquium several topics were discussed, including registration of notices with respect to security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions. The colloquium was attended by experts from governments, international organizations and the private sector.<sup>5</sup>

3. At its forty-third session in 2010, the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at the colloquium. The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources. However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.<sup>6</sup>

4. The Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the UNCITRAL Legislative Guide on Secured Transactions ("Guide"), texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the Guide.<sup>7</sup>

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<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 268.

<sup>2</sup> *Ibid.*, para. 265.

<sup>3</sup> *Ibid.*, *Sixty-fourth session, Supplement No. 17* (A/64/17), paras. 313-320.

<sup>4</sup> *Ibid.*

<sup>5</sup> The papers presented at the colloquium are available at [www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html](http://www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html).

<sup>6</sup> *Ibid.*, *Sixty-fifth session, Supplement No. 17* (A/65/17), paras. 264 and 273.

<sup>7</sup> *Ibid.*, paras. 266-267.



5. The Working Group began its work at its eighteenth session (Vienna, 8-12 November 2010) by considering a note by the Secretariat entitled "Registration of security rights in movable assets". The Working Group also considered the issue of coordination of the text on registration with UNCITRAL texts on electronic communications.<sup>8</sup> At that session, the Secretariat was requested to prepare a revised version of the text reflecting the deliberations and decisions of that session.<sup>9</sup>

## II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its nineteenth session in New York from 11 to 15 April 2011. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Cameroon, Canada, Chile, China, Colombia, France, Germany, India, Israel, Italy, Japan, Kenya, Mauritius, Mexico, Nigeria, Norway, Paraguay, Philippines, Republic of Korea, Russian Federation, Spain, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

7. The session was attended by observers from the following States: Croatia, Ecuador, Guatemala, Guinea, Iraq, Kuwait, Myanmar, Qatar, Switzerland and Syrian Arab Republic. The session was also attended by observers from the following non-member State: Holy See.

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

(a) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: Organization of American States (OAS);

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Association of the Bar of the City of New York, Commercial Finance Association (CFA), European Law Students' Association, Inter-Pacific Bar Association (IPBA), International Insolvency Institute (III), Moot Alumni Association (MAA) and National Law Center for Inter-American Free Trade (NLCIFT).

9. The Working Group elected the following officers:

*Chairperson*: Mr. Rodrigo LABARDINI FLORES (Mexico)

*Rapporteur*: Mr. Young-joon KWON (Republic of Korea)

10. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.45 (Provisional Agenda), A/CN.9/WG.VI/WP.46 and Addenda 1 to 2 (Draft Security Rights Registry Guide) and A/CN.9/WG.VI/WP.46/Add.3 (Draft Model Regulations).

11. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.

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<sup>8</sup> A/CN.9/714, paras. 34-47.

<sup>9</sup> Ibid., para. 11.

2. Election of officers.
3. Adoption of the agenda.
4. Registration of security rights in movable assets.
5. Other business.
6. Adoption of the report.

### **III. Deliberations and decisions**

12. The Working Group considered notes by the Secretariat entitled “Draft Security Rights Registry Guide” (A/CN.9/WG.VI/WP.46 and Addenda 1 to 2) and “Draft Model Regulations” (A/CN.9/WG.VI/WP.46/Add.3). The deliberations and decisions of the Working Group are set forth below in chapters IV and V. The Secretariat was requested to prepare a revised version of the text reflecting the deliberations and decisions of the Working Group.

### **IV. Registration of security rights in movable assets: draft security rights registry guide**

#### **A. General (A/CN.9/WG.VI/WP.46, paras. 1-61)**

13. The Working Group first considered the form and content of the text to be prepared. Differing views were expressed. One view was that a stand-alone guide should be prepared that would include an educational part along the lines of chapters I and II aimed at introducing the secured transactions law recommended in the Guide and a practical part that would consist of model registration regulations and commentary thereon. It was stated that both parts were equally important as the work on the Supplement on Security Rights in Intellectual Property (the “Supplement”) had indicated.

14. Another view was that emphasis should be placed on model registration regulations and a commentary thereon. It was stated that, while a short introduction could be included in the text, it should not be as long as chapters I and II. It was also observed that a text consisting of model regulations and commentary thereon would provide States that had enacted the secured transactions law recommended in the Guide with practical advice as to the issues to be addressed in the context of the establishment and operation of a general security rights registry. It was also observed that the Supplement was different in that, unlike the text on registration that sought to provide practical advice on matters addressed in the secured transactions law recommended in the Guide, the Supplement sought to coordinate the law recommended in the Guide with intellectual property law.

15. After discussion, the Working Group decided to begin its considerations with chapter III that dealt with the key characteristics of an effective security rights registry and could thus be considered as fulfilling the function of commentary on model regulations. It was agreed that, once the Working Group had the opportunity to consider the part of the text dealing with practical issues, it could better

determine which part of the introduction contained in chapters I and II should be retained.

**B. Key characteristics of an effective security rights registry  
(A/CN.9/WG.VI/WP.46, paras. 62-72)**

16. With respect to paragraphs 62-72, several suggestions were made, including the following:

(a) The text should be restructured so as to present first the approach recommended in the Guide with any necessary explanation and should not be written so as to suggest that approaches not recommended in the Guide might be preferable to those recommended in the Guide;

(b) The headings of the chapter should be revised to be more consistent with the approaches recommended in the Guide;

(c) In paragraph 63, for consistency with the terminology used in the Guide, the reference to “registration” should be replaced by a reference to “notice”;

(d) In paragraph 64, the reference to true leases and commercial consignments as falling within the scope of the registry should be presented as an approach that was followed in some States or moved to another place in the text;

(e) In paragraph 68, the first sentence did not relate to the issue of the effectiveness of a registration made without the grantor’s authorization and should be deleted or placed elsewhere in the text;

(f) Paragraphs 68 and 69 dealt with the amendment of a registration and should be moved to the place of the text where that issue was discussed with appropriate explanation of the third-party effectiveness and priority of security rights, notice of which was registered without prior authorization by the grantor;

(g) In paragraph 69, the issue of correction of typographical errors should be discussed in more detail (mainly by referring to the Guide, under which a notice could be corrected by a second notice and both notices would be preserved in the registry record but also by reference to other methods of correction of typographical errors);

(h) Paragraph 70 should refer to asset indexing at least with respect to those assets that could be identified by reference to a serial number; and

(i) References to grantor indexing and to serial number indexing should be preserved in paragraphs 71 and 72, while consideration might be given to moving that paragraph to chapter IV.

**C. Rules applicable to the registration and search process  
(A/CN.9/WG.VI/WP.46/Add.1, paras. 1-61 and  
A/CN.9/WG.VI/WP.46/Add.2, paras. 1-40)**

**1. A/CN.9/WG.VI/WP.46/Add.1, paras. 1-61**

17. With respect to paragraph 3, the view was expressed that authorization of a registration by the grantor after registration was meaningless and could expose the grantor to risks associated with unauthorized registrations. In response, it was noted that the Guide permitted registration without prior authorization to facilitate situations in which registration took place before the conclusion of a security agreement or the creation of a security right (see recommendation 67).

18. However, it was generally agreed that, while the policy decisions reflected in the Guide should not be revisited, they could be further explained. In addition, the Working Group agreed that it was necessary to clarify the third-party effectiveness and priority consequences of a registration made without prior authorization by the grantor. In that context, the following clarifications were suggested:

(a) In instances where a security right was registered without prior authorization by the grantor and a subsequent security right was registered with prior authorization by the grantor, the former security right would prevail only if authorization was later obtained (otherwise, as the former security right would be ineffective, no priority conflict could arise);

(b) If a security agreement was concluded, it would constitute authorization rendering the registration effective as of the date of the registration and not as of the date of the security agreement or other authorization; and

(c) If no security agreement was concluded (or registration was otherwise not authorized) after the registration, or if the registration was made in bad faith, the registration would be ineffective and the grantor would be able to seek cancellation of the registration through a summary procedure (see recommendation 72).

19. With respect to paragraph 9, it was suggested that:

(a) The reference to authorization for advance registration should be deleted as it gave the impression that, contrary to recommendation 67, prior authorization was necessary for advance registration; and

(b) Advance registration without prior authorization ensured the priority of a security right as against another security right but not against the rights of a buyer of the asset.

20. With respect to paragraphs 11 and 12, a number of suggestions were made, including the following:

(a) The heading should be aligned with the heading of recommendation 68 and reference should be made in the text to multiple agreements between the same parties and relating to the same assets;

(b) The order of paragraphs 11 and 12 should be inverted so that the focus would be on the approach recommended in the Guide;

(c) The second sentence in paragraph 12 should be revised to read along the following lines: “the registration continues to be effective, however, only to the extent that the description of the asset in the notice corresponds to the terms of any new or amended security agreement”; and

(d) In the third sentence of paragraph 12, reference should be made to “new categories of assets” instead of to “new assets.”

21. With respect to paragraphs 13-33, a number of suggestions were made, including the following:

(a) To emphasize the importance of the grantor’s name, the order of the paragraphs should be changed so that paragraph 18 should follow paragraph 13;

(b) References to other approaches not recommended in the Guide should be limited;

(c) In paragraphs 19 and 20, it should be explained that, while the Guide referred to a single registry record, the registry system could be designed to permit separate searches for grantors that were natural persons and grantors that were legal persons;

(d) Privacy and identity theft issues should be discussed in line with the way they were discussed in the Guide, highlighting that the law recommended in the Guide would apply together with the law on privacy and identity theft;

(e) Any rules on grantor name should be set out as examples not precluding the application of naming conventions prevailing in any given enacting State;

(f) Emphasis should be placed on the reason why a State might require certain documents (namely, to have a unique grantor identifier) rather than on what documents exactly were required;

(g) In paragraph 23, it should be clarified that not all official documents specified the components of the grantor’s name (first, middle and last name);

(h) In paragraph 24, it should be clarified that, once the three conditions set out therein were satisfied, the use of a government-issued personal identification number would be an ideal way to uniquely identify grantors;

(i) In paragraph 27, it should be clarified that “public records” were those that involved documents constituting the legal person;

(j) In the chart after paragraph 28, reference might be made to the insolvency estate as, in some legal systems, an insolvency representative could not create a security right in assets of the estate;

(k) The second sentence of paragraph 29 should become a separate paragraph as it applied generally and not only in the case of sole proprietorships; and

(l) The last sentence of paragraph 31 should be aligned with the “seriously misleading” standard provided in recommendation 64.

22. With respect to paragraphs 31-36, a number of suggestions were made, including the following:

(a) In paragraph 31, it should be clarified that the address of the grantor and additional information about the grantor such as the birth date or identity card number were examples of grantor information that did not constitute a search criterion;

(b) In paragraphs 31 and 36, the “seriously misleading” standard in recommendation 64 should be further developed possibly with relevant examples;

(c) In the first sentence of paragraph 32, reference should be made to “search logic” instead of “software”; and

(d) Paragraph 33 should be revised as the indexing and search logic to ignore all punctuations, special characters and case differences applied not only to grantors that were legal persons but also to grantors that were natural persons.

23. With respect to paragraphs 37-52, a number of suggestions were made, including the following:

(a) In addition to the examples already provided with respect to generic description of encumbered assets, paragraph 38 should be further developed to include examples on how specific assets or specific types of asset could be described in a notice that would meet the asset-description requirements of recommendation 14, subparagraph (d);

(b) As paragraphs 42 and 43 provided an accurate illustration of the justifications for serial number indexing (for certain tangible assets with significant resale market and sufficiently high value and to preserve the secured creditor’s rights to follow the asset into the hands of a buyer or lessee from the original grantor), paragraph 45 should be revised to refer to paragraphs 42 and 43;

(c) It should be clarified that the use of a serial number as a means of describing certain types of high-value asset with a resale value (recommendations 14, subpara. (d), and 63) and the use of a serial number as a search criterion were separate issues;

(d) Issues related to the description in a notice of encumbered attachments to immovable property should be discussed (along the lines of paras. 60 and 61 of A/CN.9/WG.VI/WP.46);

(e) The second sentence of paragraph 49 should be clarified as recommendation 65 related only to sufficient (or insufficient) description of assets and not to instances where the registrant had simply omitted to describe certain assets;

(f) With respect to paragraph 50, it should be clarified that: (i) the policy decision reflected in the Guide permitted over-inclusive descriptions of encumbered assets to facilitate the ability of the parties to enter into new security agreements encumbering additional assets as the grantor’s financing needs evolved (similar to advance registration); and (ii) where the grantor had not authorized such an over-inclusive registration, the grantor would be able to seek amendment or cancellation through a summary procedure (recommendation 72) and in some cases, demand compensation for damages;

(g) The last two sentences of paragraph 52 should be revised to reflect the approach referred to in paragraphs 42 and 43; and

(h) Paragraph 52 should make it clear that in systems where a serial number constituted an indexing and search criterion, both the grantor identifier and the serial number would need to be entered correctly in the registration for that registration to be effective and that the optional use of serial numbers as an indexing and search criterion without consequences if the wrong number was entered would not add anything and could even weaken the certainty achieved through the registry.

24. With respect to paragraph 53, it was suggested that it should be clarified that the first approach (whereby laws specified a standard statutory term) could limit or be contrary to the freedom of the parties to agree upon a longer duration of the registration. It was also suggested that other alternative approaches should be set out: (a) where there was no duration period for the registration and the registration would remain effective until performance of the secured obligation; and (b) where parties would self-select the duration, yet with a fall-back rule on a standard term when the duration was not selected by the parties.

25. With respect to paragraphs 56-61, a number of suggestions were made, including the following:

(a) It should be clarified that the Guide was neutral on the issue of the maximum amount for which the security right could be enforced (recommendations 14, subpara. (e), and 57, subpara. (d));

(b) The presentation of paragraphs 56 to 59 might be revised to first state the approach of the Guide;

(c) Even in cases where the maximum amount specified in the notice was less than the amount actually owed, the enforcement by the secured creditor would not be limited to the stated maximum amount if there were no other competing claimants, unless the maximum amount was included in the security agreement (and not just in the notice);

(d) In the situation referred to under subparagraph (c) above, the secured creditor would be entitled to recover the excess amount only as an unsecured creditor; and

(e) Paragraph 57 should be revised to reflect the actual lending practice, as lenders usually kept a certain margin over the market value of the asset.

## **2. A/CN.9/WG.VI/WP.46/Add.2, paras. 1-40**

26. With respect to paragraphs 1-4, a number of suggestions were made, including the following:

(a) Reference should be made to the fact that even in electronic registries where notices were submitted online, there could be a lag between the time the information contained in the notice was entered into the registry record and the time such information became available to searchers;

(b) Reference to the words “before it can be confident that its security right is effective against third parties” should be deleted as advance registration (without the authorization of the grantor) might not yet be effective against third parties; and

(c) When notices are submitted in paper form, the registry staff (in manual registration) should adhere to the order of the submission.

27. With respect to paragraphs 5-6, a number of suggestions were made, including the following:

(a) In paragraph 6, it should be clarified that it was the assignor (the original secured creditor) that was permitted to amend the secured creditor information or the assignee with the consent of the assignor;

(b) It should be clarified that the assignee's omission to ensure the registration of the amendment would result in the original secured creditor retaining the legal power to alter the state of the record (chap. IV of the Guide, para. 111);

(c) It should be clarified that notification to the grantor was a separate issue from the amendment of the registration; and

(d) The fourth sentence in paragraph 6 should state that the registry system "must be" designed so that a search result would show both the original secured creditor and the new secured creditor.

28. In paragraph 7, it should be clarified that it was possible for a competing claimant to register an amendment notice with the consent of the subordinating secured creditor, provided that the security right of the subordinating secured creditor or of a competing claimant had been made effective against third parties by registration.

29. In paragraph 8:

(a) At the end of the first sentence, language along the following lines should be added "in such a way that a search of the registry under the new name will not reveal the initial registration";

(b) The last sentence should be deleted; and

(c) It should be clarified that, in systems where a unique identity number was used to identify the grantor, a change of the grantor name had no impact on the identification of the grantor.

30. In paragraph 9:

(a) At the end of the first sentence, reference should be made to the fact that failure to enter an amendment should not make the security right "generally" or "retroactively" ineffective against third parties; and

(b) At the end of the third sentence, it should be clarified that reference to "these classes of competing claimants" referred to a secured creditor, buyer, lessee or licensee of the encumbered asset.

31. In paragraphs 10 and 11, it should be clarified that:

(a) The main issue was whether a secured creditor would have the right to register an amendment with the name of the transferee of the encumbered asset to protect third parties;

(b) The Guide recommended that the issue should be addressed in the law and listed the possible ways to address it with their comparative advantages and disadvantages;



(c) The secured creditor could make a new registration against the name of the transferee (and not an amendment of the initial registration); and

(d) Reference was made to an unauthorized transfer outside the ordinary course of business because, if the transfer was authorized or took place in the ordinary course of the grantor's business with respect to certain assets in certain transactions, the transferee would acquire the asset free of the security right (recommendation 80, subpara. (a), and 81, subpara. (a));

32. In paragraph 12, it should be clarified that:

(a) New encumbered assets could be added by way of an amendment or a new registration;

(b) The new registration or amendment of the newly encumbered asset would be effective as of the time it was made (not retroactively);

(c) The only difference between a new registration and an amendment was that the amendment would expire with the initial registration.

33. In paragraph 15:

(a) The third sentence should be deleted as, if a secured creditor failed to renew a registration in a timely fashion or inadvertently registered a cancellation, the secured creditor would suffer a loss of priority as against all competing claimants; and

(b) The last sentence should be modified to reflect the result mentioned in subparagraph (a).

34. In paragraph 20, reference should be made to the right of the grantor to seek cancellation of a registration not only if a security agreement had not been concluded but also if such an agreement was not contemplated.

35. In paragraph 21, it should be clarified that:

(a) The secured creditor should comply with the request within a number of days "after receipt of the request" (recommendation 72, subpara. (a)); and

(b) The grantor or the court should register a cancellation or amendment in accordance with a specified procedure.

36. In paragraph 22, it should be clarified that:

(a) The consent of the grantor was not required for certain types of amendment (such as assignment of the secured obligation, subordination or change of the address of the secured creditor);

(b) The registry should be able to determine whether a cancellation or amendment was registered by the secured creditor or a person other than the secured creditor;

(c) The issue of the availability of archived cancellations to searchers was a separate issue that arose both in the case of voluntary and mandatory cancellation; and

(d) In some legal systems, archived cancellations were available to searchers, while under the law recommended in the Guide information on

archived cancellations could be obtained further to a request to the registry (recommendation 74).

37. In paragraphs 23-26:

(a) The text should be recast so that paragraph 25 would follow paragraph 23;

(b) The issue of privacy concerns should be discussed separately from the issue of whether a searcher should give reasons for searching and privacy concerns should be discussed by reference to other law (privacy and identity theft law); and

(c) There was no need for a record of searchers other than that indicating payment of any search fees.

38. With respect to paragraphs 27-31, a number of suggestions were made, including the following:

(a) In the last sentence of paragraph 27, reference should be made to the fact that a careful and prudent searcher would search under the correct grantor identifier;

(b) In paragraph 28, it should be clarified that, for the purpose of a search, a searcher needed to use the correct grantor identifier and not the status of a grantor, for example, as insolvent or deceased;

(c) In paragraph 29, it should be emphasized that a search by reference to registration numbers was especially useful in circumstances where notices could not be searched by using the grantor identifier due to indexing errors or changes in the search logic; and

(d) In paragraph 30, examples should be provided of situations where a single global amendment would be useful (for example, bank mergers or acquisitions).

39. With respect to paragraphs 32 and 33, a number of suggestions were made, including the following:

(a) Rather than limiting the permissible language to official language(s) of the State under whose authority the registry was maintained, States should be able to freely determine the language in which the information should be entered, whether it was the official language or not;

(b) As it would sometimes be impossible for a searcher to know in which language the information was entered, the searcher should be allowed to search in one of the official languages, with the search result being displayed in the language the information was originally entered;

(c) Reference to “accents” in paragraph 32 should be replaced with “symbols”;

(d) In paragraph 33, if rules applicable to registration required that all linguistic versions of the grantor’s name were to be entered, those rules would also need to set out the legal consequences with respect to errors made to one or more versions of the name; and

(e) The use of identification numbers could assist in mitigating language problems.

40. With respect to paragraphs 34-36, a number of suggestions were made, including the following:

(a) The first sentence of paragraph 34 should be revised as verification, although essential for the secured creditor, was not an element required for the third-party effectiveness of a security right (recommendations 32 and 70);

(b) The second sentence of paragraph 34 should be revised to clarify that, while a registrant could obtain a record of the registration as soon as the registration information was entered into the registry record (recommendation 55, subpara. (e)), the registry had the obligation to send to the secured creditor only a copy of any “changes” to a registered notice (recommendation 55, subpara. (d));

(c) In paragraph 34, where the registrant was not the secured creditor, the copy of the registration should be sent to either the registrant or the secured creditor;

(d) The concept of “registrant” needed to be further clarified in paragraph 34; and

(e) Paragraph 35, in particular the last sentence, should be revised to refer to electronic means of communications in general rather than to any technology in particular.

41. With respect to paragraphs 37-40, it was suggested that they should be deleted or significantly reduced since whether the grantor was entitled to request additional information and whether the secured creditor was obliged to provide such information were matters for the substantive secured transactions law rather than for the regulations. It was also stated that, in any case, the grantor had access to most of the relevant information through the security agreement with the secured creditor.

42. Nonetheless, it was pointed out that, although those issues needed to be addressed in the substantive secured transactions law, it would be worthwhile to inform the readers of the text on registration that notices did not always provide all the information that might be needed by a grantor or by a third party. It was thus suggested that paragraphs 37 to 40 should be shortened to simply set out the issues that might be relevant in the operation of the registry.

43. With respect to paragraphs 45-46, a number of suggestions were made, including the following:

(a) Emphasis should be placed more on the centralized and consolidated registry record allowing registrants and searchers to access the registry through multiple modes and access points rather than on the fact that the information was stored in a single consolidated database, in particular, taking into account the development of new technologies; and

(b) Taking into account issues relevant to multi-unit States (with reference to recommendations 224-227), multi-unit States could consider establishing a centralized registry for all units of a multi-unit State.

44. With respect to paragraph 50, it was suggested that, in some instances, it would be necessary for the registry to provide a user such as a bank with a special access code allowing the bank to issue access codes for its branches.

**D. Registry design, administration and operation  
(A/CN.9/WG.VI/WP.46/Add.2, paras. 51-73)**

45. With respect to paragraphs 51 to 60, a number of suggestions were made, including the following:

(a) In paragraph 52, it should be clarified that States should retain ownership of the registry record for the purposes of establishing public trust in the registry and preventing commercialization and fraudulent use of information in the registry record;

(b) In line with the Guide, in paragraphs 57 and 58, reference should be made to one type of a search and no distinction should be drawn between official and unofficial searches;

(c) Reference in paragraph 59 should be simply to “errors” as errors were by nature inadvertent;

(d) Paragraph 60 should: (i) clarify that the registry should take all the necessary steps to avoid unauthorized access to and duplication of electronic records; (ii) refer to the objectives of avoiding loss or corruption of data and of ensuring uninterrupted service rather than to ways to address those issues by way of methods that might soon become outdated; and (iii) refer to disaster recovery centres;

(e) In paragraphs 66-68, reference should be made to the possibility of the registry being part of a government department and thus not charging any registration or search fees; and

(f) In paragraph 72, emphasis should be placed on the transition to a new secured transactions rather than on how data might migrate to a new registry without a change in the secured transactions law.

**V. Registration of security rights in movable assets:  
draft model regulations (A/CN.9/WG.VI/WP.46/Add.3)**

**A. General (A/CN.9/WG.VI/WP.46/Add.3, article 1)**

46. The Working Group next turned to a discussion of the draft model regulations. At the outset, differing views were expressed as to the form of the text. One view was that the text should be cast in the form of recommendations. It was stated that recommendations would be more consistent with the Guide, flexible and thus acceptable. Another view was that the text should take the form of model regulations. It was observed that, while model regulations were not more binding than recommendations, model regulations would be more concrete and better attract the attention of governments. After discussion, the Working Group decided to first consider the substance of the text and revert to the issue of its form at a later stage.

47. With respect to article 1, definitions, a number of suggestions were made, including the following:

(a) In the definition of the term “address”: (i) it might be better to require a physical address for the grantor and a post office box or e-mail for the secured creditor; (ii) reference should be made to “postal” rather than “zip” code; and (iii) the fact should be taken into account that, in some States, address might be reflected in more general terms (for example, town or island rather than street address);

(b) In the definition of the term “amendment”: (i) it should be clarified by listing examples of amendments; (ii) the definition should be aligned with articles 27 and 28; and (iii) it should be clarified whether the term meant a notification, the information changed or the result of the change of the information;

(c) With respect to the meaning of the terms “security right” and “movable asset” in the definition of the term “law”, it was noted that those terms did not need to be defined as they were explained either in the terminology or in the recommendations of the Guide;

(d) In the definition of the term “notice”, reference should be made to recommendations 72-75;

(e) In the definition of the term “password”, the word “confidential” should be deleted since, even if there was a breach of confidentiality, the password would still be a password (the matter could be dealt by way of a provision that that the password should be kept confidential);

(f) Consideration might be given to combining the definitions of the terms “registration” and “registry record”;

(g) The definitions of the terms “official search logic”, “registry”, “registry services” and “registry system” should be deleted as the meaning of those terms was self-evident;

(h) The terms “serial number” and “serial number assets”, which were said to be overly restrictive, should be considered only if the Working Group decided that the articles in which those terms appeared should be retained; and

(i) The definition of the term “user identification”, which was not clear as to whether it meant only a registrant or also a searcher, should be considered in the context of the articles in which that term was used.

## **B. Establishment and operation of a registry (A/CN.9/WG.VI/WP.46/Add.3, articles 2-7)**

48. With respect to article 2, establishment of a registry, it was suggested that:

(a) Reference might be made to a “central” registry;

(b) The reference to the purpose of the registry might need to be recast and streamlined; and

(c) It might be supplemented by a provision dealing with the scope of the registry.

49. With respect to article 3, appointment of a registrar and a deputy registrar, differing views were expressed. One view was that it should be deleted as it was too detailed and the matter should be left to each State. Another view was that, if the text took the form of regulations that were inherently more prescriptive than recommendations, it was unavoidable to interfere with the flexibility that was necessary for States to deal with such a matter. Yet another view was that whether the text took the form of model regulations or recommendations it should deal at least with the appointment of a registrar, but not necessarily with the way of appointment or the duties of the registrar, or the appointment of a deputy registrar or other staff.

50. With respect to article 3, it was also suggested that it should emphasize that an entity authorized by law could appoint a person or entity (public or private, see recommendation 55, subpara. (a)) to supervise and administer the registry, whereas the internal structure or hierarchy of the registry mechanism should be left to each State.

51. In addition, it was suggested that, whatever form the text might take (recommendations or model regulations), there would be certain key provisions that would need to include some detail and other provisions, such as articles 3 and 4, that would need to be cast in general terms and function as a reminder of issues that States should address in law or regulations.

52. With respect to article 4, it was suggested that a distinction should be made between the power and the duties of the registry, the nature of which was administrative, and the services to be provided by the registry (receiving, indexing and storing notices, issuing certificates and allowing searches). It was also suggested that the allocation of power and duties among the staff of the registry should be left to each State.

53. With respect to article 7, it was widely felt that the liability of a registry was a matter for relevant law (contract, tort, secured transactions or even administrative law) and should be left to that law in line with recommendation 56. A note of caution was struck, however, to the effect that the regulations or the commentary should address that matter, which, *inter alia*, could affect the cost of registration, which under recommendation 54, subparagraph (i), should be set a level no higher than necessary for cost recovery.

### **C. Registry services (A/CN.9/WG.VI/WP.46/Add.3, articles 8-10)**

54. With respect to article 8, a number of suggestions were made, including the following:

(a) The criteria for accessing the registry for registration purposes and for search purposes should be clearly distinguished and set out separately;

(b) Article 8 should be recast taking into account that the identification of the grantor in a manner that was sufficient to allow indexing or the provision of other necessary information was a condition for the registry to accept a notice but not to allow access to the registry (recommendation 54, subpara. (c));

(c) A distinction between occasional users and frequent users was only applicable to registrants and accordingly, paragraph 2 should be recast to clarify that it applied to frequent registrants only;

(d) A user identification and password could be assigned to registrants that needed such arrangements but were not necessary for searchers; and

(e) Assigning a user identification and password should not be presented as the only method for granting access to registry services as other methods were presently available or might become available in the future.

55. With respect to article 9, it was stated that the registry should be able to rely on the fact that the user identification and password were properly used and the registrant was their rightful owner. However, it was added that, in the case of wrongful use by a person and of registration of an adverse amendment, the rights of the secured creditor should not be negatively affected by a conclusive presumption that the user identification and password were properly used.

56. With respect to article 10, a number of suggestions were made, including the following:

(a) Reference should be made to the rejection of a “notice” instead of “registration”;

(b) Subparagraph (b) of paragraph 1 should be recast along the following lines “the information in the notice or the search request does not comply with the requirements of these regulations”; and

(c) In the context of electronic registration, reference should be made to “incomplete” instead of “incomprehensible or illegible” information.

#### **D. Registration (A/CN.9/WG.VI/WP.46/Add.3, articles 11-16)**

57. With respect to article 11, a number of suggestions were made, including the following:

(a) Paragraph 1 should state that the registry should record a date and time of registration according to the standard provided in paragraph 2 and assign a registration number;

(b) As paragraph 2 stated a fundamental rule, the order of paragraphs 1 and 2 might be reconsidered;

(c) Issues related to simultaneous registrations might also be dealt with by providing that the registry should record the exact date and time of receipt, and index notices according to the exact order in which they were received; and

(d) Special rules might be required for the date and time of registration of a notice with respect to an acquisition security right.

58. With respect to article 12, a number of suggestions were made, including the following:

(a) It should be clarified that article 12 set out options in line with recommendation 69;

(b) In option B, the maximum time limit should be deleted and set out in an option C, while the second sentence should be deleted, since in an electronic registry of a self-select system, a notice would be rejected if the duration of registration had not been selected; and

(c) Paragraph 3 in article 12 should be deleted with some explanation in the commentary that the matter was left to relevant law.

59. Differing views were expressed as to whether article 13 should be retained. One view was that article 13 should be deleted because the time when a registration might be made was a matter for secured transactions law addressed in recommendation 67. Another view was that article 13 should be retained as a reminder of an important matter that should be addressed in the law or the regulations. Similar views were expressed with respect to article 14. In addition, with respect to article 14, the view was expressed that the question whether one notice could cover multiple security rights was a matter for the regulations.

60. Noting that serial number indexing was not addressed in the recommendations of the Guide but was discussed in the commentary, the Working Group decided that the reference to serial number indexing in paragraph 2 of article 15 should be retained within square brackets until it had an opportunity to consider article 24. With respect to paragraph 3, it was suggested that amendments and cancellations should be indexed not only by the initial notice (rather than registration) number but also by the grantor's identifier and asset serial number. It was also suggested that notices might also be indexed by secured creditor identifier but only for internal purposes of the registry and, therefore, the matter could be addressed in the commentary rather than in the regulations.

61. With respect to paragraph 1 of article 16, it was suggested that: (a) reference should be made also to the deletion of certain information (as opposed to the removal of all the information); and (b) it should be clarified that the reference to the registry record was both to the record available to the public and the archive record. With respect to paragraph 2, it was suggested that reference should also be made to: (a) the fact that registry record in that context referred to the record available to the public (otherwise, article 16, para. 2, would be inconsistent with article 29, para. 2); (b) a judicial or administrative order of the type referred to in article 31; and (c) to the possibility that cancelled notices might be retained in the registry record available to the public at least for a certain period of time (such as two years).

62. In addition, the view was expressed that allowing the registry to remove from the record information that was frivolous, vexatious, offensive or contrary to the public interest would amount to allowing the registry to scrutinize the content of the notices registered and thus be contrary to recommendation 54, subparagraph (d). Moreover, the view was expressed that where the registry had made an error in the entry into the record of information submitted by way of a paper notice, the registry should be able to correct the error. It was stated that such a correction would be in the interest of all involved and would not have a negative impact on the rights of the registrant.



## **E. Registration information (A/CN.9/WG.VI/WP.46/Add.3, articles 17-30)**

63. With respect to paragraph 2 of article 17, it was suggested that its wording should be aligned with the wording of recommendation 54, subparagraph (d).

64. With respect to subparagraph 1 (b) of article 18, it was suggested that it should be revised to ensure that, in the case of more than one secured creditor, the identifier and address of each secured creditor or its representative should be included in the notice. With respect to subparagraph 1 (c), it was noted that it was sufficient to cover one or more assets.

65. With respect to paragraph 2, it was suggested that reference should be made to any language specified in the law, which could include the official State and any other language.

66. With respect to paragraph 3, it was suggested that, to the extent it provided that the name of each grantor should be mentioned in the notice, it was appropriate to cover mainly multiple joint owners of the same encumbered assets. It was stated that, if the owners and the encumbered assets were different, the secured creditor should register multiple notices.

67. In addition, it was suggested that the commentary should refer to the need for the registry to have a set of rules for the transliteration of names with foreign characters in the alphabet of the language(s) used by the registry. Moreover, it was suggested that the commentary should include wording preserving the naming conventions of the enacting State.

68. With respect to option A of article 19, it was suggested that it should: (a) refer also to the name of the grantor (to be more in line with recommendation 59, which referred to identification number as additional information for the identification of the grantor); (b) separate the issue of the identification of the grantor in a notice from the issue of indexing of registered notices (which could be based on the name or the identification number of the grantor); and (c) address also the identification of foreign citizens. With respect to option B, it was suggested that it should: (a) address also the identification of foreign citizens; and (b) take into account that one State might issue a passport and another State a document such as a licence.

69. With respect to paragraph 4, it was suggested that none of the possibilities mentioned therein worked well because: (a) reference to the address entered in the notice was tautological; (b) reference to the security agreement failed to cover registration made prior to the conclusion of a security agreement; and (c) reference to official documents could inadvertently result in an address that was not up to date.

70. In view of the above, it was suggested that the issue of which grantor address should be mentioned in the notice should be left to the registrant. It was stated that, in any case, it was in the interest of the registrant to ensure that an accurate grantor address was mentioned in the notice even though an incorrect statement would not render the registration ineffective unless it would seriously mislead a reasonable searcher (recommendation 64). It was also observed that, while the time for determining the accuracy of the grantor address should be the time of registration,

the secured creditor could always register an amendment notice in the case of a change of the grantor's address after registration.

71. The example was given of a national registry in which, in addition to the name of a third-party grantor, the name of the debtor of the secured obligation was mentioned in a notice. It was stated that such information was useful for several reasons, including, because it allowed third parties to obtain information from the debtor and to assess the possibility of the security right being realized. In response, it was noted that the Guide did not require that debtor information be included in the notice, since such an approach would complicate the registration process and third parties could always obtain information with respect to the debtor from the security agreement, which they would typically request in the context of due diligence.

72. In that connection, it was observed that the grantor might not be the owner but a person who had the power to encumber the encumbered asset (recommendation 13). In response, it was noted that, even in that exceptional case, there was no problem as upon creation the security right would be effective between the parties and upon registration it would become effective against third parties. It was also pointed out that information about the owner (and any security rights created by the owner) could always be obtained through the typical due diligence process, which would reveal also the identity of the owner. It was also said that the priority rules would apply in any case to priority conflicts among security rights created by the grantor or the actual owner.

73. With respect to option A of article 20, it was suggested that it should refer to both the name and the number of the grantor in the relevant (company or other) registry pursuant to the relevant law. With respect to all options of article 20, it was suggested that they should also cover: (a) legal persons that were not corporations; and (b) foreign legal persons. With respect to paragraph 2 of article 20, it was suggested that the issue of the address of the secured person that was a legal person should be addressed in the same way as the address of the secured creditor that was a natural person.

74. With respect to articles 19-21, it was suggested that they might be recast to: (a) explain more clearly that the issue of who was the grantor was a matter for substantive law, while the draft model regulations could deal with information to be included in a notice and with search criteria; and (b) focus on the search criteria rather than on how registrants should fill out notices.

75. With respect to article 21, it was suggested that it should be revised to: (a) separate more clearly trusts that had a name from those that did not; (b) refer to the name of the owner of the asset where the grantor was not the owner; and (c) consider the issue of trade names of sole proprietorships.

76. With respect to article 23, it was suggested that additional information in the form of attachments to notices referred to in paragraph 3 could be discussed in the commentary but should be deleted from article 23 and, in any case, should not refer to location of assets.

77. With respect to article 24, it was suggested that it should be deleted and explained in the commentary or revised to clarify that it had limited application to the indexing and searching of certain serial number assets. With respect to all other references in the draft model regulations to serial number assets (the relevant

definitions, articles 15, paragraph 2, 26, paragraph 2 and 33, subparagraph (b)), it was suggested that they should be retained in square brackets.

78. With respect to article 25, it was suggested that:

(a) Additional description of the relevant immovable property might not be necessary;

(b) A definition of the attachments might be included in the definitions of the model regulations; and

(c) Registration of a security right in attachments to immovable property in the immovable property registry might be left to immovable property law.

79. With respect to article 26, it was suggested that:

(a) The heading should be revised to refer to “incorrect or incomplete information”; and

(b) Paragraph 2 should be simplified and aligned with recommendation 65.

80. With respect to article 27, it was suggested that:

(a) The terminology used in the article should be aligned with the terminology used in the Guide;

(b) As the impact of transfer of an encumbered asset on the effectiveness of registration was an issue to be addressed in secured transactions law (and the Guide did not make a specific recommendation in that regard), provisions related to transfers should be placed in square brackets in the draft model regulations or in the commentary;

(c) Subparagraph 1 (a) should be deleted;

(d) Subparagraph 1 (f) should also deal with situations in which there were multiple secured creditors; and

(e) Even when the transferee was identified as the new grantor replacing the original grantor, a search should still reveal the notice showing the original grantor.

81. With respect to article 29, it was suggested that in subparagraph 1 (a) reference should be made to a “registrant’s identification information” as user identification and password would only be available to users accessing the registry via electronic means, unless another technology was used.

82. With respect to article 30, it was suggested that:

(a) In paragraphs 1 and 2, reference should be made to “notice” instead of “registration”; and

(b) The information to be included in the copy of the notice did not need to be specified.

83. With respect to article 31, it was suggested that compulsory amendment or cancellation should also be applicable in situations where the notice included description of assets that were not encumbered or no longer encumbered by the security agreement.

84. With respect to article 32, it was widely felt that it should be deleted and placed in the commentary as it dealt with substantive law issues that did not belong in the draft model regulations.

## **VI. Future work**

85. The Working Group noted that its twentieth session was scheduled to be take place in Vienna from 12 to 16 December 2011, those dates being subject to confirmation by the Commission at its forty-fourth session, which was scheduled to take place in Vienna from 27 June to 8 July 2011.

**D. Note by the Secretariat on a draft Security Rights Registry Guide,  
submitted to the Working Group on Security Interests  
at its nineteenth session**

**(A/CN.9/WG.VI/WP.46 and Add.1-3)**

**[Original: English]**

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### Background information

At its forty-second session (Vienna, 29 June-17 July 2009), the Commission noted with interest the future work topics discussed by Working Group VI at its fourteenth and fifteenth sessions (A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126). At that session, the Commission agreed that the Secretariat could hold an international colloquium early in 2010 to obtain the views and advice of experts with regard to possible future work in the area of security interests.<sup>1</sup> In accordance with that decision,<sup>2</sup> the Secretariat organized an international colloquium on secured transactions (Vienna, 1-3 March 2010). At the colloquium several topics were discussed, including registration of security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions. The colloquium was attended by experts from governments, international organizations and the private sector.<sup>3</sup>

At its forty-third session (New York, 21 June-9 July 2010), the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at the colloquium. The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources.

<sup>1</sup> *Official Records of the General Assembly, Sixty-fourth session, Supplement No. 17 (A/64/17)*, paras. 313-320.

<sup>2</sup> *Ibid.*

<sup>3</sup> For the colloquium papers, see [www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html](http://www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html).

However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.<sup>4</sup>

In that connection, it was widely felt that a text on registration of security rights in movable assets would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of security rights registries. It was stated that secured transactions law reform could not be effectively implemented without the establishment of an efficient publicly accessible security rights registry. It was also emphasized that the *UNCITRAL Legislative Guide on Secured Transactions* (the "*Guide*") did not address in sufficient detail the various legal, administrative, infrastructural and operational questions that needed to be resolved to ensure the successful implementation of a registry.<sup>5</sup>

The Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the *Guide*, texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the *Guide*. After discussion, the Commission decided that the Working Group should be entrusted with the preparation of a text on registration of security rights in movable assets.<sup>6</sup>

At its eighteenth session (Vienna, 5-10 November 2010), the Working Group considered a note by the Secretariat entitled "Registration of security rights in movable assets" (A/CN.9/WG.VI/WP.44 and Addenda 1 and 2). At the outset, the Working Group expressed its broad support for a text on the registration of security rights in movable assets, noting that empirical evidence clearly demonstrated that the efficacy of a secured transactions law depended on an effective registration system (see A/CN.9/714, para. 12). As to the specific form and structure of the text to be prepared, the Working Group adopted the working assumption that the text would be a guide on the implementation and operation of a registry of security rights in movable assets that could include principles, guidelines, commentary and possibly model regulations. The Working Group also agreed that the text of the proposed registry guide should be consistent with the type of secured transactions legal regime contemplated by the *Guide*, while also taking into account the diverse approaches taken by modern national and international registry regimes. It was also observed that, in line with the *Guide* (see recommendation 54, subpara. (j)), the proposed registry guide should take into account the need to accommodate a hybrid electronic/paper system in which parties would have the option of submitting registration and search inquiries either electronically or in paper form (A/CN.9/714, para. 13). The Secretariat was asked to prepare a draft of the proposed registry guide based on the discussions and conclusions of the Working Group (A/CN.9/714, para. 11). The text that follows constitutes the first draft.

*[Note to the Working Group: The Working Group may wish to consider whether the proposed registry guide would be a stand-alone text or a supplement to the Guide (on Secured Transactions). In view of the decision made by the Working*

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<sup>4</sup> Ibid., *Sixty-fifth session, Supplement No. 17* (A/65/17), paras. 264 and 273.

<sup>5</sup> Ibid., para. 265.

<sup>6</sup> Ibid., paras. 266-267.

*Group at its eighteenth session that the background secured transactions law for the proposed registry guide will be the law recommended in the Guide, it would seem that the proposed registry guide should take the form of a supplement to the Guide. However, calling the proposed registry text a “guide” may highlight its importance, raising its profile, and be also justified on the ground that the proposed registry guide will not only elaborate on issues already addressed in the Guide but also address new issues (always in line with the law recommended in the Guide). If the Working Group decides to call the proposed registry text a “guide” rather than a “supplement” to the Guide [on Secured Transactions], it may wish to consider its title (for example, Security Rights Registry Guide, Guide on the Implementation of a Security Rights Registry, etc.). While a final decision on this issue may be made at a later stage, the adoption of a working assumption at this stage would facilitate the drafting of the text.]*

## **I. Introduction**

### **A. General**

1. The *UNCITRAL Legislative Guide on Secured Transactions* (the “*Guide*”) reflects the global recognition of the economic importance of a modern legal framework to support financing against the security of movable assets. The establishment of a publicly accessible registry in which information about the potential existence of security rights in movable assets may be registered is an essential feature of the law recommended in the *Guide* and of reform initiatives in this area generally.

2. Chapter IV of the *Guide* contains commentary and recommendations on many aspects of a security rights registry. However, in order to understand the requirements and legal effects of registration, as well as the scope of the registry, a reader needs to have a rather thorough understanding of the *Guide* as a whole. Thus, chapter II of the draft Security Rights Registry Guide (the “draft Registry Guide”) offers an integrated concise summary of the legal function of a security rights registry for States that have adopted or wish to adopt a legislative framework for secured lending along the lines of that recommended in the *Guide*. Chapter II is intended to assist not only those involved in the registry implementation process, who are not legal experts but who will need to have a basic understanding of the legal context of the registry in order to carry out their work knowledgeably, but also the registry clientele and others (see para. 10 below).

3. A general security rights registry differs fundamentally from the kinds of registry for recording title and encumbrances on title in immovable property and high-value equipment, such as ships, with which many States are most familiar. Thus, chapter III of the draft Registry Guide explains the key characteristics of a general security rights registry, notably notice registration for the purpose of establishing third-party effectiveness and grantor-based indexing, that mark it apart from other types of registry and contribute to its efficient operation.

4. The statutory framework governing secured transactions typically leaves the detailed rules applicable to the registration and search process to be dealt with in subordinate regulations, ministerial guidelines and the like. Although chapter IV



of the *Guide* provides recommendations on the general policy issues associated with these legal issues, chapter IV of the draft Registry Guide (see A/CN.9/WG.VI/WP.46/Add.1 and 2) provides concrete guidelines on the types of legal rule for submitting notices for registration and conducting searches that must be drafted as part of the implementation process. These guidelines are further supplemented by draft model regulations (see A/CN.9/WG.VI/WP.46/Add.3).

5. Chapter IV of the *Guide* does not address, or does not address in every detail, the myriad of technological, administrative, and operational issues involved in developing and running an effective and efficient security rights registry. Thus, chapter V of the draft Registry Guide (see A/CN.9/WG.VI/WP.46/Add.2) seeks to complement the *Guide* by addressing these practical issues in a more specific and expanded fashion.

## B. Sources

6. The experience of States that have instituted the kind of general security rights registry contemplated by the *Guide* demonstrates how advances in computer technology can vastly improve the efficiency of operation of security rights registries. Thus, particularly in relation to the technical aspects of registry design and operation, the draft Registry Guide draws on these national precedents to provide guidance to States.

7. In addition, the draft Registry Guide has benefitted from other international sources, including the following:

(a) The European Bank for Reconstruction and Development (EBRD) *Publicity of Security Rights: Guiding Principles for the Development of a Charges Registry* (2004);

(b) EBRD *Publicity of Security Rights: Setting Standards* (2005);

(c) The Asian Development Bank (ADB) *Guide to Movable Registries* (2002);

(d) *The Principles, Definitions and Model Rules of a European Private Law, Draft Common Frame of Reference (DCFR), volume 6, book IX (Proprietary security in movable assets), chapter 3 (Effectiveness as Against Third Parties), section 3 (Registration), (2010), prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group);*

(e) *The Organization of American States (OAS) Model Registry Regulations under the Model Inter-American Law on Secured Transactions* (October 2009);

(f) *The International Finance Corporation (World Bank) Secured Transactions Systems and Collateral Registries* (January 2010);

(g) *The Organisation pour l'Harmonisation du Droit des Affaires en Afrique (OHADA) Treaty: recent developments in relation to the establishment of a regional security rights registry; and*

(h) *The Convention on International Interests in Mobile Equipment* (Cape Town, 2001) and its Protocols, establishing international registries (which, although they are asset based and cover other transactions in addition to secured

transactions, are notice based, with registration resulting in third-party effectiveness and priority).

8. The national, regional and international sources referred to above do not always accord with the recommendations in chapter IV of the *Guide* on registration-related issues. Consequently, the draft Registry Guide explains the policy rationale for approach recommended in the *Guide* relative to other possible approaches.

### C. Guiding principles

9. The draft Registry Guide is informed by the following overarching principles:

(a) Legal efficiency: the legal and operational guidelines for all registry services, including but not limited to registration and searching, should be simple, clear and certain;

(b) Operational efficiency: all registry services, including the registration and search process, should be designed to be as fast and inexpensive as possible to ensure the security and accuracy of the information entered in the registry record; and

(c) A balanced approach to the interests of all registry constituents: grantors, potential secured and unsecured creditors, as well as potential competing claimants, all have an interest in the extent and scope of information that is published in a security rights registry and in the efficient availability of that information; thus, the legal and operational framework of the registry should be designed to fairly balance the interests of all its potential constituents.

### D. Intended readership

10. The potential readership of the draft Registry Guide comprises all those who are interested or actively involved in the design and implementation of a security rights registry as well as those who may be affected by its establishment, including:

(a) Registry system designers, including technical staff charged with the preparation of design specifications and fulfilling of the hardware and software requirements for the registry;

(b) Registry administrators and staff;

(c) Registry clientele, credit providers, credit reporting agencies and insolvency representatives, as well as all members of the public whose legal rights may be implicated by market transactions involving movable assets potentially subject to a security right;

(d) The general legal community (including judges, arbitrators and practicing lawyers); and

(e) All involved in secured transactions law reform and law reform assistance (such as the World Bank, the EBRD, the ADB and the Inter-American Development Bank).

11. Not all of these potential readers will be versed in the intricacies of secured transactions law or even have legal training. Accordingly, the draft Registry Guide is formulated in “plain language” style employing “reader-friendly” aids.

12. Like the *Guide*, the draft Registry Guide has been formulated in a fashion that enables it to be used in States with diverse legal traditions. Consequently, to the extent that the draft Registry Guide provides model regulations, it uses neutral generic terminology that is consistent with the terminology used in the *Guide* and can be adapted readily to each State’s domestic legal tradition and drafting style, as well as to local legislative conventions regarding which types of rule must be incorporated in principal legislation and which may be left to subordinate regulations or ministerial or administrative guidelines.

13. For example, the *Guide* uses the term “notice” in the sense of a communication so as to cover not only a form (or screen) used to transmit information to the registry (see the term notice in the introduction to the *Guide*, sect. B, recommendations 54, subpara. (b), and 57) but also other communications, such as those made in the context of enforcement (see recommendations 149-151). Chapter IV of the *Guide* supplements the meaning of the term “notice” in a registration context by referring to: (a) “information contained in a notice” or “the content of the notice” (see recommendations 54, subpara. (d), and 57); and (b) the “registry record” in the sense of information contained in a notice once this information has been accepted by the registry and entered into the database of the registry that is available to the public (see recommendation 70). The draft Registry Guide uses these terms in the same sense, emphasizing more the information contained in the paper or electronic communication rather than the medium of communication.

## II. Purpose of a security rights registry

### A. Introduction

14. A general security rights registry of the kind contemplated in the *Guide* permits the registration of information contained in notices with respect to potential present and future security rights for the purpose of: (a) making the security rights effective against third parties; (b) providing an efficient point of reference for priority rules based on the time of registration; and (c) functioning as an objective source of information for third parties dealing with a grantor’s assets (see purpose section of chap. IV of the *Guide*).

15. The term “registration of a notice” describes a procedure. Typically, in a paper context, there are three steps: (a) the submission of information in a notice by a registrant; (b) the entry of the information in a notice into the registry record and assignment of a date and time to the notice by the registry; and (c) the entry of the relevant information from the notice into the registry index by the registry at which time the information in the notice becomes available to searchers. In an electronic context, all three steps may take place simultaneously at the time the registrant completes the registration. In some States, the registration is effectively registered when the second step is completed, that is, when the notice is submitted to and received by the registry. The *Guide* recommends a different approach in that it

requires information in a notice to be available to searchers of the registry record for the registration to be effective (see recommendation 70).

16. A security rights registry does not exist in a vacuum. It is an integral component of the overall legal and economic context of the secured financing regime in a particular State. Yet those who are involved in the design and implementation of a security rights registry, as well as the potential registry clientele, may not be familiar with the intricacies of secured transactions. Accordingly, this chapter provides an overview of secured transactions and the legal function of registration within a legislative framework for secured transactions along the lines of the law recommended in the *Guide*.

## **B. Function of a security right**

17. Although the legal terminology may vary (for example, “pledge”, “charge”, “security interest” or “hypothec”), the basic idea of a security right is much the same everywhere. A security right is a type of property right (right *in rem*, distinct from ownership and personal rights) given to a creditor to secure payment of a loan or other obligation (see the term “security right” in the introduction to the *Guide*, sect. B). A security right mitigates the risk of loss resulting from a default in payment by entitling the secured creditor to claim the value of the assets encumbered by the security right as a back-up source of repayment. For example, if a business that borrows funds on the security of its equipment fails to repay the loan, its secured creditor will be entitled to obtain possession of the equipment and have it disposed of in order to pay off the outstanding balance. The central feature of a security right is that it generally enables a creditor to claim the value of encumbered assets by preference over other competing claimants. As the risk of loss from default is mitigated, the ability of a person (“grantor”; see the term “grantor” in the introduction to the *Guide*, sect. B) to grant a security right expands access to credit for grantors that might not be able to obtain financing on an unsecured basis or enables credit to be obtained on more favourable terms (for example, the interest rate may be lower, the amount of the credit may be higher and the repayment period may be longer).

18. A security right is created by a contract (security agreement) in which the grantor of the security right consents to have specified assets stand as security for a specified obligation. Sometimes, the specified obligation is a loan; sometimes it is a credit facility, such as a line of credit typically offered by financial institutions. In other instances, it may be an extension of credit to finance the acquisition of tangible assets by the grantor. For example, a seller may take a security right or reserve ownership in assets sold on credit in order to secure payment of the purchase price (for acquisition financing, see the *Guide*, chap. IX; see also paras. 27, 38 and 39 below).

## **C. Reasons for secured credit**

19. Commercial enterprises (in particular small and medium-sized enterprises) typically require some form of financing to support their start-up and expansion costs and to acquire or produce the equipment, inventory and services from which

they hope to generate profits. Consequently, credit performs an important role in financing productive business development. Consumers as well may require access to credit to be able to acquire assets such as household appliances or motor vehicles. As already mentioned, a creditor that is forced to rely solely on a borrower's promise to repay is likely to extend only a small amount of credit for a short period of time, at a high interest rate and then only to a borrower that has an established credit record. Security tends to enhance access to credit at lower cost and for a longer duration because of the additional protection it offers financiers against the risk of default in payment. Indeed, many consumers and small and medium-sized businesses are unable to access credit at all unless they have assets to offer as security (see introduction to the *Guide*, paras. 1-11).

#### **D. Possessory and non-possessory security rights**

20. Legal systems have long recognized security rights in the form of the classic possessory pledge in which the grantor delivers physical possession of the encumbered asset to the secured creditor (see the *Guide*, chap. I, paras. 51-59). The requirement for delivery of physical possession means that the secured creditor can be confident that the grantor has not already encumbered the asset in favour of another creditor and enables the secured creditor to guard against damage to or deterioration in the value of the asset. Dispossession of the grantor also alerts potential buyers and other competing claimants that the grantor no longer has unencumbered title to the asset.

21. However, possessory pledges are possible only if the asset is capable of physical possession. This excludes many types of movable asset, including future assets (that is, assets acquired by the grantor or produced after the creation of a security right; see the *Guide*, chap. I, para. 8), as well as intangible assets, such as receivables and intellectual property rights. Giving up possession may defeat the purpose of the financing. An enterprise needs to retain possession of its equipment, inventory and other business assets in order to generate the income to pay the secured obligation. Similarly, postponement of delivery of tangible assets purchased on secured credit terms would deprive consumers of the present benefit of use and enjoyment of the assets. Even when delivery of possession is feasible, the secured creditor normally will not be in a position or wish to store, maintain and insure bulky assets (for a discussion of the advantages and disadvantages of possessory pledges, see the *Guide*, chap. I, paras. 51-59).

22. In view of the limitations of possessory security, modern secured transactions laws generally permit security to be granted without the need for a delivery of physical possession of the encumbered asset to the secured creditor. A legal regime that recognizes non-possessory security rights tends to increase access to credit by expanding the range of assets that a business can offer as security. An enterprise can encumber its intangible assets in addition to its tangible assets, and its future assets (most significantly, its receivables and its inventory) in addition to its present assets. This is the approach recommended in the *Guide* (for assets that may be subject to a security right, see recommendations 2 and 17; in particular for security rights in all assets of a grantor, see the *Guide*, chap. II, paras. 61-70). Non-possessory security also enhances consumer access to credit since it enables the consumer to take immediate possession of assets purchased with a loan or credit facility.

## **E. A registry as a way to address legal risks of non-possessory security rights**

23. It is inherent in the economic concept of a security right as a property right that the secured creditor has the right in the event of the grantor's default to claim the value of the encumbered asset in preference to the claims of competing claimants (see the terms "security right", "competing claimant" and "priority" in the introduction to the *Guide*, sect. B). However, the recognition of non-possessory security rights poses information challenges for third parties. It is important for potential buyers or secured creditors to be aware of whether assets in a person's possession are subject to a prior security right. It is equally important for unsecured creditors and the grantor's insolvency representative to be able to determine which of the grantor's assets are already encumbered and therefore potentially not available to satisfy their claims. In the face of these information challenges, legal systems may be reluctant to permit the holder of a non-possessory security right to pursue its security right against competing claimants that acquire a right in the encumbered asset without an opportunity to become aware of the existence of the security right. On the other hand, the value of a security right to a creditor is diminished or eliminated to the extent that rules protecting third parties enable them to take their rights in the encumbered assets free of any pre-existing security right.

24. The establishment of a security rights registry enables States to resolve the "information" problem posed by non-possessory security rights in a manner that protects the rights of both secured creditors and third parties. If registration is made a condition of the effectiveness of a security right against competing claimants, third parties can protect themselves by searching the registry in advance of dealing with the grantor's assets. Priority rules based on time of registration then work to assure secured creditors that, if they register in time, their security rights will be effective against subsequent competing claimants. The legislative framework for secured transactions recommended in the *Guide* generally provides such temporal priority rules, subject only to a small number of exceptions.

25. To achieve these benefits, the establishment of a general security rights registry must follow a supportive legal framework along the lines recommended in the *Guide*. In particular, the secured transactions law under which the registry is established will need to incorporate the three basic rules of a registry-based secured transactions law such as the one recommended in the *Guide*. First, registration must be a generally available mechanism to achieve the effectiveness of a non-possessory security right against third parties (see recommendations 29 and 32). Second, in the event of the grantor's default, the holder of a security right that became effective against third parties must be entitled as against competing claimants to enforce its security right and apply the value of the encumbered asset to the outstanding part of the secured obligation (see the term "priority" in the introduction to the *Guide*, sect. B, and recommendations 142 and 152). Third, priority among security rights in the same asset that became effective against third parties by registration must be generally determined by the order of registration (see recommendation 76, subpara. (a)). Although these rules represent the baseline rules, a modern secured transactions law along the lines recommended in the *Guide* will invariably recognize some qualifications in the interest of facilitating other policy objectives. The next section offers some typical examples.

## **F. Exceptions to registration-based third-party effectiveness and priority rules**

### **1. Possessory security rights**

26. Although most secured transactions involve non-possessory security rights, the possessory pledge is still commonly used for certain types of asset, such as luxury non-intermediated personal items, negotiable instruments, negotiable documents and certificated securities. States that have implemented a registry system almost invariably permit taking actual possession as an alternative to registration as a means of achieving third-party effectiveness of a security right in assets capable of physical possession (not non-actual possession described by terms such as constructive, fictive, deemed or symbolic possession; see the term “possession” in the introduction to the *Guide*, sect. B). This is the approach recommended in the *Guide* (see recommendation 37). The dispossession of the grantor is considered to be sufficient practical notice to third parties that the grantor’s title is unlikely to be unencumbered. In the event a possessory security right comes into competition with a security right made effective against third parties by registration, priority is generally determined by the respective order of registration or delivery of possession (see recommendation 76, subpara. (c)). However, with respect to certain types of asset, such as negotiable instruments, negotiable documents or certificated non-intermediated securities, a security right made effective against third parties by possession has priority even over a previously registered security right (see recommendations 101 and 109).

### **2. Acquisition financing**

27. A first-to-register priority rule means that a security right in the future assets of an enterprise (that is, assets that are acquired or come into existence after the security right is created), a notice of which is registered, will have priority over security rights in the same assets (that is, assets that fall within the description of the encumbered assets in the first registered notice), a notice of which is registered later. This is reasonable, as a general rule, since the subsequent secured creditor could and should have protected itself by searching the registry before extending credit. However, secured transactions laws often recognize that there should be an exception to this priority rule where the subsequent secured creditor is financing the grantor’s acquisition of tangible assets (for example, consumer goods, equipment or inventory) or intellectual property. As these new assets would not have formed part of the grantor’s asset base but for the new financing, it is considered fair that the acquisition financier (the later-registered secured creditor) should have priority with respect to the value of those assets over of the earlier-registered creditor. Giving priority to acquisition security rights (including retention-of-title rights and financial lease rights, in the context of the unitary approach to acquisition financing; see the term “acquisition security right” in the introduction to the *Guide*, sect. B) also benefits the grantor by giving it access to diversified sources of secured credit to finance new acquisitions (see the *Guide*, chap. IX). To preserve its special priority status, the acquisition secured creditor is generally required to register a notice in a timely fashion following delivery of the asset to the grantor and may also be required to notify the earlier registered secured creditor where the assets constitute inventory in the hands of the grantor; acquisition security rights in

consumer goods, however, may be excepted from the requirement for registration. This is the approach recommended in the *Guide* (see recommendation 180). The same approach is also recommended by the *Guide* for systems that treat acquisition financing in the form retention-of-title rights and financial lease rights as distinct from security rights (see paras. 38 and 39 below).

### **3. Ordinary-course-of-business transactions**

28. In many States, a buyer that acquires an encumbered asset without actual knowledge that it is subject to a security right (“a good faith buyer”) takes the asset free of a security right. Under this approach, a potential buyer is not only under no obligation to search the registry to determine whether the asset in which it is interested is subject to a security right, but also has a positive incentive not to search. This level of protection is incompatible with the goal of a comprehensive registry system aimed at facilitating publicity of security rights and establishing clear and objective rules for resolving contests between competing claimants. Consequently, secured transactions regimes that have established a general security rights registry typically enable a secured creditor that has registered a notice of its security right to follow the asset into the hands of a buyer from the grantor regardless of whether the buyer has actual knowledge of the registered security right. This is the approach recommended in the *Guide* (see recommendation 79).

29. However, the secured creditor’s general right to enforce its security right against an encumbered asset in the hands of a buyer is subject to an important qualification. Secured transactions laws almost invariably provide that a buyer that purchases a tangible asset in the ordinary course of the grantor’s business acquires the asset free of any security right in it, whether a notice about it is registered or not. This is also the approach recommended in the *Guide* (see recommendation 81). The ordinary-course-of-business exception typically protects a buyer even when the buyer has actual knowledge of the existence of a security right that became effective against third parties by registration. It is only if the buyer additionally knows that the sale violates the rights of the secured creditor under the security agreement that the buyer’s title will be subject to the security right.

30. This approach is consistent with the reasonable commercial expectations of both the grantor and the secured creditor. It is not realistic to expect buyers dealing with a commercial enterprise which routinely sells the type of asset in which the buyer is interested, for example, computer equipment, to check the registry before entering into the transaction. Moreover, a secured creditor that takes a security right in a grantor’s inventory will normally have done so on the understanding that the grantor may dispose of the inventory free of the security right in the ordinary course of the grantor’s business. After all, for the grantor to be able to generate the revenue necessary to pay back the secured loan, the law must assure its customers that they will acquire unencumbered title in any inventory sold to them.

### **4. Money, negotiable instruments and negotiable documents**

31. Secured transactions laws typically extend similar protection to transferees and competing secured creditors to whom money is paid or in whose favour negotiable documents (such as a bill of lading) or negotiable instruments (such as a cheque) are negotiated. This is the approach recommended in the *Guide* (see recommendations 101, 102, 108 and 109). Here, the policy of preserving the free



negotiability of these types of asset in the market place is considered to outweigh the risk to the priority position of the registered secured creditor.

## **5. Bank accounts and securities**

32. In the interest of facilitating transactions by large financial institutions in the securities lending, repurchase and derivatives markets, legal systems sometimes create exceptions to registration-based priority rules for security rights in bank accounts and in, at least, certain types of securities (although it should be noted that securities and payment rights arising under or from financial contracts and foreign exchange contracts are excluded from the scope of the *Guide*; see recommendation 4, subparas. (c)-(e)). In these systems, secured creditors typically have the option of taking “control” of the bank account or securities in lieu of registration; and secured creditors with “control” have priority even over earlier-registered security rights. This is the approach recommended in the *Guide* (with respect to bank accounts, see the term “control” in the introduction to the *Guide*, sect. B, and recommendation 103).

## **6. Assets subject to specialized registration**

33. Other exceptions to the first-to-register priority rule may be based on a State’s decision to retain existing well-functioning alternatives to registration in the general security rights registry. Some States, for example, have adopted a system for noting security rights on the title certificates for motor vehicles. A State may give priority to a security right noted on a title certificate as against a security right registered in the general security rights registry and may also require a notation on the title certificate for the secured creditor to prevail against a subsequent transferee. This is the approach recommended in the *Guide* (see recommendations 77 and 78).

34. In addition, some States already have in place specialized registries for recording rights, including security rights, in specific types of movable asset, notably, ships, aircraft and intellectual property. To the extent that these registries may serve broader goals than simply publicizing security rights in the relevant assets (for example, also recording ownership or transfers of ownership), a State may decide to give priority to security rights registered in a specialized registry as against a security right registered in the general registry; a State may also require registration in the specialized registry for the secured creditor to prevail against a subsequent transferee. This approach is recommended in the *Guide* (see recommendations 77 and 78).

35. Finally, States that are parties to international treaties, such as the Convention on International Interests in Mobile Equipment and its Protocols require registration in the international registry for security and other rights in the types of asset to which these treaties apply (for example, aircraft frames and engines, railway rolling stock and space assets).

## **7. Other exceptions**

36. The extent to which other exceptions are recognized depends on the particular social and economic context of each State. Some States, for example, protect buyers of relatively low-value consumer assets, whether or not purchased in the ordinary

course of the seller's business. In those States, the theory is that it is unrealistic to expect them to undertake a registry search in advance of the transaction.

## **G. Transactional scope of the registry**

### **1. General approach: substance over form**

37. Subject to the exceptions already noted, an efficient and effective registration-based secured transactions regime should be comprehensive in scope, covering all transactions that in substance operate as security regardless of the form of the transaction, the type of encumbered asset, the nature of the secured obligation or the status of the parties. This is the approach recommended in the *Guide* (see recommendation 2). So, for example, if a debtor transfers title to an asset to a creditor under a "sale", but retains possession on the understanding that title may be redeemed on payment of the outstanding obligation, the sale should, in principle, be regulated by the same registration and priority rules that apply to nominal security rights. This approach is necessary to avoid undermining the benefits of risk reduction and efficient priority ordering resulting from the establishment of a general security rights registry.

### **2. Title retention security devices**

38. In some States transactions in which a creditor retains title to an asset for the purpose of securing payment of its acquisition price by the debtor are treated in the same way as secured transactions for the limited purposes of secured transactions law and title-retention rights or financial lease rights are subsumed under the concept of "security right" and brought within the scope of the general security rights registry. This is the unitary approach to acquisition financing recommended in the *Guide* (recommendation 178). In other States, retention-of-title devices are treated as conceptually distinct from security rights granted in assets already owned by the grantor. However, even in these States, it is generally recognized that title retention security devices raise the same publicity concerns as traditional security rights. In the absence of a registration requirement, a third party would have no means of objectively verifying whether assets in a person's possession may in fact be subject to the ownership rights of a seller or lessor. Consequently, these States often also bring retention-of-title devices within the scope of the general security rights registry, while retaining the different terminology. This is the non-unitary approach recommended in the *Guide* (see recommendations 187). Both the unitary and the non-unitary approach to acquisition financing recommended in the *Guide* follow the "substance over form" approach.

39. The seller's or lessor's acquisition security right ensures that its rights in the asset are protected from the reach of a previously registered security right granted by the buyer or lessee in future assets of the same kind. In systems that adopt the unitary approach to acquisition financing recommended in the *Guide*, the seller or lessor is entitled to repossess the asset on the default of the buyer or lessee and satisfy the secured obligation (the purchase price) from the proceeds of the disposition of the asset in preference to any non-acquisition secured or other creditor. In systems that adopt the non-unitary approach of the *Guide*, the seller or lessor may repossess the asset on the default of the buyer or lessee free of any claim

by the earlier registered secured creditor. This result is appropriate for the same reasons that justify an exception to the first-to-register priority rule for the holders of acquisition security rights (see recommendation 180 and para. 25. above). First, the grantor acquired the asset as a result of the seller or lessor's extension of credit, not the credit extended by the earlier registered secured creditor. Second, giving priority to an earlier registered security right would discourage access to sales and lease financing. Consequently, a secured transactions regime generally protects the seller or lessor against competing claimants provided registration of a notice has been made in a timely fashion (see recommendations 192-194).

### **3. Outright assignments of receivables**

40. An outright assignment of a receivable creates the same problem of information inadequacy for third parties as a non-possessory security right. A potential secured creditor or assignee has no efficient means of verifying whether the receivables owed to a business have already been assigned. While inquiries could be made of the debtors of the receivables, this is not practically feasible where the transaction covers present and future receivables generally. To address this concern, secured transactions laws often extend the registration requirements applicable to non-possessory security rights to outright assignments of receivables, with priority among successive assignees or secured creditors of the same receivables determined by the order of registration. Other outright transfers, such as ordinary sales, are not made subject to registration, since, unlike outright assignments of receivables, they do not perform a financing function.

41. Bringing outright assignments of receivables within the scope of the registry does not mean that these transactions are re-characterized as secured transactions. It merely ensures that an outright assignee of receivables is subject to the same rules relating to creation, third-party effectiveness, and priority (but generally not enforcement) as the holder of a security right in receivables. It also means that the outright assignee has the same rights and obligations vis-à-vis the debtor of the receivable as a secured creditor. This is the approach recommended in the *Guide* (see chap. I, paras. 25-31, and recommendations 3 and 167).

### **4. Other types of transaction**

#### **(a) True leases and consignment sales**

42. True long-term leases and consignment sales of movable assets do not operate to secure the acquisition price of assets. However, they create analogous publicity problems for third parties since they necessarily involve a separation of a property right (the ownership of the lessor or consignor) from actual possession (which is with the lessee or consignee). To address this concern, some States expand the scope of the registration and priority regime applicable to acquisition security rights and retention-of-title devices, to these types of transaction. This approach also allows the lessor or consignor to register so as to protect themselves against the risk that a court may find that a transaction that appeared to be a true lease or a true consignment was actually a secured transaction and thus ineffective if a notice with respect to it was not registered. The *Guide*, however, does not recommend this approach.

**(b) Statutory rights**

43. A registry of security rights in movable assets is designed primarily to accommodate the registration of a security right created by agreement of the parties. However, in some States, a right that may amount to a security right or give equivalent protection created by operation of law may also be registered. Such rights include, for example, rights of a State in the assets of a taxpayer for unpaid taxes (see the *Guide*, chap. V, paras. 90-109). In those States, the same registration and priority rules that apply to security rights apply to preferential rights created by operation of law.

44. However, the *Guide* does not recommend this approach. It treats statutory claims as preferential claims that should be limited both in type and amount (see recommendation 83). As a result, a creditor holding such a right does not need to register, the first-to-register priority rule does not apply and third parties should be aware of this risk and investigate accordingly.

**H. Territorial scope of the registry**

45. Registry users require clear guidance on where a notice of a security right must be registered in situations where the transaction involves parties and assets located in different States. Typically, this guidance is found in a State's conflict-of-laws rules for determining the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right. Under the approach adopted in modern conflict-of-laws regimes such as the one recommended in the *Guide*, the applicable law depends on the nature of the assets. For security rights in tangible assets, the law of the State in which the encumbered asset is located applies (see recommendation 203). Where the encumbered assets are located in multiple States, the law of each such State applies. If these States have registries, multiple registrations will be necessary. For security rights in intangible assets, as well as mobile goods of a kind that are commonly used in multiple States, the law of the State in which the grantor is located applies (see recommendations 204 and 208).

46. However, different conflict-of-laws rules apply to security rights in certain types of asset, such as receivables arising from a transaction relating to immovable property, rights to payment of funds credited to bank accounts, rights to receive the proceeds under an independent undertaking, intellectual property rights and proceeds (see recommendations 209-215 and 248). For example, where the encumbered asset is intellectual property the applicable law is primarily the law of the State in which the intellectual property is protected, although a security right may also be created and made effective against the grantor's insolvency representative and judgement creditors, and may be enforced only, under the law of the State in which the grantor is located (see *Supplement on Security Rights in Intellectual Property*, recommendation 248).

**I. Effect of actual or imputed knowledge of an unregistered security right on third-party effectiveness and priority**

47. In States that lack a general security rights registry, the law often provides that a third party that acquires an encumbered asset without actual or imputed

knowledge that the asset is subject to a security right takes the asset free of that security right. In States that have implemented a general security rights registry of the kind contemplated by the *Guide* actual or imputed knowledge of the existence of a security right is not a substitute for registration and the acquisition of an encumbered asset with knowledge of the existence of an unregistered security right does not constitute bad faith. This approach enables third parties to place full confidence in the registry system to determine whether or not they are bound by any security rights the grantor may have given in its assets. It is not unfair to secured creditors since they could have protected themselves by timely registration.

## **J. Registration and insolvency**

48. Modern secured transactions and insolvency laws generally make registration a pre-condition to the effectiveness of a security right against the grantor's unsecured judgement creditors and insolvency representative. This is the approach recommended in the *Guide* (see recommendations 238 and 239) in line with the UNCITRAL Legislative Guide on Insolvency Law. Failure to register a notice or otherwise make a security right effective against third parties, at all or in time, means that the secured creditor is effectively demoted to the status of an unsecured creditor as against competing claimants, including the grantor's judgement creditors and insolvency representative.

49. This rule:

- (a) Encourages prompt registration by secured creditors;
- (b) Enables the grantor's insolvency representative to determine efficiently which of the grantor's assets are encumbered;
- (c) Enables judgement creditors to determine at any given time the extent to which the grantor's assets are encumbered, thereby enabling them to determine whether it is worthwhile to commence judgement enforcement proceedings; and
- (d) Enables potential creditors to determine the possible extent of secured indebtedness of their potential debtors at any given time, knowledge that may contribute to their overall assessment of creditworthiness of a potential debtor.

50. Timely registration does not, however, protect a secured creditor from challenges on the basis of general insolvency law policies, such as rules avoiding preferential or fraudulent transfers and rules giving priority to certain protected classes of creditors (see the *Guide*, chap. XII, and recommendation 239; see also recommendations 88 and 188 of the UNCITRAL Legislative Guide on Insolvency Law).

51. In addition, modern secured transactions and insolvency laws generally allow the secured creditor to take an action to continue, preserve or maintain the effectiveness of the security right against third parties even after the commencement of insolvency proceedings (see recommendation 238). Accordingly, the secured creditor should be able to extend the effectiveness of the registration that would otherwise expire during the insolvency proceedings by registering the relevant notice of amendment.

52. Moreover, modern insolvency laws generally authorize the insolvent grantor to create a security right to obtain post-commencement finance (see recommendation 65 of the UNCITRAL Legislative Guide on Insolvency Law). Such post-commencement finance does not have priority over existing secured creditor(s) unless agreed to by the existing secured creditor(s) or authorized by the court with the appropriate protections for the secured creditor. When post-commencement finance is provided, the notice of registration must identify the grantor appropriately depending on the type of insolvent person (see A/CN.9/WG.VI/WP.46/Add.1, para. 23).

## **K. Registration and creation of a security right**

53. Under the secured transactions regime recommended in the *Guide*, registration is not an element of the creation of a security right (see recommendation 33). Rather the security right takes effect and becomes enforceable between the grantor and the secured creditor as soon as a security agreement that meets minimal formalities such as writing and evidence of the grantor's consent to encumber its assets is concluded (see recommendations 13-15). Registration is purely a precondition to the third-party effectiveness of the security right. In addition, as explained in detail below, what is registered is not the security agreement itself but rather only basic information provided in a notice with respect to a potential security right (see recommendation 32 and paras. 65-69 below). The registration does not constitute evidence that the security right to which it refers actually exists. It is the off-record security agreement that evidences the security right. Registration merely alerts third-party searchers of the possible existence of a security right in the described assets.

## **L. Registration and enforcement**

54. Some legal regimes require secured creditors to register a notice of the initiation of enforcement action. In those regimes, usually the registry is required to notify earlier registered secured creditors that hold a security right in the same asset of the pending enforcement action. The *Guide* does not recommend imposing an obligation on the secured creditor to register notice of pending enforcement action. The *Guide* rather recommends a different approach in the sense that the enforcing secured creditor is required to search the registry and to notify interested third parties (including competing claimants) of the particular enforcement remedy that it seeks to exercise (see recommendation 151).

## **M. Consequences of the failure to register**

55. The *Guide* does not require that a secured creditor register a notice of its security right and thus does not recommend the imposition of monetary penalties or other administrative or other sanctions on secured creditors for failing to do so. The only adverse consequence of a failure of a secured creditor to register a notice of its security right is that the security right will not be effective against certain third parties as described in the *Guide*.

## **N. Coordination of the security rights registry and specialized movable property registries**

56. Where specialized registries exist and permit the registration of security rights in movable assets with third-party effects (as is the case with the international registries under the Convention on International Interests in Mobile Equipment and its Protocols), modern secured transactions and registry regimes deal with matters related to the coordination of registrations in the two types of registry. The *Guide* and the *Supplement on Security Rights in Intellectual Property* discuss coordination of registries in some detail (see the *Guide*, chap. III, paras. 75-82, chap. IV, para. 117; see also the Supplement, paras. 135-140, and the Supplement, paras. 135-140).

57. For example, the *Guide* provides that a security right in an asset subject to specialized registration may be made effective against third parties by registration in the general security rights registry or in the specialized registry and addresses the issue of coordination between the two types of registry through appropriate priority rules, giving priority to a security right, a notice of which is registered in the relevant specialized registry, over a security right in the same asset, a notice of which is registered in the general security rights registry (see recommendations 43 and 77, subpara. (a)).

58. The *Guide* also discusses other ways of coordination of registries, including the automatic forwarding of information registered in one registry to another registry and the implementation of common gateways to the various registries to the relevant registries. This approach raises complexities with respect to the design of the general security rights registry where the specialized registry organizes registrations by reference to the asset as opposed to the grantor based indexing system used in the general security rights registry (see the *Guide*, chap. III, paras. 77-81; see also paras. 70-72 below).

## **O. Coordination of the security rights registry and immovable property registries**

59. Immovable property registries exist in most, if not in all, States. In most States, the general security rights registry is separate from the immovable property registry owing to differences in the requirements for the description of the encumbered asset and indexing structures (see further, paras. 70-72 below) as well as to the legal effects of registration as against third parties.

60. However, a State implementing a general security rights registry will need to provide guidance on where notices relating to security rights in attachments to immovable property should be registered. Modern secured transactions regimes along the lines recommended in the *Guide* provide that such registrations may be made either in the general security rights registry or in the immovable property registry (see recommendation 43). The choice between the two types of registration has priority consequences. The *Guide* recommends that an encumbrance registered in the immovable property registry has priority over a security right a notice with respect to which registered only in the security rights registry (see recommendation 87). The *Guide* also recommends that the security right will be

ineffective against a buyer or other third party that acquires a right in the immovable property unless a notice with respect to the security right is registered in the immovable property registry in advance of the sale (see recommendation 88).

61. It should also be noted that the asset description requirements as to notices relating to security rights in attachments to immovable property may differ depending on whether the notice is to be registered in the general security rights registry or in the immovable property registry. The *Guide* requires that an attachment to immovable property be described in a manner that reasonably allows its identification (see recommendation 57, subpara. (b)). A description of the tangible asset that is or will be attached without a description of the immovable property is sufficient for the purposes of indexing such notice in the general security rights registry. In contrast, indexing of such notice in the immovable property registry will generally require that the immovable property to which the tangible asset is or will be attached be described sufficiently under the law of immovable property. Such description must be sufficient to allow the indexing of the notice in the immovable property registry.

### **III. Key characteristics of an effective security rights registry**

#### **A. Introduction**

62. Most States have established registries for recording title and encumbrances on title with respect to transactions involving immovable property as well as certain types of high-value movable asset, such as ships and aircraft. It is essential to the successful implementation of an effective security rights registry that its very different characteristics be well understood by those responsible for its design and operation, as well as by its potential clientele. Accordingly, this chapter explains the key characteristics of an efficient and effective security rights registry (the detailed legal rules and design considerations necessary to implement these key characteristics are addressed in subsequent chapters).

#### **B. Determining title to encumbered assets**

63. A title registry, such as the typical land, aircraft or ship registry, operates to disclose both the current owner of a particular asset and any encumbrances on the owner's title. However, it would not be administratively practical or cost effective to attempt to establish a reliable ownership record for the great bulk of tangible and intangible movable assets that are commonly made the subject of security rights. Consequently, a general security rights registry for movable assets of the kind contemplated by the *Guide* does not record the existence or transfer of title to the encumbered asset described in the registration or guarantee that the person named as grantor in the registration is the true owner. It is purely and simply a record of potentially existing security rights on whatever property right the grantor has or may acquire in the assets described in the registration as a result of off-record transactions or events.

64. As explained earlier, the *Guide* recommends that retention of title under sale or financial lease agreement be made subject to the general security rights



registration regime even in States that do not treat this type of transaction as giving rise a security right (see paras. 38 and 39 above). Similarly, the *Guide* recommends that the title acquired by an outright assignee of a receivable be subject to the general security rights registration regime (see paras. 40 and 41 above). Also as noted earlier (see para. 42 above), while this is recommended by the *Guide*, some States extend the general security rights registration regime to true long-term leases and commercial consignments. In addition, some States that have not extended the scope of their security rights regimes to cover true leases and commercial consignments, precautionary registrations may be made with respect to such transactions as a protective measure against the possibility that a court may find that what appeared to be a true lease or a commercial consignment was actually a secured transaction (see para. 42 above). In these types of transaction, the registration refers not to a security right but to the ownership right of the assignee, retention-of-title seller, lessor or consignor. However, registration even in these cases does not establish or evidence ownership; it merely provides notice that the assignee, retention-of-title seller, lessor or consignor may hold title to the described assets. Whether these parties hold title or not depends on off-record evidence of the transactions or events under which title is claimed.

### C. Notice versus document registration

65. Registry systems for recording title and encumbrances on title to specific parcels of land or specific movable assets, such as ships, typically require registrants to file or tender for scrutiny the underlying documentation. This is because registration generally is considered to constitute evidence or at least presumptive evidence of title and any property rights affecting title.

66. In some States, security rights registries still require submission of the underlying security documentation. However, in line with modern secured transactions regimes, the *Guide* recommends notice registration (see recommendations 54, subpara. (b), and 57). A notice-registration system does not require the actual security documentation to be registered or even tendered for scrutiny by registry staff. All that need be registered is the basic information necessary to alert a searcher that a security right may exist in the assets described in the notice. It follows that registration does not mean that the security right to which the notice refers necessarily exists; only that one may exist at the time of registration or later.

67. The *Guide* recommends notice registration rather than document registration because notice registration requires significantly less information to be transmitted to the registry and thus:

- (a) Reduces transaction costs for both registrants (as they would not need to register all the security documentation) and third-party searchers (they would not need to peruse voluminous documentation that might be on record or hire special service providers to produce an assessment of the grantor's assets as reflected on public record);

- (b) Reduces the administrative and archival burden on registry system operators;

(c) Reduces the risk of registration error (since the less information that must be submitted, the lower the risk of error); and

(d) Enhances privacy and confidentiality for secured creditors and grantors.

68. As already mentioned, in a notice registration system as the one recommended in the *Guide*, registration does not create a security right; it simply makes a security right effective against third parties if it exists at the time of registration or, in the case of advance registration, comes into existence later (see recommendations 32, 33 and 67). In addition, while a registration is not effective unless authorized by the grantor in writing (including an electronic communication; see recommendations 111 and 12), an authorization contained in the security agreement is sufficient and may be given even after registration (see recommendations 55, subpara. (d), and 71, and A/CN.9/WG.VI/WP.46/Add.1, chap. IV, sect. B). To protect a grantor from an unauthorized registration that does not give any rights to the unauthorized secured creditor but may prevent the grantor from utilizing its assets to obtain credit, the grantor is entitled to seek cancellation or amendment of a registration through a summary administrative or judicial procedure (see recommendations 55, subpara. (c), and 72, subpara. (b), and A/CN.9/WG.VI/WP.46/Add.1, chap. IV, sect. H). Any additional sanctions aimed at protecting grantors against unauthorized registrations depend on a determination made by each State as to the extent of the risk of unauthorized and fraudulent registrations relative to the cost of administering prescriptions of this nature (see the *Guide*, chap. IV, para. 20).

69. In a notice registration system like the one recommended in the *Guide*, the registry merely serves as a repository of information received by it, and the legal effect of that information is determined by the substantive rules of the secured transactions regime. Accordingly, no information submitted by registrants is subject to verification or substantive change by those administering the registry. Similarly, as discussed below, any changes in information that a registrant wishes to add to the record are submitted separately and do not have the effect of deleting information that was earlier registered. In other words, an amendment is not effected by deleting the currently registered information and replacing it with the new information. Instead, an amendment is added to the initial registration information so that the searcher is able to find and examine both the originally registered information as well as the information subsequently registered. Neither registrants nor registrars are able to replace any information from the registry record, and registry systems should be designed accordingly. Unlike standard registries, in a general security rights registry, once a registration is completed, there is no means to edit a registration and all changes must be in the form of subsequent amendment notice (see recommendation 72).

#### **D. Grantor versus asset indexing**

70. Immovable property generally has a sufficiently unique geographical identifier to enable registrations to be indexed and searched by reference to the asset. By contrast, most types of movable asset lack a sufficiently specific or unique objective identifier to support asset-based indexing. Moreover, a modern secured transactions law must accommodate the creation of an effective security right in pools of present

and future assets such as the grantor's equipment, inventory and receivables; requiring an item-by-item specific description for these types of asset would make the registration process cumbersome and prone to errors in descriptions.

71. For these reasons, information contained in notices registered in a security rights registry of the kind contemplated in the *Guide* is indexed by reference to the identifier of the grantor (the grantor's name or other identifier such as a State-issued identification number) as opposed to the asset (see the *Guide*, chap. IV, paras. 31-33 and 70, and chap. IV, sect. K). Grantor indexing greatly simplifies the process of registration. Secured creditors can register a security right in a grantor's present and future movable assets generally, or in generic categories, through a single one-time registration. This is the approach recommended in the *Guide* (see recommendation 57, subpara. (a))

72. Some security rights registration regimes provide for supplementary asset-based registration and indexing in respect of specific types of high-value asset for which reliable alpha-numerical identifiers are available and for which there is a significant re-sale market (for example, motor vehicles, trailers, mobile homes, aircraft frames and engines, railway rolling stock, boats and boat motors). Although the *Guide* does not recommend this approach, it discusses it and its rationale (see chap. IV, paras. 34-36). This approach is further discussed in chapter IV below.

## (A/CN.9/WG.VI/WP.46/Add.1) (Original: English)

**Note by the Secretariat on a draft Security Rights Registry Guide, submitted to the Working Group on Security Interests at its nineteenth session****ADDENDUM****CONTENTS**

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**IV. Rules applicable to the registration and search process****A. Introduction**

1. In the interest of legal certainty, a State establishing a security rights registry will need to implement a set of rules to regulate the registration and search process. The goal of this chapter is to identify the issues that must be addressed in these rules and provide guidelines for their treatment in line with the recommendations of the *Guide* (in particular, chapter IV).

**B. Grantor authorization for registration**

2. As already noted (see A/CN.9/WG.VI/WP.46, para. 25), under the law recommended in the *Guide*, registration of a notice in the general security rights registry is one of the methods for making the security right effective against third parties and priority among security rights made effective against third parties by such a registration is determined on the basis of the time of registration (see recommendations 32 and 76). As registration or failure to effect a registration has consequences for the third-party effectiveness and priority of a security right the secured creditor is entitled to effect a registration with respect to its security right, either directly or through a representative such as a law firm or other service

provider, provided that the necessary arrangements for access to the registry services have been made with the registry (see A/CN.9/WG.VI/WP.46/Add.2, paras. 49-52).

3. Under the approach recommended in the *Guide*, the registration of a notice with respect to a security right must be authorized by the grantor before or after registration. This requirement may be satisfied not only by a specific authorization given to the secured creditor by the grantor but also by an off-record written security agreement (see recommendation 71).

4. In contrast, some registry systems require the grantor's consent to be evidenced on the registry record itself. This requirement adds cost and time to the registration process since, to be useful, it would require reliable verification by the registry staff of the fact that the person giving consent is in fact the grantor named in the registration. Such a requirement would also add complexity to the implementation of a registry system permitting the direct entry of information into the registry record via electronic media as an alternative to the submission of a paper form (see A/CN.9/WG.VI/WP.46/Add.2, paras. 44-46).

5. Legal systems that require the grantor's authorization to appear on the registry record may be influenced by an inappropriate analogy with title registries. In a title registry, such a requirement makes sense insofar as the rights of the true owner may be lost if an unauthorized transfer is entered on the record and the person named as the new owner then proceeds to dispose of the asset. However, in a security rights registry of the kind recommended in the *Guide*, registration does not create a security right or evidence that it actually exists; it merely provides notice of the possible existence of a security right in the described assets (see recommendations 32 and 33). This is prejudicial to the person identified in the registration as the grantor only insofar as it may impede that person's ability to deal freely with the assets described in the registration until the registration is cancelled.

6. As already noted (see A/CN.9/WG.VI/WP.46, para. 68), the risk of unauthorized registrations can more efficiently be dealt with by enabling the person identified in an unauthorized registration as the grantor to quickly and inexpensively compel the cancellation or amendment of the unauthorized registration through a summary administrative or judicial procedure. This is the approach recommended in the *Guide* (see recommendations 54, subpara. (d), and 72, and A/CN.9/WG.VI/WP.46/Add.2, para. 20). To facilitate the exercise of this right of the grantor, a registrant is required to send a copy of the initial or any subsequent amendment notice to the grantor (see recommendation 55, subpara. (c)); in an electronic system, the registry may be designed so as to send this copy automatically (see A/CN.9/WG.VI/WP.46/Add.2, paras. 36-38).

7. Further protection against unauthorized registrations can be achieved by requiring potential registrants to provide some form of identification as a precondition to submitting a registration (see recommendation 55, subpara. (b)). In this way, the system has a record of the identity of the registrant (see paras. 34-36 below). Requiring registrants to identify themselves does not undermine the efficiency of the registration process as long as the registrar does not need to verify the identity of the registrant (see recommendation 54, subpara. (d)). Unlike the grantor, registrants are likely to be repeat customers. Consequently, a registrant will only need to produce identification on its initial application for access to the

registry; once it has been granted access enabling it to submit information in notices, subsequent registrations can be entered without the registrant continuously having to provide evidence of identity.

8. An additional way to minimize unauthorized registrations is to subject a person that effects an unauthorized registration to liability for any damages caused to the person identified in the registration as the grantor and to criminal or monetary penalties if it is established that the registrant made the registration in bad faith or intent to harm the interests of the grantor.

### C. Advance registration

9. As already explained (see A/CN.9/WG.VI/WP.46, paras. 65-69), in the notice registration system recommended in the *Guide*, the registrant does not register the actual security documentation. All that is registered is the basic information contained in the notice in line with the law and needed to alert a third-party searcher that a security right may exist in the described assets. This approach enables registrants to register even before the conclusion of a security agreement between the grantor and the creditor or before the creation of the security right to which the registration refers. The *Guide* recommends that advance registration be expressly permitted by law (see recommendation 67). Thus, advance registration that has been properly authorized by the grantor may not be later challenged as being ineffective because it took place before the security agreement was entered into or the security right created. Advance registration also enables a potential secured creditor (with proper authorization from the grantor) to establish its priority position against secured creditors that register or otherwise make their security rights effective against third parties at a later stage. This in turn eliminates the delay in extending credit to the grantor that would otherwise result if registration could be made only after the security agreement has been entered into. Registration by itself does not, however, ensure that the secured creditor will necessarily have priority over other classes of competing claimants. As explained in chapter II (see A/CN.9/WG.VI/WP.46, para. 53), registration does not create or evidence the creation of a security right. Consequently, until the security agreement is actually entered into and the other requirements for creation of an effective security right are satisfied, the secured creditor may be defeated by a competing claimant, such as a buyer that acquires rights in the encumbered assets in the intervening period between advance registration and the creation of the security right.

10. If the negotiations are aborted after the registration is effected and no security agreement is ever entered into between the parties, the creditworthiness of the person named as grantor in the registration may be adversely affected unless the registration is cancelled. This risk, like the risk of unauthorized registrations generally, can be controlled by: (a) requiring the secured creditor (or, in the case of an electronic registry, the registry system) to notify the grantor in a timely manner about the registration (see recommendation 55, subpara. (c)); (b) making it an obligation for the secured creditor to cancel a registration in certain cases (see recommendation 72, subpara. (a)); and (c) providing a summary procedure to enable the person identified in the registration as the grantor to compel the cancellation of the registration (see recommendations 54, subpara. (d), and 72, subparas. (b) and (c), as well as A/CN.9/WG.VI/WP.46/Add.2, paras. 15-20).

## **D. One registration for multiple security agreements**

11. In a notice registration system (in which the information in the security documentation is not entered into the registry record), there is no reason why a single registration should not be sufficient to give third-party effectiveness to, present or future, security rights arising under multiple security agreements between the same parties. Requiring a one-to-one relationship between each registration and each security agreement would generate unnecessary costs and undermine the ability of the secured creditor to flexibly respond to the grantor's evolving financing needs without having to fear a loss of the priority position it holds under the initial registration.

12. Consequently, the *Guide* recommends that the law should expressly provide that a single registration is sufficient to achieve third-party effectiveness with respect to security rights, whether they exist at the time of registration or are created later and whether they arise from one or more security agreements between the same parties (see recommendation 68). The registration continues to be effective, however, only to the extent that the registered information reflects the terms of any new or amended security agreement. For example, if a new security agreement covers new assets that were not described in the prior registration, a new registration would be needed. Otherwise third parties searching the registry would be misled into thinking that the additional assets were unencumbered.

## **E. Minimum registration information**

### **1. Grantor information**

#### **(a) General**

13. As already explained (see A/CN.9/WP.46, paras. 70-72), information contained in notices is indexed by reference to the grantor's identifier and not to the encumbered asset. In order to ensure that a search of the registry discloses all security rights that may have been granted by a person, the rules applicable to registration should make it clear that this information is an essential component of an effective registration.

14. While the grantor's address is not part of the grantor identified, it should also be required to: (a) assist in grantor identification, if necessary (for example, where the grantor's name is common); (b) enable the registrant (or, in the case of an electronic registry, the registry system) to forward copies of registered notices to the grantor; and (c) enable searchers that are not already dealing with the grantor to contact the grantor for further information. This is the approach recommended in the *Guide* (see recommendation 57, subpara. (a)).

15. Some States provide for exceptions to the requirement to include the grantor's address where personal security concerns necessitate that an individual grantor's address details not be disclosed in a publicly accessible record (although using a post office box or similar non-residential mailing address may alleviate this concern). In those States, interested parties are required to contact the secured creditor and obtain further information about the grantor, if they are not already in contact with the grantor.

16. It should be noted that, the grantor's address plays less of a role in systems in which the required grantor identifier is unique (for example, a government-issued identification number) as compared to systems in which the identifier is the grantor's name and in which a search may disclose multiple security rights granted by different grantors that share the same name (see paras. 24-26 below).

17. It is not uncommon for a person to create a security right in its assets to secure an obligation owed by a third-party debtor. Since the object of registration is to disclose the possible existence of a security right in the assets described in the registration, the rules applicable to the registration process should make it clear that the person whose identifier and address must be included in the registration is the person that owns, or has rights in, the encumbered assets, and not the debtor of the secured obligation (or a mere guarantor of the obligation owed by the debtor).

18. To provide legal certainty for registrants and third-party searchers, the applicable rules should also provide explicit guidance on what constitutes the correct grantor identifier. Otherwise, a secured creditor (that is responsible for entering the correct grantor identifier) cannot be confident that its registration will be legally effective and searchers cannot confidently rely on a search result. This is the approach recommended in the *Guide* (see recommendation 58). The next sections of the text address this issue.

**(b) Natural persons versus legal persons**

19. The general security rights registry contemplated by the *Guide* envisages that grantor information normally will be stored in a centralized and consolidated registry record (see A/CN.9/WG.VI/WP.46/Add.2, paras. 47 and 48) but that the registry system will distinguish and allow searchers to retrieve registrations depending on whether the grantor is a natural or legal person (see recommendations 59-60). This design feature recognizes that different identifier rules will be required for the two categories of grantor owing to differences in the naming conventions for each category.

20. This design feature has implications for the registration and searching process. It is critical that registry searchers understand that the registry system distinguishes between the identifier information for grantors that are natural persons and the identifier information for grantors that are legal persons. Accordingly, a search of the registry record against the identifier of a natural person will not disclose a security right registered against a grantor that is a legal person, and the converse is also true. In any case, registrants must ensure that the grantor information is entered in the field or screen designated for the category of grantor with whom they are dealing.

**(c) Grantor identifier criteria for natural persons**

21. The *Guide* recommends that, if the grantor is a natural person, the identifier of the grantor for the purposes of an effective registration is the name of the grantor as it appears in a specified official document (see recommendation 59).

22. A rule implementing this approach may specify, as the following table illustrates, examples in order to accommodate the particular circumstances of different grantors (the responsibility for entering the correct identifier of the grantor in accordance with these rules lies with the registrant):



<b>Grantor status</b>	<b>Required identifier</b>
Born in enacting State	(1) Personal identification number (2) Name on birth certificate or equivalent official document
Born in enacting State but birth not registered in enacting State	(1) Name on current passport (2) If no passport, name on other official document (e.g. driver's licence) (3) If no passport or card, name on current foreign passport from jurisdiction of habitual residence
Born in enacting State but birth name subsequently changed pursuant to change of name legislation	Name on a certificate or equivalent document (such as a marriage certificate)
Not born in enacting State but naturalized citizen of enacting State	Name on citizenship certificate
Not born in enacting State and not a citizen of enacting State	(1) Name on current passport issued by the State of which the grantor is a citizen (2) If no current foreign passport, name on birth certificate or other official document issued at grantor's birth place
None of the above	Name on any two official documents issued by the enacting State, if those names are the same (for example, a current motor vehicle operator's licence and a current government medical insurance identification card)

23. It is equally important to have clear rules specifying what components of the name as stated in the specified official document are required (for example, family name, followed by the first given name, followed by the second given name) and also to provide guidance for exceptional situations (for example, where the grantor's name consists of a single word). The name parts should be treated as individual parts and thus each name part should have its own field or screen and not concatenated into one single element.

24. In many States, many persons have common names, with the result that a search may disclose multiple grantors with the same family name and given names. The law recommended in the *Guide* provides that, in such cases, additional information, such as the birth date or an identity card number, may be used to identify the grantor. Whether the use of a government-issued personal identification number (alphanumeric or other code) is feasible and desirable depends on three principal considerations. First, whether the public policy of the enacting State permits the public disclosure of the identification numbers assigned to its citizens and residents. Second, if so, whether the system under which the numbers are issued is sufficiently universal and reliable to ensure that each natural person is assigned a unique number. Third, whether there is a documentary or other source by which third-party searchers can objectively verify whether a particular number relates to

the particular grantor in whose assets searchers are interested. If searchers must instead rely solely on the grantor's representations as to the grantor's identification number, this may not be reliable. In addition, using national identification numbers might pose problems for the grantor's unsecured creditors or the insolvency representative since the grantor may not be prepared to voluntarily provide the number to them (in such a case, unsecured creditors or insolvency representatives of the grantor would have to obtain a court order to gain access to such number); similar problems may also arise with respect to verifying the documentary source of the grantor's correct name.

25. Even if a State-issued personal identification number is used to identify a grantor, it will still be necessary to include supplementary rules for determining the correct name of the grantor along the lines set forth above in order to accommodate cases where the grantor is not a citizen or resident of the State and therefore has not been issued a personal identification number (unless a State accepts the number of the foreign passport as sufficient to identify foreign nationals).

26. Additional information to identify the grantor may also include the grantor's address but only if this information is known by the searcher. It should be noted though that, under the law recommended in the *Guide*, the grantor's address is part of the information that has to be included in a notice but not necessarily of the grantor identifier (see recommendations 57, subpara (a), and 59). In any case, there is a need for restraint in demanding supplementary information, since the more detail that is required to be included the greater the risk of registrant error and privacy concerns.

**(d) Grantor identifier criteria for legal persons**

27. To determine the correct identifier for grantors that are legal persons, the *Guide* recommends that the correct name for the purposes of an effective registration is the grantor's name as it appears in the document constituting the legal person (see recommendation 60). Virtually all States maintain a public commercial or corporate register for recording information about legal persons constituted under the law of that State including their names. Accordingly, the required identifier for registration and searching purposes should be the name as it appears on the public record. In many States, upon registration in that record, a unique and reliable registration number is assigned to each entity and used as the grantor identifier.

**(e) Other types of grantor**

28. The rules governing registration will also need to set out additional guidelines on the required grantor identifier in transactions where the grantor does not precisely fit into either the natural person or the legal person categories. The following table illustrates the types of situations that will need to be addressed, together with examples of required identifiers:

Grantor status	Required identifier
Estate of a deceased natural person	Identifier of the deceased person, determined in accordance with the rules for grantors who are natural persons, with the specification in a separate field that the grantor is an estate

Insolvency representative acting for an insolvent natural person	Identifier of the insolvent natural person, determined in accordance with the rules for grantors who are natural persons, with the specification in a separate field that the grantor is insolvent
Insolvency representative acting for an insolvent legal person	Identifier of the insolvent legal person determined in accordance with the rules for grantors who are legal persons, with the specification in a separate field that the grantor is “insolvent”
Trade union that is not a legal person	Name of the trade union as set out in its constitutive document and the identifier information for each person representing the trade union in the transaction giving rise to the registration determined in accordance with the rules for grantors who are natural persons
Trust where the document creating the trust designates the name of the trust	Name of the trust as set out in the document constituting the trust, with the specification in a separate field that the grantor is a “trust” unless the name of the trust already contains the word “trust”, and the identifier information of the trustee determined in accordance with the rules for natural persons or legal persons as the case may be
Trust where the document creating the trust does not designate the name of the trust	Identifier information of the trustee, determined in accordance with the rules for grantors who are natural persons or legal persons as the case may be, with the specification in a separate field that the grantor is a “trustee”
Participant in a legal person that is a syndicate or joint venture	Name of the syndicate or joint venture as stated in the document creating it, and the identifier information for each participant determined in accordance with the rules for grantors who are natural persons or legal persons as the case may be
Participant in a legal person other than a syndicate or joint venture	Name of the legal person as stated in the document creating it, and the identifier information of each natural person representing the legal person in the transaction to which the registration relates, determined in accordance with the rules for grantors who are natural persons
Any other organization that is not a natural or legal person not already referred to above	Name of the organization as stated in the documents of the organization, and the identifier information for each natural person representing the organization in the transaction to which the registration relates, determined in accordance with the rules for grantors who are natural persons

29. In the case of sole proprietorships, even though the business may be operated under a different business name and style than that of the proprietor, registry rules

typically require entry of the grantor's identifier in accordance with the rules applicable to grantors who are natural persons. Systems for electronic entry of information and registration forms may be designed to allow registrants to select a box with the appropriate designation instead of entering the designation in the name field of the grantor.

**(f) Grantor information and impact of error**

30. As the grantor's identifier is the search criterion for retrieving information submitted in a notice and entered in the registry record, the law recommended in the *Guide* provides guidance on whether an error in the identifier submitted by the registrant would render a registration ineffective, with the result that third-party effectiveness of the security right would not be achieved. The relevant rule makes it clear that the test should not be based on whether the error appears to be minor or trivial in the abstract, but whether it would cause the information in the registry record not to be retrieved by a search of the registry record under the correct grantor identifier (see recommendation 58). The test is an objective one; that is to say, the registration is ineffective if this test is not satisfied regardless of whether person challenging the effectiveness of the registration suffered any actual prejudice as a result of the error.

31. The law recommended in the *Guide* does not prescribe the impact of an error in grantor information that does not constitute a search criterion, for example, an error in the address of the grantor or in the grantor's birth date where this latter information is required to be entered. Guidance on this issue should be included in the regulations applicable to registration and searching. By analogy to the general test recommended by the *Guide* for errors in the entry of secured creditor information, the regulations should specify that an error in the grantor information that does not constitute a search criterion renders the registration ineffective only if it would seriously mislead a reasonable searcher (see recommendation 64). A scenario where this test might be satisfied is where the search results disclose numerous grantors all bearing the same name and the error in the entry of the supplementary information is so acute as to make it infeasible for a reasonable searcher to determine whether the relevant grantor is or is not included in the list.

32. In some registry systems that rely on electronic records, software is used that returns close matches to the correct grantor identifier (where the identifier is a name). Such systems may allow a registration to be considered effective even though the registrant has made a minor error in entering the grantor identifier. The reason for this approach is that a searcher entering the correct grantor identifier would retrieve the registration and consider it likely that the grantor whose identifier appears on the search result as an inexact match is nonetheless the relevant grantor. Whether this is the case depends on such factors as whether: (a) a reasonable searcher would be able to readily identify the correct grantor by referring to other information, such as address; (b) the list of inexact matches is so lengthy as to prevent the searcher from efficiently determining whether the grantor in which it is interested is included in the list; and (c) the rules for determining "close" matches are objective and transparent so that a searcher will be able to rely on the search result.

33. In some registry systems, the indexing and search logic in relation to the electronic record of grantors that are legal persons is programmed to ignore all

punctuation, special characters and case differences and to ignore selected words or abbreviations that do not make an identifier unique (such as articles of speech and indicia of the type of enterprise such as “company”, “partnership” “LLC” and “SA”). Where this is the case, an error in the entry of this type of information will not render the registration ineffective since the registration will still be retrieved despite the error.

## **2. Secured creditor information and impact of error**

34. The rules applicable to the registration process invariably require that the identifier of the secured creditor or the secured creditor’s representative, along with its address, be included in the notice submitted to the registry. This is the approach recommended in the *Guide* (see recommendation 57, subpara. (a))

35. The identifier rules that apply to the grantor should apply also to the secured creditor at least where the grantor’s identifier is the grantor’s name, because in a registry system where grantors are identified by personal identification numbers (alphanumeric or other code), the secured creditor should still be identified by its name. However, since the secured creditor identifier is not a search criterion, strict accuracy is not as essential to the effectiveness of the registration.

36. Consequently, under the approach recommended in the *Guide*, an error in the identifier or address of a secured creditor renders the registration ineffective only if it would seriously mislead a reasonable searcher (see recommendation 64). Still, substantial accuracy is always important, since searchers rely on the secured creditor identifier and address information in the registry record for the purposes of sending notices under the secured transactions law (such as a notice of an extrajudicial disposition of an encumbered asset; see recommendations 149-151).

## **3. Description of encumbered assets**

### **(a) General**

37. Under the law recommended in the *Guide*, a description of the assets to which the registration relates is a required component of an effective registration (see recommendation 57, subpara. (b)). In this way, the registration provides objective information to third parties dealing with the grantor’s assets (such as prospective secured creditors, buyers, judgement creditors and the insolvency representative of the grantor) and thus enables the grantor to sell or encumber (or further encumber) its assets.

38. In addition, under the law recommended in the *Guide*, a description of the encumbered assets is generally considered sufficient, for the purposes of both an effective security agreement and effective registration, as long as it reasonably identifies the encumbered assets (see recommendations 14, subpara. (d), and 63). Where the security right covers generic categories of a grantor’s assets, it may be helpful if the registration rules explicitly confirm that a reference to the relevant category is sufficient (for example, “all of the grantor’s movable assets” or “all of the grantor’s inventory and receivables”). The rules might also confirm that a generic description is assumed to cover future assets within the specified category unless expressly stated otherwise (for example, a reference to “receivables” would include both present and future receivables).

**(b) Supplementary description requirements for “serial number” assets**

39. As already explained (A/CN.9/WG.VI/WP.46, paras. 70-72), information in notices submitted to the general security rights registry contemplated by the *Guide* is generally indexed and searched by reference to the identifier of the grantor as opposed to the encumbered asset. This approach reflects two considerations. First, unlike immovable property, most categories of movable asset do not have a sufficiently unique identifier to support asset-based indexing and searching. Second, taking security in future assets and circulating pools of assets such as inventory and receivables would be administratively impractical and prohibitively expensive if the secured creditor had to continuously update its registration to add a description of each new asset acquired by the grantor. A grantor-based indexing system resolves these problems by enabling the secured creditor to make its security right effective against third parties by a single one-time registration covering security rights, whether they exist at the time of registration or are created thereafter, and whether they arise from one or more than one security agreement between the same parties (see recommendation 68).

40. As compared to asset-based indexing, however, grantor indexing has one drawback. If the grantor sells or disposes of an encumbered asset outside the ordinary course of business, the security right generally will follow the asset into the hands of the transferee (see recommendation 79). Yet the security right will not be disclosed on a search of the registry record against the identifier of the transferee, potentially prejudicing third parties that deal with the asset in the hands of the transferee and that may not be aware of the historical chain of title. Suppose, for example, that grantor B, after granting a security right in its automobile in favour of secured creditor A, sells the automobile to third party C, who in turn proposes to sell or grant security in it to fourth party D. Assuming D is unaware that C acquired the asset from the original grantor B, he or she will search the registry using only C's identifier. That search will not disclose the security right granted in favour of A because it was registered against the name of the original grantor B (on the question whether a secured creditor should be obligated to amend its registration to add the transferee as a new grantor, see A/CN.9/WG.VI/WP.46/Add.2, paras. 5 and 6).

41. In response to the “A-B-C-D” problem, some secured transactions laws provide for asset-based registration and searching in respect of specified categories of tangible asset for which unique and reliable serial numbers or equivalent alphanumeric identifiers are available. For example, the automotive industry assigns a unique alphanumeric identifier, commonly referred to as a vehicle identification number, to identify individual motor vehicles according to a system based on standards originally issued by the International Organization for Standardization (ISO). In States that have implemented this system, the relevant alphanumeric identifier is separately indexed so as to be retrievable by searchers using that identifier, rather than the name of the grantor, as the search criterion. This approach solves the A-B-C-D problem since a serial number search will disclose all security rights granted in the particular asset by any owner in the chain of title.

42. On the other hand, serial number registration and indexing limits the ability of a secured creditor to make a security right effective against third parties in the grantor's future serial number assets through a single registration in which the relevant assets are described simply in generic terms. Instead, the secured creditor

will have to effect a new registration (or amend the description of encumbered assets in its existing registration to record the serial number of each new item of serial number assets as it is acquired by the grantor). In light of this problem, serial-number registration and indexing is typically limited to tangible assets for which there is a significant resale market and which have a sufficiently high value to justify the additional legal complexity and reduced flexibility that this approach entails for secured creditors (for example, road vehicles, trailers, mobile homes, aircraft frames and engines, railway rolling stock, boats and boat motors).

43. In addition, in States that have adopted a serial number registration and indexing approach, a generic description in a registration is still sufficient to make a security right effective against third parties generally. Specific serial number registration generally is required only to preserve the secured creditor's right to follow the asset into the hands of a buyer or lessee from the original grantor. In other words, there is no need to include a specific serial number description for the purposes of achieving third-party effectiveness against other classes of competing claimants, including the grantor's secured and unsecured creditors and insolvency representative. In some States, serial number registration is also necessary for a secured creditor to retain its priority status based on the time of registration against a subsequent secured creditor that takes security in a serial number asset within the generic class covered by the prior secured creditor's registered generic description. However, even in these States, a generic description remains sufficient to achieve third-party effectiveness against the grantor's unsecured creditors and insolvency representative and to preserve priority against a subsequent secured creditor that itself did not include a specific serial number description in its registration.

44. Finally, a serial number description is generally not required where the serial number assets are held by the grantor as inventory. The A-B-C-D problem does not arise in this scenario since buyers that acquire inventory from the original grantor in the ordinary course of the grantor's business take the inventory free of the security right in any event (see recommendation 81, subpara. (a)). Moreover, a generic description of encumbered assets simply as inventory is sufficient to enable searchers to reasonably identify the encumbered assets.

45. The *Guide* discusses but does not recommend the possibility of augmenting the system for making security rights effective against third parties by registration to facilitate the identification of certain encumbered assets (such as motor vehicles) by serial numbers rather than merely by a generic description (see chap. IV, para. 31-36). If a State chooses to augment its secured transactions regime so that serial number registration would be accommodated in the general security rights registry, it must first determine the substantive rules governing serial number assets. In particular, it must provide rules that indicate whether the use of serial numbers (in the security agreement and the notice) is optional or required and, if required, the consequences of failure to use them for serial number assets. Such consequences could range from ineffectiveness of the security right between the parties (if serial number is not included in the security agreement) or ineffectiveness of the security right against third parties to third-party effectiveness but with lower priority (if serial number is not included in the notice). In addition, the registry would need to be designed so that notices have a place for the entry of serial numbers and that the indexing system can index by those serial numbers.

**(c) Description of proceeds**

46. In the event that the encumbered assets are disposed of by the grantor, the secured transactions regime contemplated by the *Guide* allows the secured creditor to claim an automatic security right in the identifiable proceeds of disposition (see recommendation 19 and the term “proceeds” in the introduction to the *Guide*, sect. B). In this case, the question arises as to whether the third-party effectiveness of the security right in the original encumbered assets automatically extends to the security right in the proceeds or whether the secured creditor needs to take additional steps to ensure that its security right in the proceeds is effective against third parties.

47. When the proceeds consist of cash proceeds (for example, money or a right to payment), the *Guide* recommends the automatic continuation of the third-party effectiveness of a prior registered security right in the original encumbered assets into the proceeds. The same is true where the proceeds are of a type that is already covered by the description of the original encumbered assets in the registered notice (for example, the description covers “all tangible assets” and the grantor trades in one item of equipment for another; see recommendation 39).

48. However, where the proceeds are not cash proceeds and are not otherwise encompassed by the description in the existing registration, the *Guide* recommends that the secured creditor amend its registration to add a description of the proceeds within a short period of time after the proceeds arise in order to preserve the third-party effectiveness and priority of its security right in the proceeds from the date of the initial registration (see recommendation 40). An amendment of the registration is necessary because a third party otherwise would not be able to identify which categories of asset in the grantor’s possession might constitute the relevant proceeds. Accordingly, the registry should be designed in such a way that allows the secured creditor in such situations to register an amendment notice to cover the type of asset represented by the proceeds.

**(d) Asset description and impact of error**

*(i) General*

49. As registrations in a general security rights registry are indexed and searched by reference to the grantor’s identifier, modern secured transactions regimes along the lines of that recommended in the *Guide* provide that a minor error in the description of the encumbered asset does not make the registration ineffective unless it would seriously mislead a reasonable searcher (see recommendation 64). In addition, under the law recommended in the *Guide*, a registrant’s failure to include an asset in the description in a registration means that the registration is ineffective only to the extent of the omitted assets and that the security right is still effective against third parties with respect to the encumbered assets that were included in the description in the registration (see recommendation 65).

50. A question may arise as to the appropriate description of the encumbered assets if a registration describes the encumbered assets as a generic category even though the security agreement concluded or contemplated by the parties covers only certain items within that category. For example, the registration may describe the encumbered assets as “all tangible assets” whereas the security agreement to which the registration is intended to relate covers only specified items of equipment. An



over-inclusive description facilitates the ability of the parties to enter into new security agreements encumbering additional assets as the grantor's financing needs evolve without the need for a new registration since the secured creditor can rely on the existing registration for both third-party effectiveness and priority purposes. In any case, the registration has to be authorized by the grantor (see recommendation 71). Otherwise, the grantor is entitled to seek an amendment of the description in the registration to accurately reflect the actual range of encumbered assets covered by the security agreement existing between the parties (see recommendations 72 and A/CN.9/WG.VI/WP.46/Add.2, paras 15-19).

(ii) *Error in the description of serial number assets*

51. In legal systems that provide for serial number registration and searching for certain serial number assets, the serial number constitutes an indexing and search criterion. Accordingly, although the law recommended in the *Guide* does not address this matter, it would appear that the rules should provide that the test for whether an error in the serial number identifier renders a registration ineffective should be the same as for an error in the grantor identifier. This means that the test should be whether the error would cause the registration not to be retrieved on a search using the correct identifier (see recommendation 58 and paras. 30-33 above).

52. Where the serial number is correctly entered in the registration, but there is an error in the grantor identifier sufficient that the registration would not be retrieved using the correct grantor identifier the question arises whether a third-party searcher should be entitled to place full confidence in either a grantor or a serial number search. The law recommended in the *Guide* does not address this matter. It would seem that, if serial number description was required and a registration could not be retrieved by a search of the registry record under the correct serial number, whether the grantor identifier was correctly entered or not, an error in the serial number entered in the registration could: (a) make the registration ineffective against third parties; or (b) make the registration effective but result in lower priority for the relevant security right. If, however, serial number indexing was optional or supplementary, an error in the serial number would not render a registration ineffective as long as the grantor identified was correctly entered (see para. 45 above).

#### **4. Duration of registration**

53. The law recommended in the *Guide* provides that an enacting State may select one of two approaches to the duration of a registration (see recommendation 69). Under the first approach, the secured transactions law must specify that all registrations are subject to a standard statutory term (for example, five years) with the obligation then being cast on the secured creditor to ensure that the registration is renewed before the expiry of that term. Under the second approach, the law must permit secured creditors to self-select the desired term of the registration. In the latter event, entry of the relevant term will be a legally essential component of an effective registration. In legal systems that adopt this second approach, it may be desirable to base registration fees on a sliding tariff related to the length of the registration life selected by the registrant in order to discourage the selection of excessive registration terms. For the same reason, it may also be desirable to allow

selection of the duration by the parties only up to a maximum temporal limit, such as, for example, 10 years (see chap. IV, para. 88).

54. In legal systems that adopt the self-selection approach, it would also be desirable to design the registry in a way that permits the secured creditor to easily select the desired term without the risk of inadvertent error, for example, by limiting the choice to whole years from the date of registration. States that adopt the self-selection approach must address the impact on the effectiveness of registration of an incorrect statement by the registrant as to the duration of the registration. The *Guide* recommends that the error should not render the registration ineffective (see recommendation 66).

55. However, this recommendation is subject to the important caveat, namely, that protection should be given to third parties that relied on the incorrect statement (see recommendation 66). This means that where the registrant enters a shorter term than it actually intended, the registration will lapse at the end of the specified term and the security right will no longer be effective against third parties, unless it was made effective prior to the lapse by some other method (see recommendation 46). While the secured creditor can re-establish third-party effectiveness, it will take effect against third parties only from that point forward (see recommendations 47 and 96). Where the secured creditor specifies a longer term than it actually intended, there appear to be no concerns with protecting third parties. If the security right referred to in the notice has in fact been extinguished (for example, by payment of the secured obligation and termination of any credit commitment), then third-party effectiveness ceases in any event. If, on the other hand, the secured obligation is still outstanding, it is difficult to see how third parties could be prejudiced by relying on the incorrect statement. The registered notice still alerts them to the possibility that a security right may exist and that they can take steps to protect themselves against that risk. As there would be nothing on the registry record to indicate that the secured creditor intended to enter a shorter term, third-party searchers would not in any way be misled by the secured creditor's error in entering a longer term. Consequently, the error in the term mentioned in the registered notice should not invalidate the registration.

## **5. Maximum amount for which the security right may be enforced**

56. Some secured transactions laws require the parties to a security agreement to include in the notice a statement of the maximum monetary amount for which the security right may be enforced. If the maximum amount specified is more than the amount of the obligation actually owed by the grantor at the time of enforcement, the secured creditor is entitled to enforce its security right only up to the amount actually owed. However, in the converse case where the specified maximum amount is less than the amount actually owed, the secured creditor can enforce its security right only up to the specified maximum amount. In effect, in this case, the secured creditor has only the rights of an unsecured creditor with respect to the difference between the amount actually owed and the maximum amount specified in the security agreement and included in the notice.

57. The aim of this approach is illustrated by the following example. An enterprise has an asset with an estimated market value of \$100,000. The enterprise applies for a revolving line of credit facility to a maximum amount of \$50,000. The creditor is willing to extend the loan on the condition that it obtains a security right in the

asset. The grantor is agreeable but since the maximum loan amount is only \$50,000 and the asset has a value of \$100,000, the grantor would like to reserve the ability to obtain another secured loan from another credit provider later by giving a security right in the same asset relying on this additional \$50,000 in value. Ordinarily, the first-to-register priority rule would deter this subsequent creditor from giving a second loan for fear that the first lender would extend later advances beyond the initial \$50,000 for which it would have priority under the general first-to-register rule. By imposing a requirement to specify the maximum value for which the first-registered security right may be enforced, the subsequent secured creditor in this example can be assured that the first-registered secured creditor cannot enforce its security right for an amount greater than \$50,000, leaving the residual value of \$50,000 available to satisfy its own claim should the grantor default.

58. Other secured transactions laws do not require that a statement of the maximum amount for which the security right may be enforced be included in the notice. This approach is based on the assumptions that: (a) the first secured creditor is either the optimal long-term financing source or will be more likely to extend financing, especially to small, start-up businesses, if it knows that it will retain its priority with respect to any financing to be provided to the grantor in the future; (b) the grantor will not have sufficient bargaining power to require the first-registered secured creditor to enter a realistic maximum amount in the registered notice (instead the secured creditor will insist that an inflated amount be included to cover all possible future extensions of credit and the grantor will not usually be in a position to refuse its consent); and (c) a subsequent creditor to whom the grantor applies for financing will be in a position to negotiate a subordination agreement with the first-registered security creditor for credit extended on the basis of the current amount of residual value in the encumbered asset. The concern with this latter approach is that it may limit the grantor's access to credit from sources other than the first secured creditor even when its assets have a residual value in excess of any credit granted or intended to be granted by the first creditor.

59. The *Guide* acknowledges that both approaches have merit and recommends that States adopt the policy that is most consistent with efficient financing practices in each State and, in particular, with the credit market assumptions that underlie each approach (see recommendation 57, subparagraph (d) and chap. IV, paras. 92-97).

60. States that adopt the requirement to specify a maximum amount in the registered notice will need to design the registry so as to address the impact of an error by the registrant in entering the amount. On this issue, in line with the approach taken in States that already have this requirement, the *Guide* recommends that an incorrect statement does not render a registered notice ineffective unless it would seriously mislead a reasonable searcher (see recommendation 64). Again, this recommendation is subject to the caveat that parties that relied on an incorrect statement of the maximum amount should be protected (see recommendation 66). Where the amount stated in the notice is greater than the maximum amount specified in the security agreement, a searcher cannot be misled since its decision to advance funds normally will be based on the amount stated in the registered notice. It should be noted that the grantor is also protected in this situation since it could

compel the secured creditor to amend the notice to correct the amount so that the grantor could obtain financing against the residual value of the encumbered asset.

61. However, where the amount stated in the notice is less than the maximum amount agreed to in the security agreement, a searcher could be seriously misled into advancing secured credit on the assumption that it could enforce its security right against any value in the asset in excess of the amount stated in the notice. Similarly, a judgement creditor might be seriously misled into taking enforcement action in the belief that the excess value of the asset above that stated in the notice would be available to satisfy its judgement claim. However, while such an error in stating the maximum amount may seriously mislead searchers as in this example, the error should not render the registration ineffective altogether. The interests of third parties are sufficiently protected by limiting the right of the secured creditor to enforce its security right as against the third party only up to the amount erroneously stated by the secured creditor in the registered notice. The law recommended in the *Guide* does not address this matter, as it would arise only if an enacting State chose to require that statement of the maximum amount be included in the notice. However, the approach just outlined would appear to be consistent with the approach recommended in the *Guide* with respect to the impact of an error in the description of the encumbered assets (see recommendations 64 and 65).

## (A/CN.9/WG.VI/WP.46/Add.2) (Original: English)

**Note by the Secretariat on a draft Security Rights Registry Guide,  
submitted to the Working Group on Security Interests  
at its nineteenth session**

**ADDENDUM**

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#### **IV. Rules applicable to the registration and search process** (*continued*)

##### **F. Effective time of registration**

1. Owing to the role that the time of registration plays in determining the comparative priority of a security right, it is essential that a date and time of registration be assigned to each notice of a security right. However, if the registry system permits the submission of notices in paper form, it will take time for the information set forth in the notice to be transposed by registry staff into the registry record. This raises the question of whether the effective date and time of registration should be assigned as soon as the paper notice is physically received by the registry or only after the information set forth in the notice is entered by registry staff into the registry record so as to be available to searchers of the registry record.

2. If the former approach is followed, there will be a time lag between the effective time of registration and the time when the information will become available to searchers of the registry record. This time lag would create a priority risk for searchers as their rights would be subordinate to rights notice of which was registered even though it was not available to searchers. To deal with this risk, search results could be assigned a “currency date” indicating that the search result is designed to disclose the state of registrations in the registry record only as of the currency date (for example, a day before the search) and not as of the real time of the search. Under this approach, a prospective secured creditor, after registering its security right, would then have to conduct a second search to make sure no intervening security rights have been registered before being confident in advancing funds. Prospective buyers and other third parties would similarly need to conduct a subsequent search before parting with value or otherwise acting in reliance on the registry record.

3. Accordingly, the better approach is for the registry system to assign the effective time of registration only after successful entry of the registration information into the registry record so as to be available to searchers. This is the approach recommended in the *Guide* (see recommendation 70). In States in which information in notices is entered into a computerized registry record (whether directly by the registrant or by the registry staff entering information submitted by the registrant in paper form), the registry software should be programmed to ensure this result (where paper registration forms are maintained in a paper record, the effective date and time manually assigned by the registry staff should similarly be concurrent with the time the information registered would be available to searchers; although increasingly all records should be electronic). It may be prudent to also assign sequential numbers to each notice to sort out priority ranking if the particular system presents any risk of registrations submitted by competing secured creditors against the same grantor being assigned the same date and time of registration. Such sequential numbers may be part of the registration number or be assigned in addition to the registration number.

4. This approach does not eliminate the time lag problem but simply shifts responsibility to the registrant that must verify that the information on the paper notice has been entered into the registry record and is searchable before it can be confident that its security right is effective against third parties. Accordingly, the registry system should be designed to enable secured creditors to themselves enter the information into the publicly available registry record using any computer facilities, whether their own, those of a service provider or those located at a branch of the registry (see further the discussion on access to the registry record in chapter V below). This approach would give secured creditors some control over the timing and efficiency with which their registrations would become effective since technological advances should virtually eliminate any time lag between submission of a notice that provides the required data and the point time at which data entered become available to searchers.

## **G. Amendment of registration**

### **1. Assignment of the secured obligation and transfer of the security right**

5. A secured creditor that has registered notice of a security right may sometimes assign the secured obligation. As a general rule in most legal systems, as an accessory right, the security right follows the obligation with the result that the assignee of the obligation in effect will be the new secured creditor. In the event of an assignment, the original secured creditor will usually not wish to have to continue to deal with requests for information from searchers and the new secured creditor will wish to ensure that it receives any notices or other communications relating to its security right.

6. Consequently, it should be permitted to update the secured creditor information in the registry record to reflect the identifier and address of the new secured creditor. However, under the approach recommended in the *Guide*, an amendment should not be required in the sense of it being necessary to preserve the effectiveness of the registration. As the identifier of the secured creditor is not a search criterion, searchers will not be materially misled by the change in the identity

of the secured creditor (see recommendation 75). In any case, the registry system may be designed so as a search result will show the information of both the original and the new secured creditor. In addition, the original secured creditor should be under an obligation to disclose the new secured creditor's identity to at least the grantor in order for the grantor to be able to obtain current information relating to the registered security right and the obligation to which it relates.

## **2. Subordination of priority**

7. Under a modern secured transactions regime along the lines of that recommended in the *Guide*, a competing claimant with priority may at any time subordinate its priority unilaterally or by agreement in favour of any other existing or future competing claimant (see recommendation 94). There is no requirement that the subordinating creditor or the beneficiary of the subordination amend the registered notice with respect to the subordinating creditor's security right to reflect this subordination. However, in some cases, a subordinating secured creditor or the beneficiary of the subordination may wish to have the record reflect the order of priority between the subordinating secured creditor and the beneficiary of the subordination. Accordingly, a State may wish to consider whether the registry should be designed so as to accommodate an amendment of the information provided in a registered notice to reflect such subordination.

## **3. Change in grantor identifier**

8. A change in the identifier of the grantor indicated in the registered notice (for example, as a result of a subsequent name change) may undermine the publicity function of registration from the perspective of third parties that deal with the grantor after the identifier has changed. After all, the grantor's identifier is the principal search criterion and, at least in the case of a new registration after the name change, a search using the grantor's new identifier will not disclose a security right registered against the old identifier. When a registration is amended, a search result may turn up both the initial registration under the previous name of the grantor and the amendment that includes the new name.

9. Accordingly, the rules regulating the registration process should permit registration of an amendment to enable the secured creditor to enter the new grantor identifier. While failure to enter an amendment should not make the security right ineffective against third parties, parties that deal with the grantor after its identifier has changed and before the amendment is registered should be protected. Accordingly, the applicable rules should provide that, if the secured creditor does not register the amendment within a short "grace period" (for example, 15 days) after the identifier has changed, its security right would be ineffective against these classes of competing claimants. This is the approach recommended in the *Guide* (see recommendation 61). Guidance should also be provided on what constitutes a change of identifier in the context, in particular, of corporate amalgamations and the effect of not making an amendment in these circumstances.

## **4. Transfer of an encumbered asset**

10. An unauthorized transfer by the grantor of an encumbered asset outside the ordinary course of business potentially gives rise to the A-B-C-D problem already discussed earlier in the text (see A/CN.9/WG.VI/WP.41/Add.1, para. 40). This is



because a search of the registry according to the transferee's identifier will not disclose a security right registered against the identifier of the grantor. Accordingly, to protect third parties that deal with the encumbered asset in the hands of the transferee, the applicable rules should permit the secured creditor to amend its registration to record the identifier and address of the transferee in the space reserved for entering grantor information.

11. The rules should also address whether and to what extent such an amendment is required to preserve the effectiveness of the security right against intervening claimants (see recommendation 62 and chap. IV, paras. 78-80). Some States adopt a rule equivalent to that applicable to a change in the identifier of the grantor (see recommendation 61, and paras. 8 and 9 above). Under this approach, failure to amend the registration to disclose the identifier of the transferee does not make the security right ineffective against third parties generally. However, if the secured creditor does not register the amendment within a short "grace period" (for example, 15 days) after the transfer, its security right is ineffective against buyers, lessees, licensees and other secured creditors that deal with the encumbered asset after the transfer and before the amendment is registered. Other States adopt a similar approach subject to the important caveat that the grace period given to the secured creditor to register the amendment begins to run only after the secured creditor acquires actual knowledge of the transfer. In still other States, such an amendment is purely optional and failure to amend does not affect the third-party effectiveness or priority of the security right (see the *Guide*, chap. IV, paras. 78-80).

## **5. Addition of new encumbered assets**

12. After the conclusion of the original security agreement, the grantor may agree to grant a security right in additional assets not already described in the registered notice. The rules should address the question of whether a new registration would be required or whether the secured creditor would be permitted to simply amend the initial registration to add a description of the newly encumbered assets. If the latter option is chosen, the rules should make it clear that the security right in the newly encumbered assets takes effect against third parties and acquires priority status only from the time of registration of the amendment. This is a necessary qualification since a search of the registry by third persons prior to registration of the amended description would not disclose that a security right has been granted in the additional assets. This is the approach recommended in the *Guide* (see recommendation 70).

## **6. Extension of the duration of a registration**

13. After a registration is made and before its duration expires, a registrant may need to extend it. The rules applicable to registration should confirm that the duration of an existing registration may be extended by way of amendment at any time before the expiry of the term of the initial registration. This is the approach recommended in the *Guide* (see recommendation 69). If a new registration were instead required, this requirement would undermine the secured creditor's original priority status and the continuity of the effectiveness of its security right against third parties.

14. As already discussed (see A/CN.9/WG.VI/WP.46/Add.1, paras. 53-55), in some States, the initial duration of the registration is established by law for a

standard period of time; and other States permit the registrant to select the appropriate duration (sometimes up to a maximum number of years). If the duration is set in the law, the rules should provide for an equivalent extension. If the law permits the registrant to select the duration of the registration, the registrant should also be permitted to select the duration of the extension period subject to any applicable maximum limit. Under this approach, a registrant who, for example, selected a five year term for the initial registration should be allowed to select three years for the duration of the extension.

#### **7. Correction of erroneous lapse or cancellation**

15. In the event that a secured creditor fails to renew a registration in a timely fashion or inadvertently registers a cancellation, the secured creditor may register a new notice of its security right. However, under the approach recommended in the *Guide*, the third-party effectiveness and priority status of the security right dates only from the time of the new registration (see recommendation 47). Accordingly, the security right will be ineffective against third parties that acquired a right in the encumbered asset in the period between the lapse or cancellation of the security right and the new registration. The secured creditor will also suffer a loss of priority as against competing secured creditors against whom it had priority, under the first-to-register rule, prior to the lapse or cancellation (see recommendation 96).

16. Some States adopt a more lenient approach. The secured creditor is given a short grace period after the lapse or cancellation to revive its registration so as to restore the third-party effectiveness and priority status of its security rights as of the date of the initial registration. However, even in States that adopt this approach, the security right is ineffective against or subordinate to competing claimants that acquired rights in the encumbered assets or advanced funds to the grantor after the lapse or cancellation and before the new registration.

### **H. Mandatory cancellation and amendment of registration**

17. A registration may not reflect, or may no longer reflect, an existing or contemplated financing relationship between the secured creditor and the grantor identified in the registration. This may happen because, after the registration, the negotiations between the parties broke down or because the financing relationship represented by the registration came to an end. In such a case, the continued presence of the information on the records of the registry will limit the ability of the person identified as grantor to sell or create a new security right in the assets described in the registration. This result is due to the fact that a prospective buyer or secured creditor will be reluctant to enter into any dealings with the grantor unless and until the existing registration is cancelled.

18. Ordinarily, the person identified as the secured creditor in a registration will be willing to register a cancellation at the request of the person identified as the grantor if it does not have or does not reasonably expect to acquire a security right in the grantor's assets. However, in the rare event that cooperation is not forthcoming, a speedy and inexpensive judicial or administrative procedure should be established to enable the grantor to compel cancellation of the registration. This is the approach recommended in the *Guide* (see recommendation 72).

19. Similar issues arise when a registration contains inaccurate information that may be prejudicial to the ability of the person identified as the grantor to deal with its assets in favour of other secured creditors or buyers; for example, the description of the encumbered assets in the registration may include items that are not in fact covered by any existing or contemplated security agreement and the grantor has not otherwise authorized such broad description. To address this situation, the procedure should also entitle the identified grantor to compel an amendment of the registration information so as to accurately reflect the actual status of the relationship between the parties.

20. Accordingly, the rules applicable should entitle a person identified as the grantor in a registration (or indeed any person with a right in the assets described in a registration) to send a written notice to the person identified as the secured creditor to cancel or amend the registration, as appropriate, in any of the following circumstances: (a) a security agreement has not been concluded; (b) the security right has been extinguished by full payment or otherwise; or (c) the grantor did not authorize the registration.

21. The person identified as the secured creditor should be obligated to comply with the request within a specified number of days, failing which the person making the demand should be entitled to request a court or other appropriate authority to order the registry to register the cancellation or amendment unless it is found that the information in the registry record correctly reflects the existing financing relationship between the parties or was authorized by the person making the demand. Whether a court or an administrative authority should be charged with the task of hearing such applications depends on the particular institutional structure of each enacting State. However, in making this choice, the enacting State should ensure that the designated authority has the capacity and expertise to deal with the application in a speedy and inexpensive fashion and procedural rules should be established to ensure that this is the case (see recommendation 72).

## **I. Voluntary cancellation or amendment of registration**

22. A secured creditor should always be in a position to amend or cancel a registration at any time, subject to appropriate authorization by the grantor. This is the approach recommended in the *Guide*, (see recommendations 71 and 73). Once a registration has been cancelled, it should no longer be available to searchers, since its continued presence on the registry record available to searchers may confuse searchers into thinking that the relevant assets are still potentially encumbered. However, the cancelled registration should be preserved by the registry archive record that is not open to the public but available for future reference, if necessary. This is the approach recommended in the *Guide* (see recommendation 74). Retrieval of the information in the archive record by the registry staff at the request of an interested party may be necessary, for example, to establish the priority of a security right at a particular point of time in the past.

## J. Entitlement to search and search results

23. Under the approach recommended in the *Guide*, to achieve its publicity objectives, the general security rights registry must be publicly accessible and a searcher should not be required to give any of the reasons for the search (see recommendation 54, subparas. (f) and (g)).

24. A search result should either indicate that no registrations were retrieved against the specified search criterion or list all registrations that match the specified search criterion along with the full details of the information as it appears in the registry record (that is, the identifier and address of the grantor and the secured creditor or its representative, the description of the encumbered asset, and, if this information is required in the particular legal system, the maximum amount of the secured obligation and the duration of the registration). This is the approach recommended in the *Guide* (see recommendations 54, subpara. (a), and 57).

25. In the name of privacy, some States require searchers to demonstrate to the satisfaction of the registry staff that they have a justifiable reason for searching the registry record. The *Guide* does not recommend this approach because the purpose of the general security rights registry is to enable third parties that are contemplating the acquisition of a right in a particular asset (by way, for example, of sale, security or judgment enforcement proceedings) or parties that otherwise require information about potential security rights in a person's assets (such as the grantor's insolvency representative) to expeditiously determine the extent to which a person's assets may already be encumbered. Requiring potential searchers to first demonstrate an interest in the grantor's assets or affairs and registry staff to make a decision thereon would gravely undermine the efficiency and functionality of the search process since it would interpose a complex and cumbersome adjudicative process into the search process. Transaction costs would also be increased to an unsustainable extent owing to the need to hire expert staff to administer and adjudicate search applications. Privacy concerns are more effectively dealt with by requiring, for example, grantor authorization of a registration and the establishment of a procedure to enable grantors to quickly and inexpensively cancel or amend unauthorized or erroneous registration information (see A/CN.9/WG.VI/WP.46/Add.1, paras. 2-8, and paras. 17-21 above).

26. However, whether the registry may request and maintain the identity of the searcher is a different matter. In some States, the registry may not disclose personal (private) information unless the registry knows the identity and nature of the searcher. The *Guide* makes such a recommendation with respect to the identity of the registrant (see recommendation 55, subpara. (b)), but does not include a similar recommendation with respect to the identity of the searcher.

## K. Search criteria

27. Since information in the registry record is indexed by reference to the grantor's identifier, the grantor's identifier should be the principal criterion by which such information is retrieved by searchers. However, a searcher should be entitled to rely on the accuracy of a search result only if the searcher used the correct grantor identifier in searching. Accordingly, the rules applicable to what

constitutes the correct grantor identifier for the purposes of registration should also apply to the search process.

28. In legal systems that provide for serial number indexing of specified types of asset, the relevant serial number constitutes an additional search criterion. However, as already discussed (see A/CN.9/WG.VI/WP.46/Add.1, para. 45), in some of these legal systems, serial number registration is mandatory for the purposes of third-party effectiveness and priority only as against certain classes of competing claimants. Consequently, the rules applicable to the search process should make it clear that a searcher is entitled to rely on a serial number search only to the extent that the particular searcher falls within the category of competing claimants for which entry of the specific serial number in the registration is required.

29. The registry system should also be designed to allow that registrations may be searched and retrieved by reference to a registration number assigned by the registry to each registration, initial, amendment, cancellation or other. While not generally useful to third parties as a search criterion, registration numbers would give secured creditors an alternative search criterion to quickly and efficiently retrieve a registration for the purposes of entering an amendment or cancellation.

30. The registry system should also be designed so as to ensure that information could be retrieved also according to the identifier of the secured creditor. This would enable registry staff, at the request of the person identified in the registration as the secured creditor, to efficiently amend the identifier or address information in multiple registrations associated with that secured creditor through a single global amendment.

31. However, the identifier of the secured creditor should not be available as a search criterion for searching by the public generally. The identifier of the secured creditor has limited relevance to the legal objectives of the registry system (see recommendation 64). Moreover, to allow public searching may violate the reasonable privacy expectations of secured creditors; for example, because of the risk that a credit provider may undertake a search based on the secured creditor identifier to obtain the client lists of its competitors (see the *Guide*, chap. IV, para. 81).

## **L. Language of registration and searching**

32. The rules applicable to registration should clarify that information must be entered in the official language or languages of the State under whose authority the registry is maintained. Searchers must enter and search results will display information in the language in which the information was entered in the registry record (see the *Guide*, chap. IV, paras. 44-46). Where the grantor's name is the relevant identifier and the correct name is in a language other than that used by the registry, the rules should clarify how the characters and any accents on characters that form the name are to be adjusted or translated to conform to the language of the registry.

33. The law under which a grantor that is a legal person is constituted may entitle the grantor to have and use alternative linguistic versions of its name. To accommodate that possibility, the rules applicable to registration should confirm

that all linguistic versions of the name must be entered as separate grantor identifiers since third-party searchers may be dealing or have dealt with the grantor under any of the alternative versions of its name.

#### **M. Copy of registration, amendment or cancellation notice**

34. Verification that information in a notice that has been successfully entered into the registry record is essential to the third-party effectiveness of a security right. Consequently, the registry should be obligated to send a copy of the registered information to the secured creditor at the postal or electronic address that appears in the registration information. Where the registrant was not the secured creditor but a representative of the secured creditor, the copy should be sent to both the registrant and the secured creditor. This is the approach recommended in the *Guide* (see recommendation 55, subpara. (d)). In an electronic context, the registry should be designed so as to return an acknowledgement in real time without any additional notification except to the registrant.

35. The registry should also be obligated to forward a copy of any subsequent amendment to or cancellation of a registration to the registrant and secured creditor. This is important to enable the secured creditor to take prompt steps to protect its position in the event that the cancellation or amendment was erroneous. This is the approach recommended in the *Guide* (see recommendation 55, subpara. (d)). Again, this may be relevant only in a paper context and not very practical if postal systems are not reliable. In an electronic registry, the secured creditor should be able to run a search to identify those registrations that have received an amendment or cancellation notice. The registry system may also be programmed to inform the registrant and secured creditor of such changes automatically. In States that have a good text messaging infrastructure, this notification could also be sent via Short Message Service (SMS) or other similar service.

36. In view of the potential impact of registration on the ability of the person identified as the grantor to deal with the encumbered assets described in a notice, the registrant should be obligated to send a copy of the initial registration notice, as well as of any cancellation or amendment notice to the person identified in the registration as the grantor. Failure of the secured creditor to meet this obligation may result only in nominal penalties and any proven damages resulting from the failure. This is the approach recommended in the *Guide* (see recommendation 55, subpara. (c)). The grantor may waive its right to receive copies of any notice registered (see recommendation 10). Again, an electronic registry should be designed to send a copy of any notice registered to the grantor automatically.

#### **N. Grantor's entitlement to additional information**

37. The rules applicable to registration should provide that the person identified in the notice as the grantor is entitled to obtain upon request from the person identified as the secured creditor up-to-date information about the current state of financing between the parties, including: (a) a list of the assets in which the person identified as the secured creditor is claiming a security right; and (b) the current amount of the

obligation secured by the security right to which the registration relates, including the amount needed to pay off the secured obligation.

38. The secured creditor should be obligated to send the requested information either to the grantor or to any third party designated by the grantor. If the secured creditor no longer claims a security right in the particular type of encumbered asset it must provide identification information of any immediate assignee or successor to the grantor or to a third party designated by the grantor.

39. The possibility of that information being sent to a third party by the secured creditor takes account of the fact that registration does not create or evidence the creation of a security right but merely signals that a security right may exist in a particular asset. Whether the security right has been created, and the scope of the assets which it covers, depends on off-record evidence. Consequently, prospective buyers and secured creditors and other third parties with whom the grantor is dealing may wish to have independent verification directly from the person identified in the registration as the secured creditor as to whether it is in fact currently claiming a security right in an asset in which they are interested under an existing security agreement with the named grantor.

40. In some States, the grantor is entitled to one request free of charge every few months. For additional requests for information, the secured creditor may charge a fee. This protects the secured creditor from having to respond to frequent requests of the grantor that may not be justified or be intended to harass.

## **V. Registry design, administration and operation**

### **A. Introduction**

41. Technical design, administrative and operational issues are crucial components of an effective and efficient registry system. This chapter canvasses the principal issues that must be addressed at this level.

### **B. Electronic versus paper registry record**

42. Registry records traditionally were maintained in paper form and this is still the case in some States. An electronic registry database offers enormous efficiency advantages over a traditional paper-based record (see the *Guide*, chap. IV, paras. 38-43). These advantages include:

- (a) A greatly reduced archival and administrative burden;
- (b) A reduced vulnerability to physical damage, theft and sabotage;
- (c) The ability to consolidate all registrations in a single database regardless of the geographical entry point of the information in notices; and
- (d) The facilitation of speedy low-cost registration and search processes (see the discussion on modes of access to the registry in paras. 47-50 below).

43. Accordingly, every effort should be made by enacting States to provide for the storage of information contained in a notice in an electronic as opposed to a paper

record. This is the approach recommended in the *Guide* (see recommendation 54, subpara. (j)).

44. The *Guide* includes in recommendations 11 and 12 the basic rules to accommodate electronic communications taken from article 9, paragraphs 2 and 3, of the United Nations Convention on the Use of Electronic Communications in International Contracts on written form and signature requirements. The rules applicable to electronic registries should be consistent with these recommendations and the principles of non-discrimination, technological neutrality and functional equivalence on which recommendations 11 and 12 are based (see the *Guide*, chap. I, paras. 119-122, as well as Explanatory Note to the Convention, paras. 133-165).

### **C. Centralized and consolidated registry record**

45. In modern secured transactions law along the lines of that recommended in the *Guide*, while registrants may choose among multiple modes and points of access to the registry, the registry record is centralized (see recommendation 54, subparas. (e) and (k)). This means that all information registered is stored in a single consolidated database. Otherwise, the transaction costs faced by searchers in having to conduct searches in multiple decentralized registry records may deter utilization of the registry system and undermine the success of the secured transactions law.

46. As noted above, centralization of the registry record can be achieved far more efficiently if information contained in notices is stored in electronic form in a centralized computer database than if the registry record is maintained in paper form. An electronic record enables information submitted to branch offices of the registry to be entered at the branch office, transferred electronically to the central registry through remote applications and then added to the central registry database. In paper systems, the information flows in a similar way except that the physical document has to be first manually transferred from the branch to the central office where the centralized paper record is maintained (see the *Guide*, chap. IV, paras. 21-22).

### **D. User access to the registry services**

47. An electronic registry record enables users to enter information and conduct searches directly without the need for the assistance or intervention of registry personnel. If possible, the system should be designed to support the electronic submission of information and search requests over the Internet or via direct networking systems as an alternative to the submission of paper registration notices and search requests (see the *Guide*, chap. IV, paras. 23-26 and 43).

48. As discussed in the preceding chapter (see paras. 1-4 above), when information is submitted to the registry in paper form, registrants must wait until the registry staff has entered the information into the registry record so as to be searchable by third parties before the registration becomes legally effective. Search requests transmitted by paper, fax or telephone also give rise to delays since the searcher must wait until the registry staff member carries out the search on their behalf and transmits the results. In addition to eliminating these delays, a system in



which registrants have the option to electronically enter the information directly into the registry record offers the following other advantages:

- (a) A very significant reduction in the staffing and other day-to-day costs of operating the registry;
- (b) A reduction in the risk of error and reduced opportunity for fraudulent or corrupt conduct on the part of registry personnel;
- (c) A corresponding reduction in the potential liability of the registry to users who otherwise might suffer loss as a result of the failure of registry staff to enter registration information or search criteria at all, or to enter it accurately; and
- (d) User access to the registration and searching services outside of normal business hours.

49. If this approach is implemented, the registry should be designed to permit registry users to enter information and conduct searches from any computer facilities, whether private or public available at branch offices of the registry or other locations. In addition, owing to the reduced costs of direct electronic access, the registry should be designed to permit third-party private sector service providers to provide registry services to users.

50. To preserve the security and integrity of the registry record, users may be issued, for example, unique access codes and passwords (other methods of access and identification may also be used). As a measure of protection against the risk of unauthorized registrations, potential registrants may additionally be required to supply some form of identification (for example, an identification card, driver's licence or passport) as a precondition to submitting a registration (see recommendation 55, subpara. (b)), while the registry is not required to verify the identity of the registrant (see recommendation 54, subpara. (d)). To facilitate access for frequent users (such as financial institutions, automobile dealers, lawyers and other intermediaries acting for registrants and searchers), all users should have the option of setting up a user account with the registry that permits automatic charging of fees to the users' credit account with the registry and institutional control of the user's access rights.

## **E. Specific design and operational considerations**

### **1. Establishment of an implementation team**

51. It is critical that the technical staff responsible for the design and implementation of the registry are fully apprised of the objectives that it is designed to fulfil, as well as of the practical needs of the registry personnel and of potential registry users. Consequently, it is necessary at the very outset of the design and implementation process to establish a team that reflects technological, legal and administrative expertise, as well as user perspectives.

### **2. Design and operational responsibility**

52. It will be necessary at an early stage in the registry design and implementation process to determine whether the registry is to be operated in-house by a governmental agency or in partnership with a private sector firm with demonstrated

technical experience and financial accountability. Under the *Guide*, while the day-to-day operation of the registry may be delegated to a private entity, the enacting State retains the responsibility to ensure that the registry is operated in accordance with the applicable legal framework (see chap. IV, para. 47, and recommendation 55, subpara. (a)). Accordingly, the enacting State may choose to retain ownership of the registry record and, when necessary, the registry infrastructure.

### **3. Storage capacity**

53. The implementation team will need to plan the storage capacity of the registry record. This assessment will depend in part on whether the registry is intended to cover consumer as well as business secured financing transactions. In this case, a much greater volume of registrations can be anticipated. Capacity planning will need to take into account the potential for additional applications and features to be added to the system. For example, it will need to take into account the need to expand the registry database at a later point to accommodate the registration of judgments or non-consensual security rights or the addition of linkages to other governmental records such as the State's corporate registry or other movable or immovable registries. Capacity planning will depend as well on whether registered information is stored in a computer database or a paper record. Ensuring sufficient storage capacity is less of an issue if the record is in electronic form since recent technological developments have greatly decreased storage costs.

### **4. Programming**

54. If the registry record is computerized, the programming specifications will depend on whether grantor-based registration, indexing and searching will be supplemented by serial number registration, indexing and searching. In any event, the hardware and software specifications should be robust and secure employing features that minimize the risk of data corruption, technical error and security breach. In addition to database control programmes, software will also need to be developed to manage user communications, user accounts, payment of fees and financial accounting, electronic links between registries, computer-to-computer communication and the gathering of statistical data.

55. The necessary hardware and software needs will need to be evaluated and a decision made as to whether it is appropriate to develop the software in-house by the registry implementation team or purchase it from private suppliers in which event the team will need to investigate whether an off-the-shelf product is available that can easily be adapted to the needs of the implementing State. It is important that the developer/provider of the software is aware of the specifications for the hardware to be supplied by a third-party vendor, and vice versa.

56. Consideration should also be given to whether the registry should be designed to function as an electronic interface to other governmental databases. For example, in some States, registrants can search the company or commercial registry in the course of effecting a registration to verify and automatically input grantor or secured creditor identifier information.

57. Another issue that should be considered is whether the registry system would allow one or more than one type of search. In some States, there is only one type of

search that is based on the official search logic (the program applied by a registry system to the search criteria provided by the searcher to retrieve information from the registry record). In those States, all that the searcher has to do is enter the correct grantor identifier and the registry system will automatically apply the official search logic and produce an official search result.

58. In other States, there is also an unofficial search. This type of search allows users to expand their search and for this purpose uses non-standard characters. For example, if the official search logic is strict returning only exact matches and a registrant registered a notice against “John Macmillan” misspelling the name as “John Macmallan”, an official search using the correct grantor identifier “Ed Smith” may not retrieve the notice and thus the registration may be ineffective. However, an unofficial search against the name “John Macm\*” will most likely retrieve the notice with the misspelled name. However, this does not change the fact that the registration is ineffective because only an official search would allow a searcher to retrieve the relevant notice. A searcher cannot rely on the result retrieved using this type of search. In any case, a searcher must know which search logic is official, that is, in the case of an electronic registry, which button to select or in which field to enter the correct identifier and then the registry system will apply the search logic automatically.

## **5. Reducing the risk of inadvertent error**

59. A notice-based secured transactions registry is not intended to guarantee or evidence the existence or effectiveness of the security rights to which registrations relate. However, the registry can be designed to ensure a basic level of information quality, while also protecting registrants from their own inadvertent errors by, for example, incorporating mandatory fields, edit checks, drop-down menus and online help resources. The registry should also enable a registrant to conduct a review of the information it has entered as a final step in the registration process.

## **6. Physical security of the registry record: secondary and back-up servers**

60. An electronic registry record may be inherently less vulnerable to physical damage than a paper record but more vulnerable in other respects such as unauthorized access and duplication. In any case, the registry should be designed to allow for automatic fail over and back up of applications and data. This is typically accomplished by providing a primary and secondary (fail over) server implementation. The secondary server ensures uninterrupted access and service in the event the primary server fails. In addition, a back-up server in a different geographical location should be established so as to ensure that registered information is not lost.

## **7. Role of registry staff and liability**

61. The role of registry staff should essentially be limited to managing and facilitating access by users, processing fees and overseeing the operation and maintenance of the registry system. It should be made clear to staff and to registry users that registry staff are not allowed to give legal advice on the legal requirements for effective registration and searching or on the legal effects of registrations and searches.

62. Registry staff should also be responsible for ongoing monitoring of the way the registry is working (or not working) in practice, including gathering statistical data on the quantity and types of registrations and searches that are being made, in order to be in a position to quickly make any necessary adjustments to the registration and search processes and the relevant regulations.

63. The potential for registry staff corruption should be minimized by designing the registry system to: (a) make it impossible for registry staff to alter the time and date of registration or any other information entered by a registrant; (b) eliminate any discretion on the part of registry staff to reject access to the registry services; (c) institute financial controls that strictly limit staff access to cash payments of fees (for example, by making it possible for payments of fees to be made to and confirmed by a bank or other financial institution); and (d) maintaining the archived copy of the original data submitted as previously outlined.

#### **8. Liability for loss or damage suffered by secured creditors or third-party searchers**

64. As already noted (see paras. 47-50 above), the registry should be designed, if possible, to enable registrants and searchers to submit information for registration and conduct a search directly and electronically as an alternative to having registry staff do this on their behalf. If this approach is adopted, the rules should make it clear that users bear sole responsibility for any errors or omissions they make in the registration or search process and carry the burden of making the necessary corrections or amendments.

65. This point aside, the enacting State will need to assess how responsibility for loss or damage due to any of the following causes is to be allocated: (a) incorrect or misleading advice or information or unjustified denial of registry services by the registry staff; and (b) delay or erroneous or incomplete registrations or search results caused by a system malfunction or failure. While in cases where the registry permits direct registration and searching by registry users the law recommended in the *Guide* limits the responsibility of the registry to system malfunction, it generally leaves this matter to enacting States (see recommendation 56).

#### **9. Registration and search fees**

66. Registration and search fees, if any, should be set at a cost-recovery level as opposed to being used to extract tax revenue. This is the approach recommended in the *Guide* (see recommendation 54, subpara. (i)). Excessive fees and transaction taxes will significantly deter utilization of the registry, thereby undermining the overall success of the enacting State's secured transactions law. However, in assessing the level of revenue needed to achieve cost-recovery, account should be taken of the need to fund the operation of the registry, including: (a) salaries of registry staff; (b) replacement of hardware; (c) upgrading of software; and (d) ongoing staff training.

67. Consideration should be given to whether registration fees should be set on a per transaction basis or based on a sliding tariff related to the duration of the registration (in systems that permit registrants to self-select the registration term). The latter approach has the advantage of discouraging registrants from selecting an inflated term out of an excess of caution. Whatever approach is adopted, fees should

not be related to the maximum amount specified for which the security right can be enforced (in systems that require this information to be included) since this would discriminate among users and discourage registrations.

68. Consideration should also be given to whether searches and cancellations should be free of charge (at least in the case of an electronic registry) so as to encourage searching by the public and the prompt registration of cancellations by secured creditors.

#### **10. Financing initial development and operational costs**

69. The implementation of a modern electronic registry requires an initial capital investment to cover the cost of implementation of the registry, including hardware and software development costs. However, the comparatively low cost of operation of an electronic security rights registry means that this investment should be recoverable out of service fees within a relatively short period after start-up through service fees. The cost can be kept low, especially if the registry record is computerized and direct electronic registrations and searches are permitted.

70. If a State decides to develop and operate the registry in partnership with a private entity, it may be possible for the private entity to make the initial capital investment in the registry infrastructure on the understanding that it will be entitled to recoup its investment by taking a percentage of the fees charged to registry users once the registry is up and running.

#### **11. Education and training**

71. To ensure a smooth implementation of the registry system and its active take up by potential users, the implementation team will need to develop education and awareness programmes, disseminate promotional and explanatory material, and conduct training sessions. The implementation team should also develop instructions on entering information into paper registration forms and electronic screens.

### **F. Transition**

72. If the enacting State already has in place registries for security rights in movable assets, transitional considerations will need to be addressed. If the new registry is intended to cover security rights previously within the scope of an existing registry, the following approaches may be considered. First, the enacting State or the private entity responsible for implementing the registry may assume responsibility for migrating the information in the existing records into the new registry record. Alternatively, the burden of migration can be placed on secured creditors that would be given a transitional period (for example, one year) to themselves re-enter the information in the new registry record. This latter approach has been used with considerable success in a number of States. If this option is chosen, a space or field on the registration form should be provided for entering a note that the registration is a continuation of a registration made prior to the coming into operation of the new registry (for transition issues with respect to matters addressed in the secured transactions law, see chap. XI of the *Guide*).

## **G. Dispute resolution**

73. A dispute resolution mechanism may be considered to settle controversies between the parties involved in registrations relating to security rights. The mechanism should include summary judicial or administrative procedures of the type discussed with regard to the cancellation or amendment of registration (see para. 21 above).

## (A/CN.9/WG.VI/WP.46/Add.3) (Original: English)

**Note by the Secretariat on registration of security rights  
in movable assets — draft model regulations, submitted to the  
Working Group on Security Interests at its nineteenth session**

**ADDENDUM**

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## **I. General**

### **Article 1: Definitions**

1. For the purposes of these regulations:

(a) “Address” means a street address and number, city, zip code and State and may include a post office box number and an electronic mail address;

(b) “Amendment” means the addition, deletion or change of the information contained in the registry record;

*[Note to the Working Group: The Working Group may wish to consider whether examples of amendments should be given in the draft Model Regulations or in the commentary of the draft Registry Guide. The following examples could be mentioned: (a) the extension of the effectiveness of a registration (renewal of a registration); (b) the deletion of a secured creditor where two or more secured creditors are identified in the registered notice; (c) the addition of a secured creditor; (d) the deletion of a grantor when two or more grantors are identified in the registered notice; (e) the addition of a grantor; (f) the deletion of encumbered assets; (g) the modification of the identifier of the grantor; (h) the modification of the identifier of the secured creditor; (i) the assignment of the secured obligation by the secured creditor; (j) the subordination by the secured creditor; (k) the subrogation of a secured creditor’s right; (l) the modification of the address of a grantor or secured creditor; and (m) the modification in the maximum monetary amount for which the security right may be enforced (if applicable).]*

(c) “Law” means the law governing security rights in movable assets;

*[Note to the Working Group: The Working Group may wish to note that the commentary of the draft Registry Guide will explain that the draft Model Regulations have been prepared against the background of the law recommended in the Guide.]*

(d) “Notice” means a communication in writing (paper or electronic) presented to the registry, to effect a registration, or amend or cancel information in the registry record;<sup>1</sup>

*[Note to the Working Group: The Working Group may wish to note that the Guide uses: (a) the term “notice” in the sense of a communication (for example, a form or screen) used to transmit information to the registry; (b) the term “information contained in a notice” or “the content of the notice” (see rec. 54 (d) and 57); and (c) the term “registry record” in the sense of information in a notice once this information has been accepted by the registry and entered into the database of the registry that is available to the public (see rec. 70). The draft Model Regulations use these terms in the same sense.]*

(e) “Password” means a confidential code, including an alphanumeric code, issued by or under the authority of the registry;

(f) “Registrant” means the person who submits a notice to the registry for the purposes of effecting, amending or terminating a registration;

(g) “Registration” means the entry of information in a notice into the registry record and includes, where the context permits, the amendment and the cancellation of information in the registry record;

(h) “Registration number” means a unique number allocated to each registration by the registry that is permanently associated with such registration;

(i) “Registry record” means the information entered and stored either electronically in the registry database or manually in paper files of the registry;

*[Note to the Working Group: The Working Group may also wish to consider whether the following terms should be defined in the draft Model Regulations or explained in the commentary of the draft Registry Guide along the following lines:*

*“Official search logic” means the program applied by a registry system to the search criteria provided by the searcher to retrieve information from the registry record. [This term is not referred to in the draft Model Regulations as the registry system applies the official search logic automatically and there is nothing that a searcher can do other than use the correct search criterion.]*

*“Registry” means all aspects of the registration office, including the personnel, equipment, software and hardware required to process, store and administer information contained in notices.*

*“Registry services” include registrations, searches, registry documents, such as search certificates and [...].*

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<sup>1</sup> See term “notice” in the introduction, section B, terminology and interpretation of the *Guide*.



*“Registry system” means the process and procedures (if manual) and software/hardware (if electronic) required to process, store, retrieve and manage the registry record.]*

[ (j) “Serial number” means:

(i) In the case of a motor vehicle, the vehicle identification number marked or attached to the body frame by the manufacturer;

(ii) In the case of an aircraft frame and an aircraft engine, the current and, if different, intended aircraft nationality and registration marks assigned pursuant to the Convention on International Civil Aviation, 1944, by the relevant authority, as well as the manufacturer’s serial number and model designator; and

(iii) In the case of a trailer, a mobile home, tractor, railway rolling stock, a boat or a boat motor, the serial number marked on or attached to the asset by the manufacturer [and any serial number assigned to an asset by a Government authority]; and

(k) “Serial number assets” means a motor vehicle, a trailer, a mobile home, tractor, an aircraft frame, an aircraft engine, railway rolling stock and a boat and boat motor.]

*[Note to the Working Group: The Working Group may wish to consider the question whether the exact meaning of the terms “motor vehicle”, “aircraft frame”, “aircraft engine” and the other types of serial number assets mentioned above should be left to the law of each enacting State or whether indicative definitions should be included here. The Working Group may also wish to consider whether “serial number” should be defined by reference to the serial number assigned to an asset not only by a manufacturer but also by a Government authority. Definitions (j) and (k) (as well as articles of the draft Model Regulations that refer to them) appear within square brackets as the law recommended in the Guide does not refer to serial number indexing (although the commentary of the Guide does, see chap. IV, paras. 31-36). As serial number indexing is used in a number of States, the Working Group may wish to consider whether it should be referred to only in the commentary of the draft Registry Guide or also in the draft Model Regulations. In addition, the Working Group may wish to identify other matters dealt with in the draft Model Regulations but not in the recommendations of the Guide and consider whether these matters should be addressed in the draft Model Regulations.]*

(l) “User identification” means an identification code the registry assigns to a registry user pursuant to these regulations.

2. Subject to paragraph 1, the definitions contained in the law apply also with respect to these regulations.

*[Note to the Working Group: The Working Group may wish to note that paragraph 2 is intended to implement the decision of the Working Group at its eighteenth session that the terminology of the Guide should be incorporated in the definitions of the draft Model Regulations (see A/CN.9/714, para. 32 (a)). The Working Group may also wish to note that, while regulations may normally be updated frequently, the exact meaning of the terms “user identification” and “password” may be left to user agreements.]*

## II. Establishment and operation of a registry

### Article 2: Establishment of a registry

[The Ministry of ...] [other entity authorized by law] establishes a registry of security rights in movable assets for the purposes of receiving, storing and making available to the public information relating to security rights in movable assets pursuant to the law and these regulations.

### Article 3: Appointment of registrar and deputy registrar

1. [The Ministry of ...] [other entity authorized by law] designates a person as registrar.
2. The [Ministry] [registrar] designates one or more persons as deputy registrar(s).

### Article 4: Duties and powers of registrar and deputy registrar

1. The registrar supervises and administers the operation of the registry in accordance with the law and these regulations and has such additional powers and duties specified by [the Ministry of ...] [other entity authorized by law] that are not inconsistent with the law and these regulations.
2. A deputy registrar has the same powers and duties as the registrar, subject to the direction and supervision of the registrar.
3. The registry provides services as set forth in the law and these regulations.

*[Note to the Working Group: The Working Group may wish to consider whether paragraph 3 or a separate article should set forth in detail the role of the registry drawing on recommendations 54 (d), 55 (b) and (d), and articles 14 (1), 15 (3) and 17 (2). The advantage of listing the role of the registry in this paragraph or a separate article is clarity and transparency in the regulations as to the role of the registry. The possible disadvantage is that such a list may appear but not be comprehensive or may be limiting where it should not be. An alternative approach might be to retain paragraph 3 and explain the role of the registry in the commentary of the draft Registry Guide. The Working Group may also wish to consider whether the commentary of the draft Registry Guide should refer to the internal organization of the registry.]*

### Article 5: Public access to the registry services

Any person is entitled to have access to the registry services in accordance with the law and these regulations.

### Article 6: Operating hours of the registry

1. Each office of the registry is open to the public during the days and hours specified for that office. Registry office locations and opening hours are published on the registry's website and posted at each office.
2. Electronic access to the registry services is generally available 24 hours a day, 7 days a week.

3. Notwithstanding paragraphs 1 and 2 of this article, the registry may suspend access to registry services in whole or in part for maintenance purposes or when circumstances arise that make it impossible or impractical to provide access. Notification of the suspension of access to the registry services and its duration is published on the registry's website and posted at the offices of the registry.

*[Note to the Working Group: The Working Group may wish to note that, in the case of an electronic registry, access to services may be suspended automatically (for example, when the Internet network goes down and electronic searches and registrations become unavailable).]*

#### **Article 7: Liability of the registry**

##### **Option A**

1. The registry is liable for loss or damage suffered by a registry user as a result of an error in the administration or operation of the registration and search system [caused through [negligence] [gross negligence] on the part of the registry].
2. If direct access to registry services by registry users is possible, the liability of the registry is limited to loss or damage suffered by a registry user as a result of system malfunction [caused through [negligence] [gross negligence] on the part of the registry].
3. The maximum total amount recoverable in a single action is [...]. A claim may be submitted only up to [...] after the loss or damage occurred.

##### **Option B**

The registry is not liable for loss or damage suffered by a registry user as a result of an error in the administration or operation of the registration and search system[, except if caused through [gross negligence] [malice] on the part of the registry].

*[Note to the Working Group: The Working Group may wish to note that article 7 is intended to reflect recommendation 56, which leaves to each enacting State the existence and the extent of the registry's liability. The Working Group may wish to consider whether article 7 should be retained, and if the article is to be retained, whether option A or B or both should be retained. If the Working Group decides to retain option A, it may wish to consider whether any liability of the registry in paragraphs 1 and 2 should be limited to actions or omissions caused through negligence or gross negligence. The Working Group may also wish to consider whether the limitation period in paragraph 3 should parallel the time set forth in the limitations of actions law of the State operating the registry or the period during which the registration information must be retained in the registry record. If the Working Group decides that option A should be retained, it may be supplemented by commentary that will refer that it sets forth an indicative example of a provision on liability that would need to be supplemented by each enacting State in accordance with its law on contractual (if there is a user agreement) or tort liability. If the Working Group decides to retain both option A and B, the commentary of the draft Registry Guide could explain that, in some States, there is no registry liability, while in other States in which there is such liability, the basis of liability is specified in the Law (for example, malfunction of the registry hardware*

or software). In some States where liability exists, law sets an upper limit on the amount of damages recoverable by a person who suffered loss or damage, as well as a time period upon the expiry of which no claim may be submitted.]

### III. Registry services

#### Article 8: Access to registry services

1. A person that submits a request by an authorized medium of communication (for example, paper or electronic) is entitled to have access to the services in accordance with these regulations and the terms and conditions of use of the registry, if that person has:

(a) Tendered payment for the service requested or has otherwise made arrangements to pay the registry fees prescribed in article 35;

(b) Identified the grantor in a manner that is sufficient to allow indexing, as provided in these regulations; and

(c) Provided any other information required by the law, as provided in these regulations.

2. The registry has to assign a user identification and a password to a person referred to in paragraph 1 of this article, provided that:

(a) Arrangements have been made for the payment of any fees prescribed under these regulations;

(b) Proof of the identity of that person has been received by the registry; and

(c) The person executed a user agreement with the registry [or agreed to the terms and conditions of use].

*[Note to the Working Group: The Working Group may wish to note that: (a) paragraph 1 is intended to reflect recommendation 54, subparagraph (c); (b) the commentary of the draft Registry Guide will explain that subparagraph 1 (c) refers, for example, to article 10, subparagraph (1) (b) of the draft Model Regulations according to which the information in a notice or search request has to be comprehensible, legible and otherwise comply with the requirements of the draft Model Regulations; and (c) paragraph 2 includes the additional element of a user agreement, as it is widely used in practice and is not inconsistent with recommendation 54, subparagraph (c).]*

#### Article 9: Registration and search requests

1. A person may register the information in a notice without having to provide to the registry proof that:

(a) The registrant is the person to whom the registry, according to the user agreement, assigned the user identification and password entered by the registrant; or

(b) The registration of the information in the notice is authorized.

2. Registration of information in a notice effected by a person using the assigned user identification and password is conclusively deemed to have been effected by the person to whom the user identification and password have been assigned by the registry.
3. A person may request from the registry a search result in accordance with these regulations and the terms and conditions of use of the registry, without having to give any reasons for the search.

#### **Article 10: Rejection of a registration or search request**

1. The registry may reject a registration or search request when a requirement of the law or these regulations has not been complied with and, in particular, when:
  - (a) A notice or search request is not communicated to the registry in one of the authorized media of communication; or
  - (b) The information in the notice or the search request is incomprehensible and illegible or otherwise does not comply with the requirements of these regulations relating to obtaining access to the registry services.
2. A message and grounds for rejection are sent to the registrant or searcher as soon as practicable.

*[Note to the Working Group: The Working Group may wish to note: (a) article 10 deals with the question whether the registry may reject a registration (or search) request; and (b) article 16 deals with the question whether the registry may remove from the record information already registered. The Working Group may wish to consider whether these two matters should be dealt with in the same article. The Working Group may also wish to consider whether article 10 should specify that the registry may reject non-conforming requests submitted in paper form, while an electronic registry will be designed so as to reject automatically non-conforming requests. The Working Group may also wish to note that the commentary of the draft Registry Guide will explain that, in the case of an electronic registry, the reasons for the registration or search not to have gone through will be immediately displayed to the user.]*

## **IV. Registration**

#### **Article 11: Date and time of registration**

1. The registry assigns a date and time of registration, as well as a registration number, to each registered notice.
2. A registration is effective from the date and time when the information in the notice is entered into the registry records so as to be available to searchers of the registry record.

#### **Article 12: Duration and renewal of the period of effectiveness of registration**

##### **Option A**

1. A registration is effective for the period of time specified in the law.

2. The period of effectiveness of a registration may be renewed for an additional period of time equal to the initial period specified in the law at any time before the registration expires.

### **Option B**

1. A registration is effective for the period of time indicated in the notice [not exceeding [20] years. When no period of time is indicated in the notice, the registration is effective for [5] years].

2. The period of effectiveness of a registration may be renewed for an additional period of time indicated in the renewal notice at any time before the registration expires.

[3. [Whether a State enacts option A or B], for purposes of calculating the period of effectiveness of a registration, where the calculation is from the day of registration or from the anniversary of the day of registration, a year runs from the beginning of that day.]

*[Note to the Working Group: The Working Group may wish to note that option A is fully in line with recommendation 69, while option B includes within square brackets elements that were discussed in the Guide (see chap. IV, paras. 87-91) but were not included in recommendation 69. As the matter addressed in paragraph 3 may be dealt with differently in the various States, the Working Group may wish consider whether paragraph 3 should be retained or deleted and the matter left to general law with appropriate explanations in the commentary.]*

### **Article 13: Time when a registration may be made**

A registration with respect to a security right may be made before or after the security right has been created or the security agreement has been concluded.

### **Article 14: Registration relating to multiple security rights arising from multiple security agreements**

A registration may relate to one or more than one security right, whether they arise from one or more than one security agreement between the same parties.

### **Article 15: Indexing of registered information**

1. Information entered in the registry record is indexed according to the grantor identifier as provided in these regulations.

[2. Information relating to security rights in serial number assets is indexed according to the serial number of the asset and to the grantor identifier as provided in these regulations.]

3. All amendments and cancellations are indexed in a manner that associates them with the initial registration number.

*[Note to the Working Group: The Working Group may also wish to note that the recommendations of the Guide do not refer to serial number as an indexing and search criterion (although the commentary does, see the Guide, chap. IV, paras. 31-36) or require the registry to assign a registration number. In view of the widespread use and importance of serial number indexing (in addition to grantor*

*indexing) in greatly enhancing the reliability and ease of indexing and searching, it appears in paragraph 2 within square brackets for the consideration of the matter by the Working Group. Another matter that was not addressed in the recommendations of the Guide and the Working Group may also wish to consider because of its importance in the efficient operation of a registry is whether notices should also be indexed in a manner that makes them retrievable by entering the secured creditor identifier for the purposes of internal searches of the registry record by the registry staff and of making global amendments (see article 28).]*

**Article 16: Change, addition or removal of information from the registry record**

1. The registry may not change or add any information in the registry record.
2. The registry may remove information from the registry record only:
  - (a) Upon the expiry of the term of the registration; or
  - (b) Upon the registration of a cancellation notice.
3. Information removed from the registry record must be archived for a period of [20] years in a manner that enables the information in them to be retrieved by the registry.

*[Note to the Working Group: The Working Group may wish to note that, in some legal systems, the registry may remove information from the record in certain situations, including when the information is frivolous, vexatious, offensive and contrary to the public interest. In those systems, the registry may also restore incorrectly removed information or correct errors made by the registry. The Working Group may wish to consider this matter and whether it should be addressed in the draft Model Regulations or in the commentary of the draft Registry Guide.]*

## **V. Registration information**

**Article 17: Responsibility with respect to the information in a notice**

1. It is the responsibility of the registrant to ensure that the information in the notice is accurate and complete.
2. The registry does not have to verify the identity of the registrant, the accuracy or legal sufficiency of information in the notice, determine whether a registration has been authorized or conduct further scrutiny of the notice.

**Article 18: Information required in a notice**

1. To enter information in the registry record, a registrant is required to provide in the appropriate field in a notice the following information:
  - (a) The identifier and address of the grantor, as required in articles 19-21;
  - (b) The identifier and address of the secured creditor or its representative, as required in article 22;
  - (c) A description of the encumbered assets, as required in articles 23-26;

(d) The period of time for which the registration is to be effective, as required in article 12<sup>2</sup>]; and

(e) The maximum monetary amount for which the security right may be enforced].<sup>3</sup>

2. The information in the notice must be expressed in the official language or languages of the enacting State.

3. If there is more than one grantor, the required information must be provided separately for each grantor.

4. For the purposes of articles 19-22, the grantor and the secured creditor identifier is determined as of the time of the registration.

*[Note to the Working Group: The Working Group may wish to note that the registry would need to be able to rely on a set of rules for the transliteration of names with foreign characters in the alphabet of the official language(s) of the enacting State. The Working Group may also wish to consider whether it would be sufficient to include in the commentary of the draft Registry Guide wording preserving other naming conventions of the enacting State or whether this wording should be included in the draft Model Regulations.]*

#### **Article 19: Grantor information (natural person)**

1. For the purposes of article 18, if the grantor is a natural person, the grantor identifier is:

##### **Option A**

the personal identification number issued to the grantor by the enacting State.

##### **Option B**

the name mentioned in an official document, such as an identification card, driver's licence or passport, issued to the grantor by the enacting State.

##### **Option C**

the personal identification number or the name mentioned in an official document issued to the grantor by the enacting State. Where the grantor is not a resident of the enacting State, grantor's identifier is the grantor's family name, followed by the first and second given name, if any, and the grantor's birth date, as provided in an official document issued to the grantor by the enacting State;

2. For the purposes of article 18 and paragraph 1 of this article:

(a) Where the grantor is a natural person whose name includes a first, second and third given name, the grantor identifier is the identifier that includes the grantor's first and second given names; and

(b) Where the grantor is a natural person whose name consists of only one word, the grantor identifier is the identifier that includes the grantor's family name.

<sup>2</sup> If the Law allows it, see the *Guide*, recommendation 69.

<sup>3</sup> If the Law allows it (see recommendation 57 (d)).



3. For the purposes of article 18 and paragraph 1 of this article, the grantor identifier is determined in accordance with the following rules:

(a) If the grantor was born in the enacting State and the grantor's birth is registered in [the enacting State] with a government agency responsible for the registration of births, the grantor identifier is the name as stated in the grantor's birth certificate or equivalent document issued by the government agency;

(b) If the grantor was born in the enacting State but the grantor's birth is not registered in [the enacting State], the grantor identifier is the name as stated in a current passport issued to the grantor by the enacting State;

(c) If the grantor does not have a current passport issued by the enacting State, the grantor identifier is the name stated in an official document, such as an identification card or driver's licence, issued to the grantor by the enacting State;

(d) If the grantor was not born in [the enacting State], but is a citizen of [the enacting State], the grantor identifier is the name as stated in the grantor's certificate of citizenship;

(e) If the grantor was not born in and is not a citizen of [the enacting State], the grantor identifier is the name as stated in a current passport issued by the State of which the grantor is a citizen;

(f) If the grantor does not have a current passport, the grantor identifier is the name as stated in the birth certificate or equivalent document issued to the grantor by the government agency responsible for the registration of births at the place where the grantor was born;

(g) In a case not falling within subparagraphs (a) to (f) of this paragraph, the grantor identifier is the name as stated in any two official documents, such as an identification card, driver's licence or passport, issued to the grantor by the enacting State.

4. If the grantor is a natural person, the address of the grantor is the address [entered by the registrant in the notice] [mentioned in the security agreement] [mentioned in an official document, such as identification card, driver's licence or passport] at the time of registration.

*[Note to the Working Group The Working Group may wish to note that: (a) under option C in paragraph 1, the registry should have both numerical and name indexes and searchers should be able to search with one or the other indexing criterion; and (b) paragraph 4 has been inserted for the Working Group to consider the matter of the address of the grantor; and (c) the address of the grantor and secured creditor or its representative has to be part of the record, but not necessarily part of the identifier, except if there is a need for additional information to identify the secured creditor, its representative or the grantor.]*

#### **Article 20: Grantor information (legal person)**

1. For the purposes of article 18, if the grantor is a legal person, the grantor identifier is:

**Option A**

The registration number assigned to the grantor by the enacting State pursuant to the law on [...].

**Option B**

The name of the legal person entity, as it appears on the public record.

**Option C**

(a) The registration number assigned to the legal person by [the enacting State] [the State under whose authority the relevant registry is organized] pursuant to the law on [...]; or

(b) The name of the legal person entity, exactly as it appears on the public record,

**Option A**

including the abbreviation which is indicative of type of body corporate or entity, such as “Ltd”, “Inc”, “Incorp”, “Corp”, “Co,” as the case may be, or “Limited”, “Incorporated”, “Corporation”, “Company”;

**Option B**

without the abbreviation which is indicative of type of body corporate or entity, such as “Ltd”, “Inc”, “Incorp”, “Corp”, “Co,” as the case may be, or “Limited”, “Incorporated”, “Corporation”, “Company”.

2. If the grantor is a legal person, the address of the grantor is the address [entered by the registrant in the registered notice] [mentioned in the security agreement] [as it appears on the public record] at the time of registration.

**Article 21: Grantor information (other)**

1. For the purposes of article 18:

(a) If the grantor is the estate of a deceased person, the grantor identifier is the name of the deceased person in accordance with article 19, with the specification in a separate field that the grantor is an estate;

(b) If the grantor is a trade union that is not a legal person, the grantor identifier is the name of the trade union mentioned in the document that constituted the trade union and the name of each person representing the trade union in the transaction giving rise to the registration, in accordance with article 19;

(c) If the grantor is a trust, and the document creating the trust designates the name of the trust, the grantor identifier is the name of the trust and trustee in accordance with article 19, with the specification in a separate field that the grantor is a “trustee”;

(d) If the grantor is a trustee acting for a trust, and the document creating the trust does not designate the name of the trust, the grantor identifier is the [identification number] [name] of the trustee in accordance with the provisions for

entering the name of a grantor who is a natural person, with the specification in a separate field that the grantor is a trustee;

(e) If the grantor is an insolvency representative acting for a natural person, the grantor identifier is the name of the insolvent person in accordance with article 19, with the specification in a separate field that the grantor is insolvent;

(f) If the grantor is an insolvency representative acting for a legal person, the grantor identifier is the name of the insolvent legal person in accordance with article 20, with the specification in a separate field that the grantor is insolvent;

(g) If the grantor is a participant in a syndicate or joint venture, the grantor identifier is the name of the syndicate or joint venture as stated in the document creating it and the name of each participant in accordance with article 19 or 20, as the case may be;

(h) If the grantor is a participant in an entity other than one already referred to in the preceding rules, the grantor identifier is the name of the entity as stated in the document creating it, the names of each natural person representing the entity in the transaction to which the registration relates in accordance with article 19.

2. For the purposes of this article, a representative (other than an insolvency representative) is a natural person who has power to bind the legal person or its officers or members and who has exercised that power in relation to the transaction to which the registration relates.

3. The address of the grantor of the kind addressed in this article is the address [entered by the registrant in the registered notice] [mentioned in the security agreement] [mentioned in an official document, such as identification card, driver's licence or passport] at the time of registration.

#### **Article 22: Secured creditor information**

1. For the purposes of article 18:

(a) If the secured creditor is a natural person, the secured creditor identifier is the name of the secured creditor in accordance with article 19;

(b) If the secured creditor is a legal person, the secured creditor identifier is the name of the secured creditor in accordance with article 20; and

(c) If the secured creditor is a person or entity described in article 21, the secured creditor identifier is the name of the person or entity in accordance with article 21.

2. If the registrant enters, instead of the identifier and address of the secured creditor, the identifier and address of a representative of the secured creditor to whom inquiries relating to the registration may be addressed, paragraph 1 of this article applies to the identifier of the representative of the secured creditor.

3. If the secured creditor is a natural person, the address of the secured creditor is the address [entered by the registrant in the registered notice] [mentioned in the security agreement] [mentioned in an official document, such as identification card, driver's licence or passport] at the time of registration. If the secured creditor is a legal person, the address of the secured creditor is the address [entered by the

registrant in the registered notice] [mentioned in the security agreement] [as it appears on the public record].

### **Article 23: Description of encumbered assets**

1. For the purposes of article 18, the description of the encumbered assets in the notice may be specific or generic as long as it reasonably allows the assets to be identified. This rule applies also to proceeds.
2. Unless otherwise provided in the Law, a generic description that refers to all assets within a generic category of movable assets or to all of the grantor's movable assets includes assets within the specified category to which the grantor acquires rights at any time during the period of effectiveness of the registration.
3. Additional information may be provided in the form of an attachment to better identify the assets and their location or if additional space is needed.

### **[Article 24: Description of encumbered serial number assets]**

For the purposes of article 18, if the encumbered assets are serial number assets other than those held by the grantor as inventory, the description of the serial number assets in the notice is sufficient if it is in accordance with article 23 and, in addition, the serial numbers of the assets are set forth in the notice.]

*[Note to the Working Group: The Working Group may wish to consider whether this article should be retained. If the Working Group decides that this article should be retained, it may wish to note that enacting States that decide to institute serial number asset indexing and searching will need to consider the type of asset to which this feature should apply and what alphanumeric identification criteria should be specified for each category of asset. The enacting State will also need to take into account its existing registry regimes for registering property rights in certain of these categories of asset, as well as international regimes, notably the registries for aircraft frames, aircraft engines and railway rolling stock established under the Cape Town Convention on International Interests in Mobile Equipment. With regard to subparagraph (b) of this provision and the definition of the term "serial number", the Working Group may wish to note that parties other than the manufacturer may provide or issue the serial number (for example, a Government authority).]*

### **Article 25: Description of encumbered attachments to immovable property**

1. For the purposes of article 18, if the encumbered assets are tangible assets that are or will become attachments to immovable property, the description of the assets in the notice is sufficient if it is in accordance with article 23 and, in addition, includes a description of the relevant immovable property, to which the attachments are or will be attached, [sufficient under the registry rules for the immovable property of the enacting State] [by reference to the parcel identifier number in the records of the immovable property registry of the enacting State].

2. A registrant may register a notice of a security right in attachments to immovable property in the appropriate immovable property registry office of the enacting State by submitting a notice to that office setting out:

(a) The identifiers of the grantor and secured creditor in accordance with articles 19-22;

(b) A description of the tangible assets in accordance with article 23;

(c) A description of the immovable property, to which the tangible assets are or will be attached, [sufficient for indexing under the registry rules for the immovable property of the enacting State] [by reference to the parcel identifier number in the records of the immovable property registry of the enacting State];

(d) The identifier of the owner of the immovable property as it appears in the records of the immovable property registry, if different from the identifier of the grantor;

[(e) A statement specifying, in multiples of whole years, the period of time during which the registration of the notice is to be effective;<sup>4</sup> and

(f) A statement of the maximum monetary amount for which the security right may be enforced].<sup>5</sup>

*[Note to the Working Group: The Working Group may wish to consider whether the additional description of the immovable property required in paragraph 1 should be required in any case or only when the notice is to be registered in the immovable property record (see paragraph 2). The Working Group may also wish to note that, while this article does not refer explicitly to crops or similar types of asset, it may apply to crops or similar types of asset if a State treats them as attachments to immovable property.]*

#### **Article 26: Impact of omissions and errors on the effectiveness of registration**

1. A registration is effective only if it provides the grantor's correct identifier as set forth in articles 19-21 or, in the case of an incorrect statement, if the information in a notice would be retrieved by a search of the registry record using the correct grantor identifier.

[2. A registration covering a serial number asset is effective only if it provides the correct serial number as set forth in article 24 or, in the case of an incorrect statement, if the information in the notice would be retrieved by a search of the registry record using the correct serial number. An ineffective registration is ineffective only with respect to the incorrectly identified serial number asset and this ineffectiveness does not affect the effectiveness of the registered notice with respect to any other assets described in the same notice.]

3. Except as provided in paragraphs 1 [and 2] of this article, an incorrect or insufficient statement of the information required to be entered in the registry record under these regulations, or in the manner of its entry, does not render registration ineffective, unless it seriously misleads a reasonable searcher.

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<sup>4</sup> If the law on registration of encumbrances in immovable property allows it.

<sup>5</sup> If the Law allows it (see recommendation 57 (d)).

*[Note to the Working Group: The Working Group may wish to note that the commentary of the draft Registry Guide will give examples of seriously misleading defects, omissions or errors.]*

#### **Article 27: Amendment of registration**

1. To amend the information provided in a registered notice, a registrant is required to provide in a subsequent amendment notice the following information:

- (a) The field in which the information to be amended is recorded;
- (b) The initial registration number of the registered notice to which the amendment relates;
- (c) The purpose of the amendment (for example, to add, change or delete information in the registry record, record an assignment, or renew the period of effectiveness of a registered notice);
- (d) If information is to be added, the additional information in the manner provided by these regulations for entering information of that kind;
- (e) If information is to be changed or deleted, the information to be changed or deleted, and in the case of a change, also the new information in the manner provided by these regulations for entering information of that kind; and
- (f) The identifier of the secured creditor authorizing the amendment.

2. If the purpose of an amendment is to disclose a transfer of the encumbered assets to which the notice relates, the registrant has to identify the transferee as a grantor in accordance with articles 19-21.

3. If the transfer relates to only part of the encumbered assets described in the notice, the registrant has to identify the transferee as a grantor in accordance with articles 19-21 and describe the part of the encumbered assets transferred has to be described in accordance with article 23.

4. If the purpose of the amendment is to disclose a subordination of the security right to which the registered notice relates, the registrant has to describe the nature and extent of the subordination and identify the beneficiary of the subordination in the fields designated for entering such information.

5. If the purpose of the amendment is to disclose an assignment of the secured obligation, the registrant has to provide the identifier of the assignor and assignee.

6. Amendments that purport to delete all grantors and fail to provide the identifier of a new grantor, delete all secured creditors and fail to provide the identifier of a new secured creditor or delete all encumbered assets and fail to provide a description of the encumbered assets to be added to the registration are ineffective.

7. Subject to article 31, a registrant may register an amendment at any time. The registration of an amendment, other than a renewal, does not extend the period of effectiveness of the registration.

8. An amendment is effective from the date and time when the information in a notice is entered into the registry records so as to be available to searchers of the registry record.

*[Note to the Working Group: The Working Group may wish to note that the commentary will explain that an amendment changing the identifier of a grantor will be indexed by adding the new identifier as if it were a new grantor. A search under either the grantor's old identifier or the grantor's new identifier will reveal the registration. The Working Group may also wish to consider whether there should be a mechanism to identify different versions of a registration. For example, an initial registration may be given the number 12345-01, the first amendment 12345-02, the third amendment 12345-03 and so on. The Working Group may also wish to consider whether in the case of a transfer of the encumbered asset (see para. 3), the transferee should be identified as the new grantor replacing the existing grantor or whether both the identifiers of both the transferor and the transferee should be retained in the publicly available registry record. In the former case, the reliability of the registry would be enhanced and the search results would be simplified, but a search against the identifier of the transferor would not disclose the information in initially registered notice. In the latter case, the information on record would be more complete but not fully reliable or simple.]*

#### **[Article 28: Global amendment of secured creditor information]**

A secured creditor identified in multiple notices registered may:

- (a) Amend the secured creditor information in all such notices, as provided in article 27; or
- (b) Request the registry to amend the secured creditor information in all such registrations.]

*[Note to the Working Group: The Working Group may wish to note that article 28 appears within square brackets pending determination by the Working Group of whether there should be a secured creditor index for internal searches by the registry staff (see note to article 15).]*

#### **Article 29: Cancellation of registration**

1. To cancel a registration, a registrant is required to provide in the cancellation notice the following information:
  - (a) The registrant's user identification and password;
  - (b) The registration number of the initial registered notice to which the cancellation notice relates; and
  - (c) The grantor identifier mentioned in the initial registration.
2. When a registration is cancelled, the relevant information is retained in the registry record with a specification that the registration is cancelled and is removed from the registry record only past its expiration date.
3. Subject to article 31, a registrant may cancel a registration at any time.

*[Note to the Working Group: The Working Group may wish to consider whether the grantor identifier is necessary for a registrant that has obtained access to the registry (with his/her user identification and password, that may apply in an electronic or paper context), and has the relevant registration number.]*

**Article 30: Copy of registration, amendment or cancellation notice**

1. When a registration is effected, amended or cancelled electronically, a registrant receives a printed or electronic copy as soon as the information in the notice is entered into the registry record.
2. Where a registration is effected, amended or cancelled otherwise than electronically, the registry is obligated to send promptly a copy to the person identified in the notice as the secured creditor at the address(es) set forth in the relevant registration, amendment or cancellation notice.
3. The copy of the registration, amendment or cancellation notice [which may be in printed or electronic form and] contains the following information:
  - (a) The secured creditor identifier;
  - (b) The grantor identifier;
  - (c) The description of the encumbered assets;
  - (d) The date and time when the initial registration was effected, amended or cancelled, as the case may be; and
  - (e) The registration number of the initial registration.
4. The registrant has to send to each person identified as a grantor in a registration, within [thirty days after the registration is effected], [a printed or electronic] copy of the registration, amendment or cancellation notice, except where that person has waived in writing the right to receive it.

*[Note to the Working Group: The Working Group may wish to note that paragraph 2 is more in line with recommendation 55, subparagraph (d), than paragraph (1). However, this distinction between paper and electronic registration may be more in line with actual practice. The Working Group may also wish to consider whether, if the amendment notice gives an address that is different from the address stated in the initial registration notice, the copy should be sent to both the old and the new address. Sending the copy to both addresses enhances the possibility that the secured creditor will receive it and check the accuracy of the information in the amendment notice (but in a paper environment adds to cost). The Working Group may wish to note that, with respect to the waiver of rights addressed in paragraph 3 of this article, under recommendation 10 of the Guide, party autonomy applies except where otherwise provided. The relevant recommendation 55, subparagraph (c), is not among those recommendations that are not subject to party autonomy, but provides that failure of the secured creditor to meet this obligation may result in penalties and damages. The Working Group may wish to consider that a waiver of this right of the grantor should not be permitted as sending copies of registered notices to grantors is a fundamental feature of the notice-filing system and an important protection for the grantor]*



## VI. Obligations of the secured creditor

### Article 31: Compulsory amendment or cancellation of notice

1. The person identified in the registered notice as the secured creditor is obliged to submit to the registry an amendment or cancellation notice, to the extent appropriate, not later than [15] days after the secured creditor's receipt of a written demand by the person identified in the registered notice as the grantor if:

(a) No security agreement has been concluded between the person identified as the secured creditor and the person identified as the grantor;

(b) The security right to which the registration relates has been extinguished by payment or otherwise; or

(c) The registration has not been authorized by the grantor.

2. No fee or expense will be charged or accepted for compliance.

3. If the person identified in the registered notice as the secured creditor does not comply in a timely manner, the person making the demand is entitled to seek a cancellation or amendment through a summary judicial or administrative procedure.

4. The person identified in the registered notice as the grantor is entitled to seek a cancellation or amendment through a summary judicial or administrative procedure even before expiry of the period provided in paragraph 1, provided that there are appropriate mechanisms to protect the secured creditor.

5. Upon delivery of a judicial or administrative order ordering cancellation or amendment, the registry has to cancel or amend the registered notice.

*[Note to the Working Group: The Working Group may wish to note that: (a) article 31 has been revised to be more consistent with recommendation 72; and (b) under recommendation 72, subparagraph (b), the grantor bears the burden of proving that the registration must be amended or cancelled. The Working Group may also wish to consider whether the commentary of the draft Registry Guide should refer to a different approach taken in some legal systems. Under this approach, the registered notice is cancelled automatically if the secured creditor fails to respond to the demand in a timely manner. This approach reduces the workload of the registry staff and encourages the secured creditor to respond to amendment and cancellations demands in a timely manner. In view of the fact that secured creditors are sophisticated parties, it is considered that the risk that they will miss an amendment or cancellation demand and the registration will be inadvertently cancelled is insignificant.]*

### Article 32: Grantor's right to demand additional information

1. The person identified in a registered notice as the grantor may demand in writing that the person identified in the registered notice as the secured creditor:

(a) Confirm in writing whether or not there exists a security agreement between the grantor and the secured creditor as of the date of the demand;

(b) Approve or provide a list of the encumbered assets as of the date of the demand; and

(c) Approve or provide a statement indicating the amount of the obligation secured by the security right to which the registration relates as of the date of the demand.

2. If the person identified in the registered notice as the secured creditor is no longer the secured creditor, it has to provide to the person identified in a registered notice as the grantor the identifier and address of any assignee or successor, as long as this information is known to the secured creditor.

3. The person making the demand may instruct that the person identified in the registered notice as the secured creditor to deliver its response to a designated third person.

4. The registrant has [15] days after receipt of the demand to comply with it. No fee or expense will be charged or accepted for compliance.

*[Note to the Working Group: The Working Group may wish to note that the recommendations of the Guide do not deal with this matter and may wish to consider whether it should be retained. If this article is retained, the Working Group may also wish to consider whether: (a) the grantor should be entitled to a limited number of responses free of charge within a specified period of time; and (b) the grantor should be entitled to damages or other remedy through a summary judicial or administrative procedure.]*

## VII. Searches

### Article 33: Search criteria

A searcher of the registry record may request a search by using one of the following search criteria:

- (a) The grantor identifier;
- [(b) The serial number of a serial number asset;] or
- (c) The initial registration number.

### Article 34: Search results

1. A search result obtained either indicates that no information was retrieved against the specified search criterion or sets forth all information that exist in the registry record at the date and time when the search was performed

2. Upon request made by a registry user who has tendered or arranged for payment of any fees, the registry issues a [paper] [electronic] search certificate on the basis of one of the criteria referred to in article 33. The certificate reflects the search result.

3. A search certificate is admissible as evidence in a court or tribunal and is, in the absence of evidence to the contrary, conclusive evidence of the matters certified therein.

*[Note to the Working Group: The Working Group may wish to note that the commentary of the draft Registry Guide will explain that the concept in paragraph 1*

*applies primarily to a paper system, while an electronic system would present links to the complete registration as it was entered in the registry record.]*

## VIII. Fees

### Article 35: Fees for registry services

#### Option A

1. [Subject to paragraph 2 of this article,] the following fees are payable for registry services:

- (a) Registrations:
  - (i) Paper-based [...];
  - (ii) Electronic [...]
- (b) Searches:
  - (i) Paper-based [...];
  - (ii) Electronic [...];
- (c) Certificates:
  - (i) Paper-based [...];
  - (ii) Electronic.

[2. If the registry is operated by the State, electronic registry services are available without a fee.]

3. The registry may, at its own initiative or at the request of a person, enter into an agreement with that person establishing an account with the registry to enable fees to be charged and paid.

#### Option B

The Minister of [...] may determine the fees and methods of payment for the purposes of these Regulations by decree.

#### Option C

The registry services are free of charge.

*[Note to the Working Group: The Working Group may wish to note that, under recommendation 54, subparagraph (i), of the Guide, registry services may or may not be subject to a fee and that, if there is a fee, it should be aimed at cost recovery rather than profit level. The Working Group may wish to consider whether one or more of the options set forth above should be retained. In that regard, the Working Group may wish to take into account that registry services are commercial services that should not be paid by the State (that is, the taxpayers). The Working Group may also wish to note that, while regulations are normally easy to revise, in some States, a decree may be a more practical way to set registry fees. If the Working Group adopts or retains option A as a possibility, it may also wish to consider whether fees should depend on the duration of registration to more readily reflect the cost of*

*storing the relevant information. The commentary of the draft Registry Guide may explain that article 35 is intended to set forth some possible examples and that States may wish to enact different regulations for the payment of registry fees.]*

## IV. INSOLVENCY LAW

### A. Report of the Working Group on Insolvency Law on the work of its thirty-ninth session (Vienna, 6-10 December 2010)

(A/CN.9/715)

[Original: English]

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### I. Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on two insolvency topics: (a) Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) Directors' responsibilities and liabilities in insolvency and pre-insolvency cases, both of which were of current importance; and (c) Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency.

## II. Organization of the session

3. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-ninth session in Vienna from 6 to 10 December 2010. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Belarus, Canada, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Greece, Iran (Islamic Republic of), Israel, Italy, Japan, Malaysia, Mexico, Namibia, Philippines, Republic of Korea, Russian Federation, Spain, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

4. The session was also attended by observers from the following States: Belgium, Croatia, Democratic Republic of the Congo, Denmark, Indonesia, Lithuania, Netherlands, New Zealand, Romania, Slovakia, Slovenia, Switzerland and Tunisia.

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

(a) *Organizations of the United Nations system*: International Monetary Fund (IMF) and the World Bank;

(b) *Invited intergovernmental organizations*: European Union (EU), Interparliamentary Assembly of Member Nations of The Commonwealth of Independent States (CIS) and the Caribbean Community (CARICOM);

(c) *Invited international non-governmental organizations*: Alumni Association of The Willem C. Vis International Commercial Arbitration Moot (MAA), American Bar Association (ABA), Asian Clearing Union (ACU), Center For International Legal Studies (CILS), Groupe de réflexion sur l'insolvabilité et sa prévention (GRIP 21), INSOL International (INSOL), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (IIT), International Law Institute (ILI), International Swaps and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC) and Union Internationale des Avocats (UIA).

6. The Working Group elected the following officers:

*Chairman*: Mr. Wisit Wisitsora-At (Thailand)

*Rapporteur*: Mr. Anthony Ojok Oyuko (Uganda)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.94);

(b) A note by the Secretariat on Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (A/CN.9/WG.V/WP.95 and Add.1);

(c) A note by the Secretariat on Directors' responsibilities and liabilities in insolvency and pre-insolvency cases (A/CN.9/WG.V/WP.96); and

(d) A note by the Secretariat on judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency (A/CN.9/WG.V/WP.97 and Add.1-2).

8. The Working Group adopted the following agenda:
  1. Opening of the session.
  2. Election of officers.
  3. Adoption of the agenda.
  4. Consideration of (a) the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' responsibilities and liabilities in insolvency and pre-insolvency cases; and (c) judicial materials addressing the use and interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.
  5. Other business.
  6. Adoption of the report.

### **III. Deliberations and decisions**

9. The Working Group engaged in discussions on: (a) the provision of guidance on interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' responsibilities and liabilities in insolvency and pre-insolvency cases; and (c) the production of judicial materials addressing the use and interpretation of the UNCITRAL Model Law on Cross-Border Insolvency on the basis of documents A/CN.9/WG.V/WP.95, A/CN.9/WG.V/WP.96 and A/CN.9/WG.V/WP.97, their Addenda and other documents referred to therein. The deliberations and decisions of the Working Group on those topics are reflected below.

### **IV. Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI)**

10. The Working Group discussed selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") in relation to centre of main interests (COMI) on the basis of documents A/CN.9/WG.V/WP.95 and Add.1.

#### **A. General discussion**

11. The Working Group recalled that the mandate given by the Commission with respect to the topic concerning the interpretation and application of selected concepts of the Model Law relating to COMI was based on the "United States" proposal as described in paragraph 8 of document A/CN.9/WG.V/WP.93/Add.1 to provide guidance on the interpretation and application of selected concepts of the UNCITRAL Model Insolvency Law relating to centre of main interests and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that

would not preclude the development of a convention”.<sup>1</sup> In that regard, it was clarified that such future work was not intended to modify the already existing UNCITRAL standards with respect to insolvency and the concepts included therein, but to clarify their meaning.

12. It was observed that certain concepts of the Model Law relating to COMI and the concept of COMI itself had raised issues of interpretation, resulting in diverging court decisions (see documents A/CN.9/WG.V/WP.95 and Add.1).

13. The question was raised whether the Working Group should embark on a discussion of the various types of text of uniform law that could be developed to provide guidance on the different concepts. The various types of texts of uniform law could be (i) rules, (ii) recommendations or (iii) commentary/guidelines on selected topics of the Model Law. In response, it was recalled that the Working Group had in the past left considerations of form to be decided after the debate on substantive issues. It was generally felt that the same approach should also be taken with the future work on clarifying concepts of the Model Law.

14. With respect to clarifying the concept of COMI as contained in the Model Law, it was noted that, though the concept appeared in various articles of the Model Law, such as articles 2 (b), 16 (3) and 17 (2) (a), the Model Law did not contain any definition of it. As an example of a text developed on the same topic by a regional economic integration organization, it was pointed out that the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the “EC Regulation”) also referred to the notion of COMI without providing any definition. It was pointed out that, in view of the importance of that notion, it was desirable to avoid inconsistent interpretation in its use. It was observed, however, that the notion of COMI might be used in different contexts, for example, under the EC Regulation, in relation to the jurisdiction in which main proceedings should be commenced and, under the Model Law, in relation to the appropriateness of recognition of an already commenced proceeding. It was also noted that it would be desirable for the future work to be undertaken to include further elaboration regarding how to determine COMI of an enterprise group.

15. Acknowledging the diverse and conflicting case law relating to COMI, it was generally felt that clarifying the concept of COMI could be useful for practitioners and courts. It was further noted that it might be difficult to provide a concrete definition for the concept of COMI, but that there were several ways of providing clarification including providing a list of factors to be considered for the determination of COMI with a view to providing greater uniformity and predictability.

16. It was further noted that other terms included in the Model Law such as the elements of the definition of foreign proceeding and the issue of the point in time the COMI of a debtor was evaluated were connected to the terms of COMI, and it was agreed that it would be beneficial to first consider those other factors and then to commence consideration of the concept of COMI.

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<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 259 (a).



## **B. Proceedings qualifying for recognition under the Model Law: article 2**

### **Issues with respect to the definition of a “foreign proceeding” pursuant to article 2 (a) of the Model Law**

17. It was noted that the definition included in article 2 (a) of the Model Law of a “foreign proceeding” had given rise to diverse interpretation in case law (see A/CN.9/WG.V/WP.95, paras. 8-37). The question was raised whether the Working Group should consider providing clarity on the definition of certain elements of a foreign proceeding pursuant to article 2 (a) of the Model Law, which states that “foreign proceeding means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation”.

18. In that regard, it was questioned whether there was a need to define the requirement of the insolvency of the debtor. In response, it was said that such definition was not needed, as the requirement of the insolvency of the debtor would flow from the terms “pursuant to a law relating to insolvency”.

19. With respect to the need of providing a definition for the terms “pursuant to a law relating to insolvency”, it was felt that difficulties in judicial interpretations of those terms had resulted from equating terminology of legislation of different jurisdictions. It was noted that the Working Group did not aim for unification of insolvency laws, but to provide clarity on concepts in the Model Law. In that respect, it was said that it would be impossible to further detail the definition of a “foreign proceeding” that would still capture all domestic proceedings. It was further noted that the notion of “a law relating to insolvency” already provided the desirable degree of flexibility. It was also noted that the UNCITRAL Legislative Guide on Insolvency Law (the “Legislative Guide”) provided for a definition of insolvency proceedings in paragraph 12 (u) and accompanying commentary, which was consistent with the definition included in the Model Law.

20. The Working Group noted that the Guide to Enactment of the Model Law stated that the requirement of a “collective proceeding” referred to the involvement of creditors collectively in the foreign proceeding, rather than that the proceeding was designed to assist a particular creditor to obtain payment. With respect to the requirement of “collective proceedings”, it was said such requirement was an important element of the definition. It was noted that there might be some domestic proceedings where that requirement could technically be questioned as not fully satisfied, but that the proceedings had been nevertheless recognized under the Model Law. In that respect, the need for flexibility of a definition in the Model Law on a foreign proceeding was again emphasized. The concern was further expressed that establishing further criteria of what constituted a foreign proceeding would be unnecessarily restrictive.

21. It was suggested that the Secretariat could identify some proceedings that did not clearly fall into the definition of article 2 (a) of the Model Law or which inclusion could or had already given rise to concerns (referred to in the discussion as “grey area”), in order to facilitate the Working Group’s consideration on whether

clarification of the definition of “foreign proceeding” was needed. The utility of such study was questioned on the basis that such study would be a study of the current situation not capturing new circumstances and not taking into account that the concept of “a law relating to insolvency” was very broad.

22. After discussion, the Working Group agreed that, at that point of its deliberations, it was premature to state whether the definition of “foreign proceeding” pursuant to article 2 (a) of the Model Law needed clarification. The Working Group requested the Secretariat to prepare an informative note to assist its consideration of that matter at a future session.

### **C. Uniform interpretation and international origin: article 8 of the Model Law**

23. The Working Group noted that article 8 of the Model Law provided that in interpreting the text, regard was to be had to its international origin and the desirability of promoting uniformity in its application and the observance of good faith. The Working Group considered whether further guidance should be provided on the sources to be used to provide assistance on interpretation of the Model Law under article 8 (see document A/CN.9/WG.V/WP.95, paras. 40-42).

24. It was noted that jurisprudence on the Model Law was important for the uniform interpretation pursuant to article 8 and that the Guide to Enactment of the Model Law referred to the facilitation of such harmonized interpretation (see Guide to Enactment of the Model Law, para. 92) by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat published abstracts of judicial decisions that interpret conventions and model laws emanating from UNCITRAL. In that respect it was noted that UNCITRAL texts other than the Model Law (including the Legislative Guide) would also be of assistance for such interpretation. It was further said that jurisprudence on the interpretation of the Model Law had also included references to cases relating to other than UNCITRAL texts, such as cases dealing with the EC Insolvency Regulation, which also includes the concept of COMI (see paragraph 14 above).

25. After discussion, it was generally viewed that there was no need to provide further clarification on article 8 of the Model Law.

### **D. Recognition**

#### **1. Public policy exception: article 6 of the Model Law**

26. The Working Group noted that article 6 of the Model Law provided an exception to recognition of a foreign proceeding where to do so would be “manifestly contrary to the public policy” of the receiving State. The Working Group further noted that the Guide to Enactment indicated that exception should generally be interpreted restrictively and that it was only intended to apply in exceptional circumstances concerning matters of fundamental importance to the enacting State.

27. The Working Group considered whether there was a need to provide clarification on the public policy exception. It was questioned whether forum

shopping should be included in the exception. In response, it was viewed as appropriate to deal with forum shopping with respect to the determination of COMI itself, as the public policy exception was to be narrowly applied.

28. One delegation informed the Working Group on its domestic enactment of the Model Law which required a governmental body to be informed and given the opportunity to intervene once the public policy exception was raised, in order to discourage its being raised frivolously. Some views were expressed that clarification of the exception could be useful to counter potential abuse, in particular as not all domestic enactments possessed such a provision. It was said that it might be difficult to define the public policy exception, as it was viewed as a matter of domestic law differing from jurisdiction to jurisdiction.

29. In response, different suggestions were made to counter improper invocation of the public policy exception. It was suggested that a reference could be made to the “exceptional nature” of the public policy exception. It was also suggested that a reference to article 8 on the interpretation of the Model Law and to the cases collected in CLOUT (see paragraph 24 above) would suffice. It was further said that the Guide to Enactment already provided adequate explanation on the sensitivity of applying the public policy exception. It was also said that article 22 of the Model Law provided sufficient protection of creditors and other interested persons. A different view expressed was that the Secretariat could be asked to provide a list of examples of application of the public policy exception. In response, it was said that providing examples could raise difficulties, as those examples were based on cases with particular facts requiring further guidance. In addition, it was said that providing examples would require an assessment on the value of such cases by the Working Group.

30. After discussion, the Working Group agreed that the public policy exception was a matter of national law to be decided by national courts. The Working Group further agreed that the exception should be narrowly applied, but did not take a decision on how to ensure such restricted application at that stage of its discussion, agreeing to give further consideration to that issue when discussing the judicial materials on the Model Law contained in document A/CN.9/WG.V/WP.97 and its addenda.

## **2. Decision to recognize a foreign proceeding under article 17 as main or non-main proceeding pursuant to article 2 (b) and (c) of the Model Law**

31. It was noted that it was not the wording of the Model Law that had given rise to difficulties, but rather its application in the area of recognition. It was further noted that many national enactments of the Model Law were of a rather recent nature, so that its application had sometimes caused uncertainties with case law just developing. It was also noted that article 17 of the Model Law laid down the procedure for recognition, separated from whether and what relief would be accorded, pursuant to articles 19 and 21 of the Model Law.

### **(a) Precondition for recognition: main or non-main proceeding**

32. The Working Group noted that article 17 (2) (a) of the Model Law provided that a foreign proceeding within the meaning of article 2 (a) should be recognized as either a main (where the debtor’s COMI was) or non-main foreign proceeding

(article 2 (b) or (c)). The Working Group then considered whether a court must be satisfied that a proceeding under the Model Law was either a foreign main or non-main proceeding, as a pre-condition for recognition.

33. The view was expressed that that question had been sufficiently addressed by the decision in the *Bear Stearns* case,<sup>2</sup> requiring such determination as a necessary pre-condition for recognition.

34. It was questioned whether there should also be a third category of proceedings or, to the same end, an expansion of the concept of “establishment” contained in article 2 (f) of the Model Law to capture proceedings on the basis of location of assets in a State and reference was made to article 28 of the Model Law. In response, it was said such expansion would result in a modification of the Model Law outside of the Working Group’s mandate for its current work and contrary to the spirit of the Model Law. It was noted that the Model Law left sufficient discretion to domestic law to allow the opening of domestic proceedings on other grounds.

35. After discussion, the Working Group agreed that the Model Law clearly provided for recognition of only two types of proceedings, foreign main and non-main proceeding.

**(b) Procedure to establish determination of main or non-main proceeding**

36. It was suggested to include either in the initial court order opening the proceedings or as additional evidence submitted pursuant to article 15 (2) (c), factual information regarding whether the proceeding was a main or non-main proceeding within the meaning of the Model Law, to assist the determination of foreign main or non-main proceeding by a court which might decide on an application for recognition at a later stage. In that respect, it was noted that article 15 of the Model Law already specified the documents which should accompany an application for recognition. With respect to a concern that the proposal would disadvantage proceedings under the supervision of an authority other than a court, it was recalled that the notion of “court” used in the Model Law also included a judicial or other authority competent to control or supervise a foreign proceeding pursuant to article 2 (e) of the Model Law. Another concern was that the court deciding on the opening of the proceedings might not be aware of the necessity for such inclusion.

37. After discussion, the Working Group agreed that it would provide useful assistance if a court opening the proceedings would include in its order information as proposed above and further agreed to contain that point in its final work product.

**3. Location of COMI: article 16 presumption**

38. The Working Group noted that article 16 (3) of the Model Law established a presumption upon which the court was entitled to rely in determining COMI, which provided that, in the absence of proof to the contrary, the debtor’s registered office

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<sup>2</sup> *Bear Stearns Hi-Grade Structured Credit Strategies Master Fund Ltd.* 374 B.R. 122 (Bankr. S.D.N.Y. Sep 2007); [CLOUT case No. 760]; A/CN.9/WG.V/WP.93/Add.2, paras. 45-48; *Bear Stearns* (on appeal) 389 B.R. 325 (S.D.N.Y. May 2008); [CLOUT case No. 794]; A/CN.9/WG.V/W, paras. 45-48; see also document A/CN.9/WG.V/WP.95/Add.1, Annex.

(or habitual residence in the case of an individual) was presumed to be the centre of its main interests. The Working Group further noted that paragraph 122 of the Guide to Enactment of the Model Law indicated that the purpose for that presumption was to expedite the evidentiary process. The Working Group also noted that a number of cases had raised issues concerning the location of the COMI and the interpretation of the presumption in article 16 (3) (see document A/CN.9/WG.V/WP.95/Add.1, paragraphs 5-20). The Working Group considered whether a list of indicative factors for the COMI should be established with relation to rebutting the presumption.

**(a) Development of a list of indicative factors**

39. Different views were expressed on the weight that the various factors listed in paragraph 20 of document A/CN.9/WG.V/WP.95/Add.1 ought to have in such COMI analysis. In particular, some viewed the factors included in subparagraphs (a) to (g) and (m) as fundamental to the COMI analysis, whereas others regarded “the site of the controlling law or to the law governing the main contracts of the company” (subparagraph (d)) as secondary or “the location from which financing was organized or authorized or the location of the debtor’s primary bank” (subparagraph (f)) as not appropriate unless the bank controlled the debtor company. Some viewed the “location of employees” (subparagraph (k)) as crucial on the basis that the employees might be future creditors, whereas others viewed that matter to be a question of protection of rights of interested parties, not relevant to the COMI analysis and as sufficiently addressed by article 22 of the Model Law. Views further varied on the factors of “the location from which reorganization of the debtor was being conducted” (subparagraph (l)) and “the location in which and whose law governed the preparation and audit of accounts” (subparagraph (o)), with respect to the latter, it was noted that the company could be audited in different States.

40. It was also suggested to prioritize the factors in the list and to keep it as short as possible. In response, it was said that prioritizing was difficult, as the evaluation might differ from jurisdiction to jurisdiction and that shortening the list might be misleading. A concern was expressed with respect to the term “list”, as it might convey a mandatory nature. In response, the Working Group was recalled of the purpose for the list, which was to assist judges in their analysis on objective criteria to determine COMI to find the appropriate forum. It was also noted that all criteria were based on the concept of a “sufficient connection” to the State to be subject to its insolvency laws, a concept that was also referred to as a basis for jurisdiction in the Legislative Guide, Part two, Chapter I, paragraph 12.

41. After discussion, the Working Group agreed that a list of indicative factors would assist judges in their COMI analysis.

**(b) Impact of fraud on the factors to be considered in determining COMI**

42. The Working Group considered the impact of the incidence of fraud on the factors to be considered in determining COMI. Questions were raised with respect to the definition of fraud. It was said that it could refer to a company which engaged in fraudulent activities or establishment of which was itself a fraud. It was further questioned whether the definition would include civil or criminal fraud. It was further questioned whether so-called “illegitimate” forum shopping where a debtor tried to find a more favourable jurisdiction to deter creditors would fall under the definition. Concerns were expressed that each jurisdiction had its own notion of

fraud, which would be addressed in the public policy exception under article 6 of the Model Law.

43. After discussion, the Working Group agreed that that issue would need further consideration.

**(c) Time period for determination of COMI**

44. The Working Group considered whether the COMI determination should be made as of the date of application for commencement of insolvency proceedings or as of the date of the application for recognition of those proceedings, as there had been a number of cases arising under both the Model Law and the EC Regulation involving a debtor moving from one jurisdiction to another in close proximity to the commencement of insolvency proceedings. The Working Group noted that the Model Law did not make any mention of timing with respect to the determination of COMI (see A/CN.9/WG.V/WP. 95/Add.1, paragraphs 26-36). It was said that using the time of recognition could lead to unfair results and would be contrary to the spirit of the Model Law, in particular as many years might have passed between the date of commencement and of application for recognition. In that regard, the view was expressed that the time period chosen for that determination should provide stability.

45. After discussion, the Working Group agreed that the relevant time period for determination of COMI should be the date of the initial application for commencement of insolvency proceedings and that that conclusion would be included in the final work product, which might be an amendment of the judicial material on the Model Law contained in document A/CN.9/WG.V/WP. 97 and its addenda.

**4. Establishment**

46. The Working Group considered the question whether the concept of “establishment” defined in article 2 (f) of the Model Law and relevant for the determination of a non-main proceeding required clarification. After discussion, the Working Group agreed that the concept of establishment did not need clarification, either with respect to a company or an individual debtor.

**5. COMI of an enterprise group**

47. It was noted that many cases under the Model Law involved enterprise groups and that it might be beneficial to also provide guidance on the interpretation of COMI in the Model Law of an enterprise group.

48. After discussion, the Working Group agreed to request the Secretariat, resources permitting, to prepare a study on COMI of enterprise groups for its consideration at a future session, including (i) discussion during its previous work on part three of the Legislative Guide, (ii) existing practice with enterprise groups, and, so far as possible, (iii) suggestions on how far future work might go.

## **V. Directors' responsibilities and liabilities in insolvency and pre-insolvency cases**

49. The Working Group discussed the responsibility and liability of directors and officers of an enterprise in insolvency and in pre-insolvency on the basis of documents A/CN.9/WG.V/WP.96 and other documents referred to therein.

50. The Working Group recalled the mandate of the Commission that the work on that topic should focus upon those responsibilities and liabilities that arose in the context of insolvency, and that it was not intended to cover areas of criminal liability or to deal with corporate issues outside the context of insolvency (A/65/17, para 259 (b)).

### **A. Introduction**

#### **1. General remarks**

51. The original proposals from the United Kingdom, INSOL international and the International Insolvency Institute, set out in documents A/CN.9/WG.V/WP.93/Add.3, A/CN.9/WG.V/WP.93/Add.4 and A/CN.9/582/Add.6, were recalled, and the proponents outlined the issues raised.

52. It was noted that where an enterprise might be approaching insolvency, abuse on the part of directors had been observed, such as transactions detrimental to the company and/or its creditors, perhaps for the benefit of the director concerned, including putting assets put beyond the reach of creditors and future office-holders.

53. Several aspects of the topic were highlighted: whether there could be minimum standards that should govern directors' behaviour and guidance to encourage best practice; whether directors' duties would change with the approach of insolvency; how the cross-border context would affect such duties; and what the appropriate consequences for breach of duties might be.

54. The aim of the work on the topic was, it was said, to ensure that, where insolvency was already approaching, directors should take such action as would preserve the value of the company, perhaps via reorganization, rather than simply waiting for the commencement of insolvency proceedings. While many systems encouraged reorganization as an important and constructive tool, it was insufficiently used in practice, often because of a lack of incentives. Directors were also generally not penalised for taking valuable assets from a failing company for future use. Thus the work on the topic would seek to provide incentives for taking appropriate action, balanced with consequences including personal liability where such action was not followed.

55. It was emphasized that the objective was to encourage directors to take appropriate and timely steps upon becoming aware that the company could not trade out of its difficulties, which might include seeking the early commencement of a suitable insolvency procedure. This encouragement should be balanced, it was said, against the risk of directors putting the business into liquidation prematurely (to avoid the risk of incurring personal liability) when a reorganization procedure, given time to take effect, would give the best outcome. The need for a flexible

approach, which would allow directors acting in good faith to take the most appropriate action, was noted.

56. It was observed that there were, as yet, no international standards on this question, though reference was made to post-insolvency duties and avoidance provisions in Recommendation 87 of the Legislative Guide; and it was recalled that the European Commission and World Bank had indicated the need for such standards. It was also emphasized that addressing this issue would enhance the objectives of the Model Law and the Legislative Guide.

57. The importance of considering the issue in the context of enterprise groups was also highlighted; one concern raised was that failure to do so might lead to one company within a group operating in a country with a restrictive regime being forced into premature liquidation, with a detrimental effect on the group as a whole.

58. The Working Group recalled a questionnaire issued by the International Insolvency Institute on the topic, and a detailed publication by INSOL with a country-by-country analysis, and it was observed that further studies of the current position throughout the world might assist in its future deliberations.

## **2. Features of possible work**

59. The scope of possible work was considered in detail. While it was noted that there was no intention of addressing criminal liability, or matters of pure corporate governance, it was agreed that the intersection of those issues was a reality that had to be considered.

60. As regards the nexus between criminal and civil law questions, it was recalled that criminal sanctions or penalties were not in the Working Group's mandate. The difficulty of a complete separation in practice between these areas was highlighted. For example, compensation on civil claims might be left in abeyance until any criminal cases related to the insolvency concerned had been completed, as was the case in some jurisdictions. It was added that the Working Group would need to ensure that the scope of its work throughout its deliberations reflected the practical aspects of this interaction.

61. As regards the intersection of insolvency and company law, it was noted that directors' liabilities in general were an issue of corporate governance and so outside the Working Group's mandate, and insolvency law should not extend into those areas. It was stressed that, absent insolvency, the duties of directors were owed to the company (which, in some systems, also meant to its shareholders); when insolvency approached or insolvency proceedings commenced, those duties might or would extend to creditors and other stakeholders; the interests of these groups might conflict (for example, the creditors might be best served by liquidation and distribution but the shareholders might wish to trade on so long as there was any hope of avoiding insolvency). In this regard, the critical period to consider when additional duties might arise would be prior to the commencement of insolvency proceedings.

62. As regards the eventual text or guidance to be issued, it was noted that the area was highly fact-specific and not readily amenable to rule-making, and hence the type of guidance to be produced would need to be descriptive rather than normative or prescriptive; expressions of principles would also avoid interfering with matters



of corporate law. The need to avoid discouraging responsible risk-taking and enterprise was emphasized. Differences in the extent of directors' liabilities were highlighted and it was recalled that not all systems traditionally included a judicial review of evaluative assessments of this type.

63. It was added that a creditor might have remedies against directors, and enforcement action would be taken outside the insolvency proceedings. This aspect of the topic might fall outside the Working Group's mandate, strictly speaking, but the risk of such action (which might affect the estate) should nonetheless be borne in mind.

64. Other practical aspects of the topic were highlighted: first, the question of funding any action, even if it had reasonable prospects of success, had been noted to be a considerable impediment to enforcement in practice. Secondly, the beneficiaries of any recovered sums should be considered: where recovered moneys would accrue to secured creditors under an all-asset or all-enterprise security interest, rather than to the general body of creditors, there would be little or no incentive for an insolvency representative to act.

65. Private international law issues were also noted as important, both as regards jurisdiction and applicable law; it was agreed that harmonizing standards on these issues should make these questions easier to determine. In the light of these considerations, it was agreed that the cross-border context should be added to the aspects of the topic set out in paragraph 74 of A/CN.9/WG.V/WP.96 that the Working Group would consider.

66. It was recalled that, in discussing the issues to be considered and possible solutions, straying into areas of corporate law should not be automatically avoided. The need was to ensure that the ultimate results did not go beyond the context of insolvency or interfere in company or other civil or criminal law.

67. The Working Group agreed that these considerations indicated that guidance on the topic would be appropriate. It also heard suggestions on the various elements of the topic that might form the basis of guidelines or other guidance on this issue, based on the items listed in paragraph 74 of A/CN.9/WG.V/WP.96 (see section 3 below). The general importance of taking steps that might lead to an increase in the insolvency estate, where appropriate, was recalled.

### **3. Issues to be considered**

#### **(a) Defining the persons by whom the duties are owed**

68. The first aspect raised was the need to identify who might owe such duties. The Working Group noted that the starting point would be formally appointed directors (and that a statutory definition of directors was the norm); the description set out in paragraphs 18-22 of A/CN.9/WG.V/WP.96, including the OECD (Organisation for Economic Co-operation and Development) principles, indicated how the group of possible individuals might be expanded.

69. Additional persons included *de facto* or shadow directors (those that acted as directors or that directed or otherwise controlled the company, or in accordance with whose instructions the company was accustomed to act); officers that had responsibilities related to the management of a company (which might include a chairman, auditors or general managers); boards of administration or directors in

larger companies and enterprise groups, persons with decisive influence or dominance, and persons with ostensible authority to bind the company. The interaction between the identification of those that owed duties and the nature of the duties was noted in this regard.

70. In this context, the risks of limiting the duties to those formally appointed as directors were emphasized: among other things, so doing might encourage the use of nominees or “men of straw”, so that the real decision-takers would be protected from any liability. Caution was urged, however, in that not all jurisdictions regulated the duties of directors other than formally appointed directors, at least in the period prior to insolvency.

71. It was generally accepted that directors for this purpose could be natural or legal persons. Legal persons might include other companies within an enterprise group, banks, consultants or other advisors, and auditors. While it was agreed that these entities might influence the company’s actions, views differed as to whether their influence constituted management of the company, and as to whether such management was a prerequisite to any liability (that is, how the issue of causation would relate to the definition of those that owed relevant duties and to breaches of such duties). An important consideration was to identify the group of persons that might cause harm through some type of managerial action; harm might be caused in a subsidiary company through actions taken at the behest of a parent company. The possible differences between auditors, in particular, and other categories of persons were noted.

72. It was concluded that a purposive approach would be appropriate; national law would set out in a non-exhaustive fashion those with appropriate duties. Additional persons should be identified in a descriptive manner, based on the other persons to whom duties could be extended rather than a technical description of, for example *de facto* or shadow directors. It was agreed that future deliberations would be based on that approach, and it was recalled that the question of whether the group of persons should be expanded beyond directors to others with influence would be considered further.

**(b) Identifying the persons to whom the duties are owed**

73. It was observed that the persons to whom duties might be owed could be based on potential liability to all stakeholders, or to a defined group, such as the company, shareholders and/or creditors, or those that would benefit from any recovery made. The view was expressed that creditors in this sense should be interpreted as the general body of creditors rather than any particular creditor or group of creditors.

74. An alternative suggestion was that the duties should be considered as owing to the estate *per se*. In support of that suggestion, the existence of a well-accepted definition of the concept was recalled, which would include all persons to whom services or funds were owed, and the benefits of avoiding dealing with different classes of stakeholder were highlighted. This approach, it was said, would also be consistent with the objective of equal treatment of similarly-situated creditors (Recommendation 1 (d) of the Legislative Guide), and would involve a practical rather than a doctrinal approach, based on identifying the potential beneficiaries of any recovery action.

75. It was noted that directors should be presumed to act in good faith, so that the interests of the company coincided with those of shareholders, creditors and employees. Acting in bad faith might be actionable.

76. The interaction of this issue with the time at which duties arose was noted. The duties of directors of a solvent company were owed exclusively to that company and, it was recalled, should not be extended; where a company might be insolvent, the duties were owed to the estate and as such might be extended to shareholders and other stakeholders, whose interests would ultimately be represented by an insolvency representative.

77. The Working Group was invited to distinguish between the onset of insolvency as a matter of fact and the formal commencement of insolvency proceedings. In the period between these two events, those jurisdictions that recognized the concept of wrongful or insolvent trading equated the responsibility of formally-appointed directors and all other persons that held themselves out as acting in authority as regards the company, or that issued instructions or otherwise influenced the management of the company.

78. The importance of recognizing the scope and extent of duties that might arise in the concept of an enterprise group when identifying those responsible was highlighted, and that there might be different degrees of responsibility.

79. It was agreed that the Working Group would continue its deliberations at a future session on the basis of the issues set out above.

**(c) Defining the time at which duties arise in the period before commencement of insolvency proceedings**

80. It was agreed that the duties under consideration might arise before the commencement of formal insolvency proceedings. In this regard, the fact that this point in time and the factual onset of insolvency were rarely simultaneous was noted.

81. It was agreed that the duties would arise when the company was or would imminently become factually insolvent (practically speaking, when creditors' money was put at real risk or when the company was at real risk, referred to in the discussion as the "vicinity of insolvency"), though the duties could be enforced only in the context of a formal insolvency proceeding. The timing therefore underscored the importance of the topic in supporting appropriate and timely action when companies became insolvent. In other words, the point in time at which the duties arose should be that point at which directors should have been aware that there was no reasonable prospect of avoiding insolvent liquidation.

(d) Specifying the nature of the duties owed or the types of misconduct to be covered, for example:

- (i) **Wrongful trading** — where a director or officer ought to have known that insolvency was unavoidable and the director or officer has failed to take reasonable steps to minimize losses to creditors;
- (ii) **Breach of duty** — where a director or officer has misapplied or retained money or property of the company or where a misfeasance or breach of duty, fiduciary or otherwise, has caused the misapplication of assets or a loss to the company; and
- (iii) **Misconduct involving company money or property** — where a director or officer causes or allows a preference or a transaction at an undervalue to the detriment of creditors.

82. There was general agreement that the issue of the nature of the duties owed included consideration of who owned the duty (item 3 (a)), to whom (item 3 (b)), and what time (item 3 (c)).

83. As regards wrongful trading (paragraph (d) (i)), it was noted that some jurisdictions presumed fault associated with the insolvency in some certain circumstances. The experience of one country was shared: in an insolvency in which less than 20 per cent of the company's debts could be paid, liability on the part of directors was indicated, and courts could require a repayment from those directors into the estate. On the other hand, it was stressed that fault should not be presumed.

84. As regards the scope of the duties, caution was urged that imposing too tight a regime might discourage trade and entrepreneurship (contrary to the general mandate of UNCITRAL). Where there were external causes of insolvency, such as a general recession, directors exercising proper business judgment should not be penalized. Other views were that directors should be cognizant of trading conditions, though they might be relevant as defences to an eventual recovery action.

85. In this regard, it was stressed that there were always two questions to consider: whether there was a duty, and whether it had been breached. In some jurisdictions, where a company was near insolvency, the directors were required to make enquiry about whether the company was solvent before undertaking significant transactions (such as transactions risking half of its assets, significant transfers of assets or distributions to shareholders). Directors could also be required to justify the transactions concerned and that they had taken the possibility of insolvency into account.

86. The importance of avoiding the notion of strict liability was underscored; insolvency representatives taking action would need to show the duty, a breach and that the breach in fact caused harm. Any other approach, it was said, would indeed compromise the objective of promoting good practice in insolvency without compromising entrepreneurship.

87. In this regard, it was agreed that the existence of any liability would be entirely fact-specific, and a mechanism to examine the facts would be critical. From this perspective, drafting lists of bad management practice would be endless and counterproductive, and would effectively lead to strict liability in some situations.

In addition, such an approach would not take account of changing circumstances, which might unjustifiably change the characterization of a decision. In that light, it was said that it would be impossible to provide a universal definition of such a duty. A more constructive approach, it was considered, would be to provide guidance on how to discharge the duty itself, addressing the steps that could or should be taken. Appropriate action might include continuing to trade in an attempt to turn the company around or putting it into liquidation, or many steps in between. Appropriate steps when insolvency was likely could include providing notifications to interested parties (though not going beyond the obligations in a formal insolvency proceeding), diligence in running the company, and taking steps for the benefit of the estate.

88. Another view was that it would be possible to craft an abstract statement of duties based on utmost diligence, putting emphasis on directors' being able to show that they had taken all reasonable steps to put the company on a good or improved footing. Nonetheless, the standard should be set at a reasonable level, since otherwise, directors might simply resign, with negative consequences for a subsequent reorganization or insolvency proceeding.

89. A further consideration was that the duties should relate to the identities of the group to which they were owed: in particular, to ensure that duties did not remain restricted to the company as such (rather than the estate).

90. In the light of these considerations, the Working Group agreed to base its future deliberations on identifying the steps that would need to be taken to discharge the duty identified in item (i).

91. As regards the examples of breach of duty (paragraph 3 (d) (ii)) and misconduct involving company money or property (paragraph 3 (d) (iii)), it was recalled that the Legislative Guide already included provisions on preferences and transactions that could be avoided; they also raised general duties of directors outside the insolvency context, and therefore that the emphasis of future work should be on item wrongful trading (paragraph 3 (d) (i)), and it was noted that the class of persons that might be protected might need to be restricted.

**(e) Identifying the remedies available for that behaviour or breach of duty**

92. The three questions outlined in paragraph 63 of A/CN.9/WG.V/WP.96 were considered.

93. It was observed that the primary aim of enforcement action was to restore the estate to the position in which it would have been absent the misconduct that gave rise to the enforcement action, and that the nature of the action to be taken would therefore be based on that aim. Such action might be termed wrongful or insolvent trading, but the terminology would be an issue for future consideration. Without effective remedies being available, it was added, the debate would be purely academic, and the policy aims of current work remain unfulfilled. It was also observed that a regime that contemplated the enforcement of duties had a deterrent effect and could promote good practice in company management in the vicinity of insolvency; nonetheless, provisions should not be crafted in such a manner that they would encourage insolvency proceedings, because of the risks of personal liability, to be commenced in premature fashion.

94. It was observed that the number of actions for wrongful or insolvent trading were fewer than might be expected given the number of insolvencies, and that, as a result, while the cause of action might be considered to be the appropriate one, guidance should seek to address any obstacles to effective action. In addition to the issue of securing funding to pursue actions, it was noted that many cases might settle, or the directors might not have sufficient assets to make an action cost-effective.

95. An additional potential remedy, it was said, was the possibility of subordination of claims on the insolvent estate by directors that had engaged in misconduct. Support was expressed for the proposition that subordination might provide an effective remedy, and it was agreed that further study of the topic was required, with a view to allowing the Working Group to consider it among available remedies at a future session.

96. The Working Group was urged to take care in considering possible remedies to avoid exceeding its mandate, in that they raised questions to be decided in each State both as regards the nature of claims and the proper person to pursue them, together with related issues such as burden and standard of proof.

97. As regards the person that had the right to take enforcement action, it was stated that the persons to which a relevant duty was owed, and that had sustained loss, should have that right. There was agreement that the right would normally accrue to the insolvency representative, as the representative of the insolvent estate, to be exercised with regard to the collective interests of creditors. As regards other classes of persons, it was noted that a wide variety also had the right to pursue directors in various legal systems, and that there was no common approach. They included creditors as individuals, creditors as a collective body, classes of creditors or a creditors' committee, companies (i.e. legal persons), the state prosecutor, and a court-appointed trustee or examiner (where such a person would be needed because of conflicts of interest arising in cases in which directors continued to manage the company during the insolvency).

98. As regards creditors, it was noted that rights that might accrue under other bodies of law (civil law, company law or tort law) were not to be considered here, though it was observed that such other bodies of law might inform the manner in which provision for enforcement action would be made, and it was agreed that the insolvency provisions should not in any way negate those rights. To the extent that a duty to creditors existed separate to that owed to the estate, the creditors concerned should be able to enforce it for reasons of consistency; if a decision were made to remove that right, the reasons for adopting such a policy should be set out clearly. An alternative approach, it was said, drawing on provisions in Recommendation 87 of the Legislative Guide on avoidance of transactions, would be to allow creditors to request the insolvency representative to take action; if he did not, creditors might be able to take action themselves; in certain circumstances they might have a cause of action against the insolvency representative.

99. It was also noted that a creditor would generally not have the evidence required to pursue a claim and the extent of the creditor's damage would be difficult to establish. Support was expressed for the proposition that the proceeds of any successful action should accrue to the estate as a whole, though a creditor that had taken action should be able to recover its costs and fees. Nonetheless, it was

observed that in certain jurisdictions the proceeds of actions did not necessarily flow to all creditors (for example where there were relevant security interests). It was noted that these issues would be further explored at a future date.

100. It was also noted that a potential claim was an asset of the insolvent estate, and an insolvency representative should have the flexibility and obligation to deal with it as with any other asset: the appropriate action might include a disposal of that asset to a creditor — in other words, the right of action could be assigned (for value) to that creditor. This approach, it was added, could also assist in addressing one observed obstacle to enforcement action: a lack of funds to pursue the claim. As regards the latter question, it was also noted that creditors might be willing to fund the insolvency representative in pursuing a claim because of the potential benefits.

101. As regards other potential persons that might have the right to take enforcement action, caution was urged to avoid encroaching on criminal procedures (as might be the case should a state prosecutor become involved). Nonetheless, it was noted, there might be some overlap between civil and criminal remedies where actions seeking pecuniary compensation were pursued, and it might be appropriate to refer to the impact of existing criminal proceedings on action in the insolvency.

102. The experience in some jurisdictions on enforcement actions was shared, and the benefits of streamlined procedures avoiding the costs and length of some types of litigation were noted.

103. As regards the timing of enforcement action, it was noted that prior to the commencement of insolvency, creditors might have remedies against directors, but that those remedies would arise under other bodies of law. Accordingly, it was agreed that these remedies should not be the subject of further discussion by the Working Group in connection with the topic.

104. A separate remedy outlined in A/CN.9/WG.V/WP.96 was the possibility of disqualification of directors. It was stated that this was intended to be an administrative and not a criminal sanction, though the risks of overlap were again emphasized. The aim of the remedy was not to punish the director concerned, but in addition to the question of deterrence, to protect the general public from the activities of an individual that had proved him- or herself unsuitable to run a limited liability company. It was considered that this remedy was ancillary to the main question of restoring the insolvent estate; while it was stated to be a mechanism to be considered, views differed as to the extent to which it should be addressed by the Working Group.

105. Another view was that disqualification actions were outmoded, reflecting a punitive approach that was no longer considered constructive, and that such actions inevitably involved an overlap with criminal matters. It was also noted that effectiveness of disqualification might be open to question if a disqualified director could simply carry on as a *de facto* or shadow director, or if measures were not in place to ensure that disqualification could have a cross-border effect. On the other hand, it was suggested that the possibility of disqualification was an effective deterrent. It was agreed to revert to these issues at a future session.

106. The Working Group considered the possible defences that directors might raise in the context of an enforcement action. It was noted that the prospects of an informal reorganization might be jeopardized if the risks of liability were too great.

It was observed that possible defences could include that there were reasonable grounds to expect the company might be solvent, and particular steps to be taken might include the drawing up of accounts revealing a fair record of the company's finances, taking advice from a suitable professional, and that the proposed course of action is in the creditors' interests and that the directors were pursuing a restructuring. It was noted that there was a link between the manner in which the duty was phrased and possible defences; these items outlined above could be treated either as possible defences or as a manner of discharging the primary duty.

107. The practical difficulties that protracted litigation on these issues involved were recalled, including those arising from establishing the facts and the steps necessary to discharge the duty. From this perspective, it was suggested that the duty could be crafted to describe actions that should put the director on notice of the possible risks (such as the transfer of a proportion of assets, transactions exceeding a threshold, engaging in a risky activity putting at risk a certain proportion of the assets), to supplement the principle itself. In practical terms, it was added, the director would have to be able to demonstrate his or her consideration of the effect of proposed actions on the company's solvency and, if insolvency were a possibility, what steps he or she had taken to protect the interests of creditors and so forth.

108. It was agreed that striking the right balance between promoting appropriate behaviour and avoiding premature insolvency would be a key element of the guidance to be drafted, and that the issues set out above would be taken up at a future session.

**(f) Cross-border issues**

109. A series of issues relating to cross-border issues was raised. First, it was noted that the Model Law was silent on jurisdiction, which therefore remained a matter of private international law. The Working Group was encouraged to consider that, in actions related to insolvency, specialized courts would be the appropriate forum, and so guidance to such end would be useful. Secondly, as regards applicable law, a variety of solutions among legal systems were observed to operate in practice (as regards both proceedings and questions of liability and damages), it was noted. Thirdly, the Model Law was noted to grant access by foreign representatives to other jurisdictions in limited circumstances, but these did not include liability actions. Finally, the question of whether defences in one jurisdiction would apply in proceedings in another was raised. The Working Group took note of the comments made, and agreed to revert to the issues at a future session.

## **VI. Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency**

110. The Working Group discussed the judicial materials on the Model Law on the basis of document A/CN.9/WG.V/WP.97 and its addenda.

111. As background explanation to the judicial materials, the Working Group noted that participants in the judicial colloquium that had been held by UNCITRAL in cooperation with INSOL and the World Bank had indicated a desire for information and guidance for judges on cross-border-related issues and in particular on the Model Law. In that light, the Commission had mandated the Secretariat to develop



such text in the same flexible manner as was achieved with respect to the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*<sup>3</sup> (the “Practice Guide”) involving insolvency practitioners and professionals and with a view to consideration at an appropriate stage by Working Group V and finalization and adoption by the Commission, possibly in 2011.<sup>4</sup>

112. It was explained that the judicial materials were of a purely descriptive nature with the aim to provide assistance to judges on the Model Law pursuant to the Commission’s mandate and thereby enhancing predictability and consistency of case law. It was further explained that references to cases were included in the judicial materials to illustrate different views taken in the interpretation of the Model Law. To enhance the purpose of the judicial materials, it was said that it would be beneficial if those materials could be updated on an ongoing basis in consultation with judges and practitioners. To that end, it was suggested that publication in electronic format might be particularly appropriate.

113. The Working Group generally agreed that the judicial materials would constitute a very useful document that would assist judges in Model Law countries and also in those countries that had not enacted the Model Law, where the document would greatly facilitate the adoption of the Model Law.

114. Some points were raised for possible addition or clarification in the judicial materials, as follows: (1) whether a foreign representative could represent the debtor in a proceeding other than insolvency proceeding (civil litigation) without prior recognition; (2) the meaning of the term “participate in existing proceeding” in paragraph 29 (b) in the light of its footnote reference to article 12 of document A/CN.9/WG.V/WP.97; (3) the meaning of the term “intervene” in paragraph 29 (d) of document A/CN.9/WG.V/WP.97; (4) the need to address the enterprise group context in more detail; (5) the need to acknowledge that not all domestic legislation would require an “establishment” pursuant to article 2 (f) for a non-main proceeding; and (6) whether a receiving court could reconsider the determination of the initial court on the question of COMI.

115. It was suggested that the title of the judicial materials should be “Judicial Guide”, which would be in line with other UNCITRAL texts, such as the Legislative Guide and the Practice Guide. In response, it was said that the word “guide” had not been chosen, as it would insufficiently capture its descriptive nature. It was suggested that the title should avoid conveying the impression that the judicial materials were prescriptive in nature.

116. The Working Group agreed that the judicial materials should be further developed in light of the comments made at the current session, with a view to its possible finalization at the next session. The Working Group invited comments from States on their experience with the Model Law to be submitted to the Secretariat for possible consideration in the preparation of a revised draft.

117. The Working Group heard information by the World Bank on the Insolvency and Creditor Rights Standard (the “ICR Standard”) that was part of the Financial Stability Board’s Standards and Codes Initiative and was used by the World Bank in

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<sup>3</sup> United Nations publication, Sales No. E.10.V.6.

<sup>4</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 261.

the ICR Reports on the Observance of Standards and Codes (the “ICR ROSC”). It was recalled that the ICR Standard already included the recommendations contained in the Legislative Guide and the World Bank Principles for Effective Insolvency and Creditor Rights Systems. The ICR Standard had been developed in coordination with the UNCITRAL secretariat. The Working Group was further informed that the ICR Standard was currently in the process of being updated to take into account part three of the Legislative Guide. The Working Group took note of that development with appreciation and requested the Secretariat to continue participating in the process, in close cooperation with the World Bank.

**B. Note by the Secretariat on the interpretation and application of  
selected concepts of the UNCITRAL Model Law on Cross-Border  
Insolvency relating to centre of main interests (COMI), submitted to the  
Working Group on Insolvency Law at its thirty-ninth session  
(A/CN.9/WG.V/WP.95 and Add.1)**

**[Original: English]**

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## I. Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on two insolvency topics, both of which were of current importance, where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the first of those two topics,<sup>1</sup> concerning a proposal by the United States, as described in A/CN.9/WG.V/WP.93/Add.1, paragraph 8, to

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<sup>1</sup> The second topic concerning the liability of directors and officers of a company in insolvency and pre-insolvency is addressed in A/CN.9/WG.V/WP.96.

provide guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) relating to centre of main interests (COMI) and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.<sup>2</sup>

4. As a preliminary matter, the Working Group may wish to consider, or at least to bear in mind, the need to resolve the form and manner in which the first part of the proposal, i.e. guidance on issues related to COMI, might be presented. The proposal (A/CN.9/WG.V/WP.93/Add.2, paras. 68-70) suggests that, in considering the questions raised below, the Working Group should set out the policy rationale for any conclusions it may reach that could form the basis of guidance to be provided on interpretation of the Model Law. Explaining that policy rationale could also provide a helpful “legislative history” for a jurist or insolvency authority to understand the scope and meaning of the various provisions of the Model Law. The Working Group might wish to consider how that might be achieved. Various types of document could be developed, depending upon the level of guidance the Working Group sought to provide, such as information and commentary on the one hand or recommendations on the other. An information document that could accompany the existing text of the Model Law and Guide to Enactment of the Model Law (the Guide to Enactment) might be one solution, while another might be to add to or revise the Guide to Enactment itself.

## **I. Interpretation and application of concepts relating to centre of main interests**

### **A. Background**

5. The Model Law has now been adopted by some 19 jurisdictions and a number of cases interpreting various issues arising under the Model Law have been reported in the UNCITRAL CLOUT series.<sup>3</sup>

6. The United States proposal notes that in the majority of proceedings for recognition commenced under laws enacting the Model Law the location of the debtor’s COMI being, on the basis of the presumption in article 16, the registered office of the debtor, has not been disputed.<sup>4</sup> The proposal also notes, however, that a number of court decisions have raised issues which could be examined and clarified. These issues include: what is required to satisfy the various elements of the definitions in article 2 of the Model Law, particularly “foreign proceedings” under paragraph (a); the scope of what is required to rebut the presumption in paragraph 3 of article 16 based on place of registration (or incorporation under some laws); whether a decision by a State accepting jurisdiction to commence an insolvency case or other similar decision may be challenged; and the criteria that may be

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<sup>2</sup> See the related proposal of the Union Internationale des Avocats (UIA), concerning the possible development of a convention, as referred to in A/CN.9/686, paras. 127-130.

<sup>3</sup> Case Law on UNCITRAL Texts, A/CN.9/SER.C/ABSTRACTS/72, 73, 76 and 92, available online at [www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html).

<sup>4</sup> A/CN.9/WG.V/WP.93/Add.2, para. 7.

employed to answer these questions. The proposal suggests that harmonizing such criteria may be an important factor in raising predictability in this important area of the law, as the insights of the collaborative body that negotiated the Model Law are likely to be persuasive in many jurisdictions.

7. This note examines the court decisions relating to interpretation and application of the various components of the definitions in article 2 of the Model Law in order to better understand the impact of the issues raised, as well as the areas where uncertainty has arisen.

## **B. Proceedings qualifying for recognition under the Model Law: article 2**

### **1. Requirement for insolvency of the debtor**

8. As a preliminary matter, it might be noted that the Model Law does not define “insolvency” or “insolvency proceeding”. Although the possibility of including a definition of those terms in the Model Law was considered by the Working Group, it was concluded that it was not necessary. Rather, since the focus of the Model Law was recognition of foreign proceedings, the Working Group generally agreed that the work should concentrate on identifying the characteristics that a foreign insolvency proceeding should possess in order to qualify for recognition.<sup>5</sup>

9. Notwithstanding the absence of a definition, a consideration of the preparatory documents<sup>6</sup> appears to suggest that, although it was widely acknowledged that different jurisdictions might have different notions of what fell within the term “insolvency proceedings”, there was a general understanding that such proceedings involved some form of financial distress or an insolvent debtor. This is reflected in the Guide to Enactment. Paragraph 51 notes that the word “insolvency” as used in the title of the Model Law, refers to the various types of collective proceedings against insolvent debtors. Paragraph 71 notes that the expression “insolvency proceedings” may have a technical meaning in some legal systems, but is intended in subparagraph (a) of article 2 to refer broadly to proceedings involving companies in severe financial distress.

10. The Working Group may recall that the definition of “insolvency” in the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) is “when a debtor generally is unable to pay its debts as they mature or when its liabilities exceed the value of its assets.”<sup>7</sup> The Working Group may also recall that the Legislative Guide identifies the key objectives of an effective insolvency law (part one, chap. I, paras. 1-14 and recommendations 1-6), as well as the general features of an insolvency law (part one, chap. I, paras. 20-27 and recommendation 7). With respect to commencement of insolvency proceedings, recommendations 15 and 16 of the Legislative Guide contemplate insolvency or imminent insolvency, as defined above.

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<sup>5</sup> See A/CN.9/422, para. 47.

<sup>6</sup> A.CN.9/WG.V/WP.44, 46 and 48 and A/CN.9/422, 433 and 435, available online at [www.uncitral.org/uncitral/en/commission/working\\_groups/5Insolvency.html](http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html).

<sup>7</sup> Legislative Guide, glossary, para. (s).

11. The Model Law recognizes that, for certain purposes, insolvency proceedings may be commenced under specific circumstances defined by law that do not necessarily mean the debtor is in fact insolvent. Paragraph 195 of the Guide to Enactment notes that for use in jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of foreign main proceedings, a rebuttable presumption of insolvency of the debtor for the purposes of commencing a local insolvency proceeding. Paragraph 194 notes that those circumstances might include cessation of payments by the debtor or certain actions of the debtor such as a corporate decision, dissipation of its assets or abandonment of its establishment.

12. One case involving recognition of foreign proceedings under legislation enacting the Model Law has raised an issue concerning the insolvency of the debtor. In *Betcorp*,<sup>8</sup> the proceeding for which recognition was sought in the United States was a members' voluntary winding up proceeding, commenced under Australian law, where the debtor was not insolvent.<sup>9</sup> The *Betcorp* court noted that the relevant part of the Australian law<sup>10</sup> covered a number of different procedures used to end a corporation's existence; that not all of those procedures required court supervision; and that the law addressed winding up of a company based on its insolvency, as well as grounds for winding up other than insolvency. The court took the view that the element of the definition in paragraph (a) of article 2, "pursuant to a law relating to insolvency", did not require the company to be either insolvent or contemplating using any provisions of the Australian law to adjust any debts.<sup>11</sup>

## 2. Elements of the definition of "Foreign proceeding"

13. To be recognized under the Model Law, a foreign proceeding must fall within the definition in paragraph (a) of article 2, which contains several elements. The proceedings should be (emphasis added):

- (i) *Collective* judicial or administrative proceeding in a foreign State, including an interim proceeding,
- (ii) Pursuant to a law relating to insolvency,

<sup>8</sup> Short form references to cases are included throughout this note. Full citations for those cases are included in the Annex.

<sup>9</sup> At its incorporation in 1998, Betcorp operated only in Australia, but later expanded its operations to include the provision of online gambling services to the US. This core part of its business was ended with the passage of the Unlawful Internet Gambling Enforcement Act (2006), which prohibited online gambling in the US. The company halted its operations in the US and ceased all operations shortly thereafter. At a meeting in September 2007, shareholders voted overwhelmingly to put the company into voluntary winding up. According to the evidence presented, the company was solvent.

<sup>10</sup> Australian Corporations Act 2001 (Cth) — while chapter 5 of the Act deals with external administration, the relevant proceedings in *Betcorp* were commenced under part 5.5, which deals with voluntary winding up pursuant to a resolution of a company, where it is a requirement that the company is solvent.

<sup>11</sup> *Betcorp*, p. 282, see below, para. 28. It is relevant to note that the definition of a foreign proceeding in Chapter 15 of the United States Bankruptcy Code (which enacts the Model Law in the United States) includes, in addition to the words "law relating to insolvency", the words "or adjustment of debt".

(iii) In which proceeding the assets and affairs of the debtor *are subject to control or supervision by a foreign court*,

(iv) *For the purpose of reorganization or liquidation.*

14. Paragraph (1) of article 16 creates a presumption with respect to the definitions of “foreign proceeding” and “foreign representative” in article 2. If the decision commencing the foreign proceeding and appointing the foreign representative indicates that the foreign proceeding is a proceeding within the meaning of paragraph (a) of article 2 and that the foreign representative is a person or body within the meaning of paragraph (d) of article 2, the court is entitled to so presume.

15. The courts have relied upon that presumption in several cases. In *Ernst & Young*, a Canadian court order appointing a receiver was recognized in the United States as a foreign proceeding under Chapter 15. Although the nature of the Canadian receivership was questioned, the United States court did not consider that issue, relying instead on the content of the Canadian order appointing the receiver.<sup>12</sup>

16. In the case of *Innua Canada*, the United States court also recognized a Canadian receivership as amounting to a foreign proceeding. Recognition was based on the Canadian court that had appointed the receiver declaring, in its order, that the receiver was the foreign representative of a foreign proceeding and specifically authorizing the receiver to seek recognition in the United States under Chapter 15. The United States court took the view that it was therefore entitled to apply the presumption in paragraph 1 of article 16 of the Model Law.<sup>13</sup>

17. The cases considering article 2 sometimes raise questions relating to only one or two of the requisite elements. This note discusses each of the elements separately, although it might be noted, as stated by the English appeal court in *Stanford International Bank* that, while each factor noted above has to be considered, the definition must be read as a whole.<sup>14</sup>

#### **(a) Collective proceeding**

18. The Guide to Enactment notes the requirement that creditors be involved collectively in the foreign proceeding,<sup>15</sup> rather than that the proceeding is one designed to assist a particular creditor to obtain payment. It is also noted that a variety of collective proceedings would be eligible for recognition “be they compulsory or voluntary, corporate or individual, winding-up or reorganization”, and would include those where the debtor retained some degree of control over its assets, albeit under court supervision (e.g. debtor-in-possession, suspension of payments).<sup>16</sup> When discussed in the Working Group, it was noted that “a collective character involved representation of the mass of creditors”.<sup>17</sup> The Working Group may recall that the Legislative Guide establishes various key objectives of an effective and efficient insolvency law, a number of which expand on the collective

<sup>12</sup> *Ernst & Young*, p. 776.

<sup>13</sup> *Re Innua Canada Ltd*, quoted in *Stanford International Bank*, para. 80.

<sup>14</sup> *Stanford International Bank* (on appeal), para. 23.

<sup>15</sup> Guide to Enactment, para. 23.

<sup>16</sup> *Id.*, para. 24.

<sup>17</sup> A/CN.9/422, para. 48.

nature of insolvency proceedings.<sup>18</sup> The collective nature of different types of proceedings has been raised in several cases concerning requests for recognition of foreign proceedings under the legislation enacting the Model Law in different States.

19. In *Betcorp*, recognition in the United States of an administrative proceeding commenced under Australian law was granted on the basis that the proceeding satisfied the requisite aspect of a “collective” proceeding under Model Law because it considered the rights and obligations of all creditors and realized assets for the benefit of all creditors. The United States court noted that that conclusion was in contrast to, for example, a receivership remedy instigated at the request, and for the benefit of, a single secured creditor.<sup>19</sup>

20. In *Stanford International Bank*, on an application for recognition under the legislation implementing the Model Law in England, the English court held that a receivership order made by a court in the United States was not a collective proceeding pursuant to an insolvency law. The basis for that decision was that the order was made after an intervention by the United Securities Exchange Commission (SEC) “to prevent a massive ongoing fraud”.<sup>20</sup> The court took the view that the purpose of the order was to prevent detriment to investors, rather than to reorganize the debtor or to realize assets for the benefit of all creditors. That view was upheld on appeal, largely for the reasons given in the English lower court.

21. In *Gold & Honey*, the United States court denied recognition to an Israeli receivership proceeding, finding that it was not an insolvency or collective proceeding as it did not require the receivers to consider the rights and obligations of all creditors. The court observed that the receivership was more akin to an individual creditor’s action for repossession than it was to a reorganization or liquidation by an independent trustee, both of which are instituted by a debtor for the purposes of paying off all creditors with court supervision to ensure evenhandedness.<sup>21</sup>

22. In *British American Insurance*, the court concurred with the findings in *Betcorp* and *Gold & Honey* on the meaning of “collective proceedings”. The court added that the word “collective” contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action. Notice to creditors, including general unsecured creditors, may play a role in this analysis. In determining whether a particular foreign action was collective as required, it was appropriate to consider both the law governing the foreign action and the parameters of the particular proceeding as defined in, for example, orders of a foreign tribunal overseeing the action.<sup>22</sup>

23. In *Rubin v Eurofinance*, the appellate court noted that it was not in dispute that the proceeding was collective, but observed that it was a collective proceeding because it was concerned “with collecting and distributing the debtor’s assets.”<sup>23</sup>

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<sup>18</sup> Legislative Guide, part one, paras. 3-13.

<sup>19</sup> *Betcorp*, p. 281.

<sup>20</sup> *Stanford International Bank*, para. 73.

<sup>21</sup> *Gold & Honey*, p. 370.

<sup>22</sup> *British American Insurance*, p. 902.

<sup>23</sup> *Rubin v Eurofinance* (on appeal), para. 41.



The court referred to another case in which it had been observed that insolvency, whether personal or corporate, was a collective proceeding to enforce rights and not to establish them.<sup>24</sup> The appellate court held that bankruptcy proceedings included various mechanisms [in this case dealing with the collective enforcement regime of the insolvency proceedings] which allowed the insolvency representative to bring actions against third parties for the collective benefit of all creditors. Those mechanisms are integral to and are central to the collective nature of bankruptcy and are not merely incidental procedural matters.<sup>25</sup>

**(b) Pursuant to a law relating to insolvency**

24. Preparatory documents indicate that this formulation was used to allude to the fact that liquidation and reorganization might be conducted under law other than, strictly speaking, insolvency law (e.g. company law).<sup>26</sup> It was approved by the Working Group as being “sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute in which they might be contained.”<sup>27</sup>

25. The question of what constitutes “a law relating to insolvency” has been considered by several courts, particularly in the context of determining whether a receivership proceeding is a foreign proceeding that would qualify for recognition.

26. In *Stanford International Bank*, the English court found that the United States proceeding initiated by the SEC did not qualify as a foreign proceeding as, amongst other things, it was not based on a law relating to insolvency.<sup>28</sup> The court said that the underlying cause of action which led to the making of the receivership order had nothing to do with insolvency and no allegation of insolvency featured in the SEC’s complaint.<sup>29</sup> It went on to say that the fact that some receiverships may be classified for some purposes as “insolvency proceedings” or be treated as acceptable alternatives to insolvency did not mean that the receivership satisfied the requirements for a foreign proceeding under the Model Law.<sup>30</sup> The general body of common law or equitable principles which bear on the appointment of a receiver and the conduct of a receivership, the court said, was not a law relating to insolvency since it applied in many different situations, many of which had nothing to do with insolvency.<sup>31</sup>

27. On appeal, the presiding judge further considered the nature of a “law relating to insolvency”, concluding that it did not have to be statutory (i.e. it could include the common law) nor did it have to be a law relating exclusively to insolvency. The first step, the court said, was “to identify the law under, or pursuant to which, the relevant proceeding was brought and then to consider whether that law related to

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<sup>24</sup> *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26, [2007] 1 A.C. 508, Lord Hoffman, para. 15.

<sup>25</sup> *Rubin v Eurofinance* (on appeal), para. 61.

<sup>26</sup> A/CN.9/WG.V/WP.44, Notes to article 2(c), para. 2.

<sup>27</sup> A/CN.9/422, para. 49.

<sup>28</sup> *Stanford International Bank*, para. 84.

<sup>29</sup> *Id.*, para 84 (iii).

<sup>30</sup> *Id.*, para. 84 (viii).

<sup>31</sup> *Id.*, para. 84 (ix).

insolvency and whether the other factors to which the definition [in article 2] refers could be regarded as being brought about ‘pursuant’ to that law.”<sup>32</sup>

28. The presiding judge largely agreed with the reasoning of the lower court and added that the fact that a court may subsequently make orders which bring into force a process which can be recognized as an insolvency proceeding was immaterial unless and until it was done. The principles of the common law or equity did not “relate to insolvency” unless and until they were activated for that purpose.<sup>33</sup>

29. In *Betcorp*, the United States court noted that that element of the definition did not require the company to be either insolvent or to be contemplating using any provisions of the Australian law to adjust any debts. In reaching the conclusion that the Australian proceeding satisfied that part of the definition, the judge relied upon the comprehensive nature of the Australian companies law (under which the voluntary liquidation commenced) and an explanatory statement of the Australian Government that its company laws qualified under the Model Law. With respect to the first point, the court noted that the relevant law addressed the whole of the corporate life cycle of an Australian corporation and that Chapter 5, under which the provisions on voluntary liquidation were to be found, addressed corporate insolvency. With respect to the second point, the court made reference to the explanatory memorandum that accompanied the legislation implementing the Model Law in Australia, noting that such memoranda may be used by Australian courts in interpreting legislation passed by the Parliament. That memorandum made reference to the parts of Chapter 5 of the Corporations Act to be covered by the Model Law, as well as to parts that were to be excluded; since the part dealing with voluntary liquidation was not specifically excluded, the court concluded that such a liquidation would be covered by the Model Law.<sup>34</sup>

**(c) Control or supervision of assets and affairs of the debtor by a foreign court**

30. Other than noting that a foreign proceeding would include proceedings in which the debtor retained some measure of control over its assets, albeit under court supervision,<sup>35</sup> the Guide to Enactment does not define the level of control or supervision required to satisfy the definition or the time at which that supervision or control should arise. Preparatory documents suggest that this formulation was

<sup>32</sup> *Stanford International Bank* (on appeal), para. 24.

<sup>33</sup> *Id.*, para. 26.

<sup>34</sup> *Betcorp*, pp. 281-282. The explanatory memorandum also quoted the last sentence of paragraph 71 of the Guide to Enactment which refers to “companies in severe financial distress” (Chapter 2, para 12 of the explanatory memorandum) — see above, para. 9. The explanatory memorandum is available at [www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0C4BA8C26A7BE888CA2573EF00117EAC/\\$file/13020811.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0C4BA8C26A7BE888CA2573EF00117EAC/$file/13020811.pdf). A discussion paper issued for the purposes of considering adoption of the Model Law in Australia took a different view, noting that: “In the Australian Corporations Act context, [...] the scope of the Model Law would extend to liquidations arising from insolvency, reconstructions and reorganisations under Part 5.1 and voluntary administrations under Part 5.3A. It would not extend to receiverships involving the private appointment of a controller. It would also not extend to a members’ voluntary winding up or a winding up by a court on just and equitable grounds as such proceedings may not be insolvency related.” CLERP 8 (2002), p. 23, available at [www.treasury.gov.au/documents/448/PDF/CLERP8.pdf](http://www.treasury.gov.au/documents/448/PDF/CLERP8.pdf).

<sup>35</sup> Guide to Enactment, para. 24.

adopted to clarify the formal nature of the control or supervision requirement and make it clear that “private financial adjustment arrangements that might be entered into by parties outside of judicial or administrative proceedings [and which] could take a potentially large number of forms”<sup>36</sup> were not suitable for inclusion in a general rule on recognition. Several cases have considered some aspects of this requirement.

31. In *Gold & Honey*, the court took the view that both assets and affairs must be under the control or supervision of the courts. The court found that the receivers had proven that all of the debtor’s assets present in Israel were under the control of the Israeli court in the receivership proceeding, but that there was no proof the receivers had been given authority with respect to the debtor’s business affairs. Moreover, the lender (which had applied to have the receiver appointed) conceded in oral argument that the receivers were not provided with authority over the business affairs of one of the debtor entities.<sup>37</sup>

32. In *Betcorp*, the United States court took the view that the requirement for supervision or control by a foreign court was met by the administrative or judicial oversight of the liquidators responsible for administering the collective proceeding on behalf of all creditors. The authority responsible for the general supervision of liquidators in the performance of their duties could require liquidators to obtain permission before undertaking certain actions and had the ability to remove or revoke the authority of any person to be a liquidator. On that basis, it was found to be an “authority competent to control or supervise a foreign proceeding for the purposes of the definition of ‘foreign proceeding’”.<sup>38</sup> Reference was made to the case of *Tradex Swiss*, in which the Swiss Federal Banking Commission was held to be a foreign court under Chapter 15 because it controlled and supervised the liquidation of securities brokers, such as the debtor. In the alternative, the *Betcorp* court held that the winding up proceedings was also subject to supervision by the courts, since the liquidator or any creditor could have recourse to the court to seek determination of any question arising in the liquidation and the court could take any action it thought fit with respect to the actions of a liquidator. The requirement for control or supervision by a foreign court could also be satisfied on that basis.<sup>39</sup>

33. In *Multicanal*, a case not decided under the Model Law but involving recognition of an Argentinean proceeding in the United States, the court considered the involvement of the court in a debt restructuring agreement. The basic contention was that the court’s oversight of the proceeding was inadequate for purposes of recognition because it was brought into the process only after the solicitation of votes was over and it was only authorized to consider limited aspects of the proceedings, such as whether the statement of assets and liabilities of the debtor was adequate and whether the statutory majorities had been obtained in the voting process. After analysing the Argentinean process in detail, the court concluded that it bore many similarities to an analogous United States proceeding, including with

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<sup>36</sup> A/CN.9/419, para. 29.

<sup>37</sup> *Gold & Honey*, p. 371.

<sup>38</sup> *Betcorp*, p. 284.

<sup>39</sup> *Id.*

respect to judicial oversight, and was the type of proceeding that could be recognized under United States law.<sup>40</sup>

34. A further issue arising under this part of the definition and under the definition of “foreign representative” is whether the particular entity administered by a foreign representative is a “debtor” for the purposes of the domestic law to be applied by the receiving court, that term not being defined in the Model Law.

35. A question of that type arose in *Rubin v Eurofinance*. In that case, receivers and managers had been appointed by the United States court over a debtor referred to as “The Consumers Trust”. A trust of that description was recognized as a legal entity, a “business trust”, under the law of the United States. On a recognition application to the English Court, it was argued that since English law did not recognize such a trust as a legal entity, it was not a “debtor” for the purposes of recognition under legislation enacting the Model Law. The judge rejected that submission holding that, having regard to the international origins of the Model Law, a “parochial interpretation” of the term “debtor” would be “perverse”.<sup>41</sup>

**(d) For the purposes of liquidation or reorganization**

36. The cases that have considered this issue are those involving appointment of receivers, where the question concerns the purpose of the foreign proceeding and whether the powers accorded the receiver are consistent with the conduct of liquidation or reorganization.

37. In *Stanford International Bank*, the lower court considered that in determining whether the United States receivership was a foreign proceeding within the requirements of article 2, it was important to consider the actual powers and duties conferred or imposed on the receiver by the United States court order. Citing the example of *Gold & Honey*, the court said that the label of foreign receivership was hardly determinative of recognition issues. The court found that the recited purpose of the receivership order was to prevent dissipation and waste, not to liquidate or reorganize the debtors’ estates; the detriment that the court was concerned to prevent was detriment to investors; the powers conferred on and duties imposed on the receiver were duties to gather in and preserve assets, not to liquidate or distribute them; and under the order the receiver had no power to distribute assets of the defendants.<sup>42</sup> Cumulatively, those findings led the court to conclude the proceeding was not a foreign proceeding. On appeal, the presiding judge took the view, as noted above, that at the stage at which the application was considered, the SEC proceeding was not for reorganization or liquidation, but rather for the protection of investors and the assets of the debtor. The fact that the United States court could subsequently make orders that would bring into force a process which could be recognized as an insolvency proceeding was immaterial unless and until it did so.<sup>43</sup>

<sup>40</sup> *Multicanal*, p. 509.

<sup>41</sup> *Rubin v Eurofinance*, paras. 39 and 40; affirmed on appeal.

<sup>42</sup> *Stanford International Bank*, para. 84.

<sup>43</sup> *Stanford International Bank* (on appeal), para. 26.

**(e) Issues for consideration**

38. The Working Group may wish to consider the issues raised by the cases cited above with respect to the definition of a “foreign proceeding”, including:

(a) Whether a foreign proceeding needs to satisfy all of the elements of the definition in order to qualify for recognition;

(b) Whether criteria should be established to determine what constitutes a collective proceeding, the extent to which the Legislative Guide might be relevant in establishing those criteria, and whether proceedings that are not collective should be eligible for recognition;

(c) Whether insolvency or financial distress is an element of the definition of “foreign proceeding” and thus required for recognition;

(d) The degree of control or supervision of the assets and affairs of the debtor by a foreign court required to satisfy the definition;

(e) The time at which the proceeding should be for the purpose of liquidation or reorganization — at the time of the application for recognition or at a later point if there is a possibility of an additional grant of powers; and

(f) Whether there is a need to define what constitutes a debtor for the purposes of the Model Law.

**C. Uniform interpretation and international origin — article 8****(a) Meaning of article 8**

39. Article 8 of the Model Law provides that in interpreting the text, regard is to be had to its international origin and the desirability of promoting uniformity. The Guide to Enactment notes that a provision similar to article 8 appears in a number of private-law treaties, including those of the United Nations and in model laws, including those of UNCITRAL.<sup>44</sup> The importance of Article 8 to interpretation is noted in the decisions of a number of courts.

40. In *Bear Stearns*, for example, the court noted that “Chapter 15 also directs courts to obtain guidance from the application of similar statutes by foreign jurisdictions: ‘[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.’”<sup>45</sup> In *Stanford International Bank*, the appellate court noted that “The regulation implementing [the Model Law] requires that it be interpreted by reference to any documents of the working group of the UN which produced it and the Guide to its enactment prepared in response to the request for its preparation made by the UN Commission on International Trade in May 1997.”<sup>46</sup> The appellate court in *Rubin v Eurofinance*

<sup>44</sup> Guide to Enactment, para. 91.

<sup>45</sup> *Bear Stearns*, p. 10.

<sup>46</sup> *Stanford International Bank* (on appeal), judgement of the Chancellor, para. 4; see also *Rubin v Eurofinance*, para. 40.

took the view that the striking similarities between certain aspects of the English and United States law justified a harmonized interpretation.<sup>47</sup>

41. In *Betcorp*, the United States court stated that section 1508 of Chapter 15 required that in interpreting phrases such as “centre of main interests” the court “shall consider” how those phrases have been construed in other jurisdictions which have adopted similar statutes, which meant “looking not only at domestic cases, but also at cases decided by the courts of other countries.” As stated in the [United States] legislative history: “[n]ot only are these sources persuasive, but they advance the crucial goal of uniformity of interpretation.”<sup>48</sup> As noted above, (para. 28), the *Betcorp* court took notice not only of cases decided by other courts, but also of various background and explanatory documents relating to the foreign law.

**(b) Issues for consideration**

42. The Working Group may wish to consider whether further guidance might be provided on the sources to be used to provide assistance on interpretation of the Model Law under article 8.

**D. Recognition**

**1. Public policy exception — article 6**

**(a) Interpretation of article 6**

43. Article 6 of the Model Law provides an exception to recognition of a foreign proceeding where to do so would be “manifestly contrary to the public policy” of the receiving State. The Guide to Enactment indicates that generally this exception should be interpreted restrictively and that it is only intended to apply in exceptional circumstances concerning matters of fundamental importance to the enacting State.<sup>49</sup> Discussion at the thirtieth session of the Commission confirmed that the article was intended to refer only to fundamental principles of law, in particular constitutional guarantees and individual rights, and should only be used to refuse, for example, the application of foreign law, where to do so would contravene those fundamental principles. It was noted, for example, that if the courts were to apply their broad “domestic” notion of public policy, “very few foreign judicial decisions would ever be recognized since most foreign proceedings would, in one or other aspect, depart from procedures which, internally, constituted matters governed by imperative rules.”<sup>50</sup> The word “manifestly” was used to avoid a situation where cooperation under the Model Law was frustrated because a particular step or measure was seen to be contrary to a mere technicality of a mandatory nature.<sup>51</sup>

44. In the case of *Ephedra*, involving recognition of a Canadian proceeding in the United States, the inability to have a jury trial on certain issues to be resolved in the Canadian proceedings, in circumstances where there was a constitutional right to

<sup>47</sup> *Rubin v Eurofinance* (on appeal), para. 60.

<sup>48</sup> *Betcorp*, p. 289.

<sup>49</sup> Guide to Enactment, paras. 86-89.

<sup>50</sup> A/52/17, para. 171.

<sup>51</sup> *Id.*, para. 172.

such a trial in the United States, was held not to be “manifestly contrary to the public policy of the United States”. The court ruled that the exception should be narrowly interpreted and restricted to the most fundamental policies of the United States.<sup>52</sup>

45. In *Ernst & Young*, the parties objecting to recognition of the Canadian receivership in the United States raised two arguments related to the public policy exception. Initially, they contended that Colorado investors (or more broadly, United States investors) were likely to receive less in the Canadian receivership proceeding, which would include creditors from Canada and Israel, than what they would receive from the Colorado court or the Federal Court. However, the court was not persuaded by that argument on the basis that all wronged investors should share in the assets accumulated in the receivership proceeding, regardless of nationality or locale.<sup>53</sup>

46. Second, the objecting parties argued that the costs associated with the Canadian receivership proceeding would deplete the assets of the debtors to such a degree that distributions to the wronged investors would be minimal. However, other than pointing out the receiver was an international firm, the objecting parties provided no evidence to support that allegation. The United States court took the view that costs of liquidation were a reality, whether the proceeding was local or foreign. As a result, it could find no evidence to support a conclusion that the receivership proceeding would produce a result so drastically different as to be “manifestly contrary” to United States public policy.

47. In *Gold & Honey*, a United States court refused recognition of Israeli proceedings on public policy grounds. After Chapter 11 proceedings had been commenced in the United States and after the automatic stay had come into force, a receivership order was made in Israel in respect of the same debtor company. The United States judge declined to recognize that Israeli proceeding “because such recognition would reward and legitimize [the] violation of both the automatic stay and [subsequent orders of the United States court] regarding the stay”.<sup>54</sup> Because recognition would severely hinder the ability of the United States court to carry out two of the most fundamental policies and purposes of the automatic stay — namely, preventing one creditor from obtaining an advantage over other creditors, and providing for the efficient and orderly distribution of a debtor’s assets to all creditors in accordance with their relative priorities<sup>55</sup> — the judge considered that the high threshold required to establish the public policy exception had been met.

48. In *Metcalf and Mansfield*, in addition to recognition, the Canadian foreign representative sought enforcement of certain Canadian orders in the United States, pursuant to the law applicable to enforcement of foreign judgements, the principles of international comity and the public policy embodied in Chapter 15. No objection was made to recognition of the Canadian proceedings. Citing *Bear Stearns*, the court noted that while recognition turned on the objective criteria of the United States equivalent of article 17 of the Model Law, post-commencement relief was largely discretionary and turned on subjective factors that embodied principles

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<sup>52</sup> *Ephedra*, pp. 336-337.

<sup>53</sup> *Ernst & Young*, p. 781.

<sup>54</sup> *Gold & Honey*, p. 371.

<sup>55</sup> *Id.*, p.372.

of comity. The court decided the relief granted in the foreign proceeding and the relief available in a United States proceeding need not be identical. The key determination required by the court was whether the procedures used in Canada met the United States fundamental standards of fairness. The court concluded that the provision in Chapter 15 equivalent to article 6 did not preclude giving comity to the Canadian orders in this case.<sup>56</sup>

49. An issue that has attracted some attention is whether the public policy exception might be used to address, for example, a problem of forum shopping which has resulted in the debtor being placed in a more favourable position, with consequential prejudice to creditors, or to address behaviour contrary to the law of the recognizing State. In a case not decided under the Model Law, but relating to *Stanford International Bank*, a Canadian court found that the behaviour of the Antiguan liquidators, who were seeking recognition in Canada, contravened Canadian law. That disqualified them from acting and from presenting their application for recognition of the Antiguan proceeding in Canada.<sup>57</sup>

**(b) Issues for consideration**

50. The Working Group may wish to consider the following questions with respect to use and interpretation of the public policy exception in article 6:

(a) Whether elaboration of the circumstances in which the public policy exception might be implemented by a court addressing issues of recognition under the Model Law would assist interpretation and application of that article; and

(b) Whether in cases where an applicant requesting relief under the Model Law has contravened a country's established laws or procedures, that contravention could be a basis for denial of recognition under the public policy exception.

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<sup>56</sup> *Metcalfe and Mansfield*, pp. 697-698.

<sup>57</sup> In the case of the Bankruptcy of Stanford International Bank, 11 September 2009, Superior Court, District of Montreal, Quebec, decision on the application of the liquidators, para. 59.



**A/CN.9/WG.V/WP.95/Add.1 (Original: English)**

**Note by the Secretariat on the interpretation and application of  
selected concepts of the UNCITRAL Model Law on Cross-Border  
Insolvency relating to centre of main interests (COMI), submitted to  
the Working Group on Insolvency Law  
at its thirty-ninth session**

**ADDENDUM****CONTENTS**

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**I. Interpretation and application of concepts relating to centre  
of main interests (*continued*)**

**D. Recognition (*continued*)**

**2. Main and non-main proceedings**

1. Article 17 of the Model Law provides that a foreign proceeding within the meaning of paragraph (a) of article 2 shall be recognized as either a foreign main proceeding or a foreign non-main proceeding.

2. In the case of *In the matter of Yuval Ran*, the United States appellate court observed that a foreign proceeding must be classified as either a foreign main or foreign non-main proceeding in order to be recognized and for relief to be afforded under Chapter 15. If the foreign proceeding is neither, the court said, then it is simply ineligible for recognition.<sup>1</sup> Paragraph 2 of article 17 of the Model Law provides only for recognition of those two types of proceeding; proceedings commenced on the basis of presence of assets is not eligible for recognition, although presence of assets may be a sufficient basis for commencing a local proceeding after recognition of a foreign main proceeding.<sup>2</sup>

<sup>1</sup> *In the matter of Yuval Ran* (2010), p. 6.

<sup>2</sup> See article 28. The effects of that proceeding would be limited to the assets of the debtor located in the commencing State.

**(a) Issues for consideration**

3. The United States proposal notes that a court must have jurisdiction in order to proceed and render determinations in regard to issues before it. Two questions are raised in that regard:

(a) Whether a court should be satisfied that a proceeding under the Model Law is a foreign main proceeding or a foreign non-main proceeding, as a pre-condition for recognition; and

(b) The procedure to be should be established to make that determination clear and definitive and whether that procedure should establish a menu of options so that it can be harmonized to the extent feasible.<sup>3</sup>

**3. Location of COMI — article 16 presumption**

4. Article 16 of the Model Law establishes a presumption upon which the court is entitled to rely in determining COMI. Paragraph 3 provides that, in the absence of proof to the contrary, the debtor's registered office (or habitual residence in the case of an individual) is presumed to be the centre of its main interests. Paragraph 122 of the Guide to Enactment makes it clear that article 16 establishes presumptions that allow the court to expedite the evidentiary process; at the same time they do not prevent, in accordance with the applicable procedural law, a court calling for or assessing other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party.

**(a) Rebutting the presumption and burden of proof**

5. A number of cases have raised issues concerning the location of the COMI of the debtor and the interpretation of the presumption in article 16. Particular concerns relate to rebuttal of the presumption and the factors that would be relevant in that regard, especially in the case of a company debtor. Given that the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation) uses a similar concept of COMI, cases decided under that Regulation with respect to COMI may be relevant, pursuant to article 8, to interpretation of the Model Law. The Guide to Enactment notes that the notion of COMI corresponds to the formulation in article 3 of the convention that was the precursor to the EC Regulation and acknowledges the desirability of "building on the emerging harmonization as regards the notion of 'main' proceeding."<sup>4</sup> The Working Group will recall that although the concepts in the two texts are similar, they serve a different purpose. The determination of COMI under the EC Regulation relates to the jurisdiction in which main proceedings should be commenced. The determination of COMI under the Model Law relates to the effects of recognition, principal amongst those being the relief available to assist the foreign proceeding.

<sup>3</sup> A/CN.9/WG.V/WP.93/Add.2, para. 67.

<sup>4</sup> See A/52/17, para. 153 which indicates that "... the interpretation of the term in the context of the Convention would be useful also in the context of the Model Provisions." It should be noted that the EC Regulation does not define COMI, but provides, in recital 13, that the term should correspond to "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." See also Guide to Enactment, paras. 18 and 30.

(i) *Decisions in the European Union*

6. In the leading case under the EC Regulation, *Eurofood*, the European Court of Justice (ECJ) held that the COMI of *Eurofood* was in Ireland because the presumption as to registered office had not been rebutted. The ECJ held that “in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community Legislature in favour of the registered office ... can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect”.<sup>5</sup>

7. In considering the presumption, the ECJ suggested that it could be rebutted in the case of a “letterbox company” which did not carry out any business in the territory of the State in which its registered office was situated. In contrast, it took the view that “the mere fact” that a parent company made economic choices (for example, for tax reasons) as to where the registered office of a subsidiary might be situated, would not be enough to rebut the presumption.<sup>6</sup>

8. *Eurofood* places significant weight on the need for predictability in determining the centre of main interests of a debtor.

9. A number of other decisions under the EC Regulation are set forth in A/CN.9/WG.V/WP.93/Add.2, paras. 13-34.

(ii) *Decisions under the Model Law*

10. In *Bear Stearns*, the United States court gave further consideration to the question of determination of the centre of main interests of a debtor. The application for recognition involved a company registered in the Cayman Islands which had been placed into provisional liquidation in that jurisdiction.

11. Noting that in Chapter 15 the word “proof” in article 16 had been replaced with the word “evidence”, the judge referred to the legislative history, which explained that the change was to make it clearer, using United States terminology, that the ultimate burden was on the foreign representative.

12. The judge went on to say that:

“The presumption that the place of the registered office is also the centre of the debtor’s main interest is included for speed and convenience of proof where there is no serious controversy.”<sup>7</sup>

That approach permitted and encouraged fast action in cases where speed was essential, while leaving the debtor’s true “centre” open to dispute in cases where the facts were more doubtful. The judge added that the “presumption was not a preferred alternative where there is a separation between a corporation’s jurisdiction of incorporation and its real seat”.<sup>8</sup>

13. On appeal, the appellate court affirmed the lower court’s decision that the burden of displacing the presumption lay on the foreign representative and that the

<sup>5</sup> *Eurofood*, para. 34.

<sup>6</sup> Id.

<sup>7</sup> HR Rep No. 31, 109th Cong, 1st session 1516 (2005).

<sup>8</sup> *Bear Stearns*, p. 128.

court had a duty, independently, to determine whether that had been done, irrespective of whether party opposition was or was not present.<sup>9</sup>

14. In *Stanford International Bank*, the English court noted that United States jurisprudence was not qualified by a requirement that creditors be able to ascertain the COMI of the company, in contrast to the EC Regulation, which provided that COMI was the place where the debtor conducted the administration of its interests on a regular basis and was “therefore ascertainable by third parties”. The court found that since the registered office of Stanford International Bank was in Antigua, the burden of rebutting the presumption fell on the United States receiver and would only be rebutted by factors that were objective. Those factors would not count unless they were also ascertainable by third parties, were in the public domain and were what third parties would learn in the ordinary course of business with the company.<sup>10</sup> It followed, the court said, that the burden of proof as to the COMI was never on the party opposing “main proceeding” status and that such an opponent had only a burden of adducing some evidence inconsistent with the registered office being the COMI.

15. On appeal, the appellate court upheld the decision of the lower court. Having considered both the EU and the United States cases on COMI, the presiding judge expressed the view that the same expression used in different documents may bear different meanings because of their respective contexts. However, he could see nothing in those respective contexts (i.e. EU and United States) to require different meanings to be given: in both cases the phrase was used to identify the proceedings which should take priority over similar proceedings in other jurisdictions. In both cases, the judge indicated, the concern was that persons dealing with the debtor should be able to know before insolvency intervened which system of law should govern the eventual insolvency of their counterparty.

“It would be absurd if the COMI of a company with its registered office in say, Spain, which is being wound up both there and in the United States should differ according to whether the court in England was applying UNCITRAL on an application by the United States liquidators for recognition as a foreign main proceeding or the EC Regulation in deciding whether the court in England may entertain a petition to wind up the Spanish company [in England].”<sup>11</sup>

16. Slightly different approaches were taken by the other appellate judges in *Stanford International Bank* with respect to the relevance of ascertainability by third parties. The observations made might be seen as suggesting that a court is required to judge objectively, on the evidence before it, where the centre of main interests of the debtor lies, as opposed to making that finding based on evidence of what was actually ascertainable by creditors and other interested parties who dealt with the debtor during the course of its trading life.

17. In *Fairfield Sentry*, recognition in the United States of proceedings before the court in the British Virgin Islands (BVI) was sought. The debtors were incorporated and maintained their registered offices in BVI, but having ceased doing business

<sup>9</sup> *Bear Stearns* (on appeal).

<sup>10</sup> *Stanford International Bank*, para. 62.

<sup>11</sup> *Stanford International Bank* (on appeal), para. 54.

some months before the BVI proceeding commenced, their activities had been conducted only in connection with the winding up of their business. The court found that although their business was international, the most feasible administrative “nerve centre” for the debtor had for some time been in the BVI. The court cited the recent decision in *Hertz Corp. v Friend*, in which the United States Supreme Court held that “the phrase ‘principal place of business’ under United States law refers to the place where a corporation’s high level officers direct, control, and coordinate the corporation’s activities, i.e., its ‘nerve centre’, which will typically be found at its corporate headquarters. [...] in practice it should normally be the place where the corporation maintains its headquarters — provided that the headquarters is the actual centre of direction, control, and coordination, i.e., the ‘nerve centre’, and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have travelled there for the occasion). If the record reveals attempts at manipulation — for example, that the alleged ‘nerve centre’ is nothing more than a mail drop box, a bare office with a computer, or the location of an annual executive retreat — the courts should instead take as the ‘nerve centre’ the place of actual direction, control, and coordination, in the absence of such manipulation.”<sup>12</sup>

18. The *Fairfield Sentry* court also noted the finding in *British American Insurance*, that where, by necessity and good faith, a foreign representative relocated all of the primary business activities of the debtor to his location (or brought business to a halt), thereby causing other parties to look to that foreign representative as the location of the debtor business, the debtor’s COMI may become lodged with the foreign representative. That fact, together with the location of the registered office, supported the location of the COMI of the debtor as being in the BVI.<sup>13</sup>

**(b) Factors relevant to determination of COMI**

*(i) Identifying the factors — company debtors*

19. Various factors have been identified as relevant to determining the COMI of a debtor and to rebutting the presumption in article 16. In *Betcorp*, although the centre of main interests of the debtor was not in dispute, the judge offered some thoughts on the subject. He concluded that “... a commonality of cases analysing debtors’ [centre of main interests] demonstrates that courts do not apply any rigid formula or consistently find one factor dispositive; instead they analyse a variety of factors to discern, objectively, where a particular debtor has its principal place of business.”<sup>14</sup>

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<sup>12</sup> *Hertz, Corp.*, pp. 1192-1195.

<sup>13</sup> *Fairfield Sentry*, pp. 5-8; *British American Insurance*, p. 914.

<sup>14</sup> *Betcorp*, p. 290.

20. Many factors have been considered by the courts with respect to determining the COMI of company debtors. They are not described in exactly the same way in each of the cases, but may be grouped under the following general descriptions, which are not intended to provide an exhaustive list:

- (a) The location of the debtor's headquarters<sup>15</sup> or head office functions<sup>16</sup> or "nerve centre";<sup>17</sup>
- (b) The location of a debtor's management or those who actually managed the debtor<sup>18</sup> or of the operational management of the debtor;<sup>19</sup>
- (c) The location of the debtor's main assets and/or creditors<sup>20</sup> or the location of the majority of creditors who would be affected by the case;<sup>21</sup>
- (d) The site of the controlling law<sup>22</sup> or of the law governing the main contracts of the company;<sup>23</sup>
- (e) The jurisdiction whose law would apply to most disputes;<sup>24</sup>
- (f) The location from which financing was organized<sup>25</sup> or authorized<sup>26</sup> or the location of the debtor's primary bank;<sup>27</sup>
- (g) The location from which administration of the debtor was organized;<sup>28</sup>
- (h) The location from which contracts (for supply) were organized;<sup>29</sup>
- (i) The location from which purchasing policy, staff, accounts payable and computers systems were managed<sup>30</sup> or cash management system was run;<sup>31</sup>
- (j) The location in which commercial policy was determined;<sup>32</sup>
- (k) The location of employees;<sup>33</sup>
- (l) The location from which reorganization of the debtor was being conducted;<sup>34</sup>

<sup>15</sup> *Tradex Swiss; Stanford International Bank; MPOTEC.*

<sup>16</sup> *ENERGOTECH, MPOTEC, Hellas.*

<sup>17</sup> *Hertz Corp. v Friend*; In the case of the Bankruptcy of Stanford International Bank, 11 September 2009, Superior Court, District of Montreal, Quebec, decision on the application of the SEC receiver, para. 35; *Fairfield Sentry.*

<sup>18</sup> *Tradex Swiss; Stanford International Bank.*

<sup>19</sup> *Eurotunnel, British American Insurance.*

<sup>20</sup> *Tradex Swiss; Ernst & Young, Eurotunnel, British American Insurance.*

<sup>21</sup> *Stanford International Bank.*

<sup>22</sup> *Tradex Swiss.*

<sup>23</sup> *MPOTEC.*

<sup>24</sup> *Stanford International Bank, Ernst & Young, British American Insurance.*

<sup>25</sup> *Daisy Tek.*

<sup>26</sup> *MPOTEC.*

<sup>27</sup> *MPOTEC, Hellas.*

<sup>28</sup> *Eurofoods; Daisy Tek.*

<sup>29</sup> *Daisy Tek.*

<sup>30</sup> *MPOTEC.*

<sup>31</sup> *Ernst & Young.*

<sup>32</sup> *MPOTEC.*

<sup>33</sup> *Eurotunnel.*

<sup>34</sup> *Eurotunnel; Ernst & Young, Hellas.*

(m) The location which creditors recognized as being the centre of the company's operations;<sup>35</sup>

(n) The location in which the debtor was subject to supervision or regulation;<sup>36</sup> and

(o) The location in which and whose law governed the preparation and audit of accounts.<sup>37</sup>

(ii) *Identifying the factors — individual debtors*

21. Determination of the COMI of an individual debtor has not been the subject of many cases. In *In the matter of Yuval Ran*, the appellate court noted that the factors relevant to determining the COMI of an individual debtor might be somewhat different to those relevant to the COMI of a company debtor. The appellate court referred to *In re Loy*,<sup>38</sup> in which the court had noted that factors such as (a) the location of a debtor's primary assets; (b) the location of the majority of the debtor's creditors; and (c) the jurisdiction whose law would apply to most disputes, might be used to determine an individual debtor's COMI when there was a serious dispute. In other words, the *Ran* court said, the *Loy* court considered factors which are normally applied to the determination of a corporate debtor's COMI in order to determine the disputed COMI of an individual debtor. The court found that the receiver's evidence, while sufficient to rebut the presumption that *Ran's* COMI was in the United States, was nevertheless insufficient to prove by a preponderance of the evidence that *Ran's* centre of main interests was in Israel. The appellate court also disagreed with the operational history approach, noting that the language of the relevant provisions was clearly couched in the present tense and did not involve looking back at past events.<sup>39</sup> The appellate court also found that it was important that the debtor's COMI be ascertainable by third parties.

(c) **Impact of fraud**

(i) *Cases involving fraud*

22. A question that arose in the case of *Ernst & Young* was the extent to which fraud might affect the determination of COMI, where the place of registration was merely a pretext and no actual business was carried out there. The case involved two related companies, one of which was registered in Colorado in the United States and the other in Canada, that were part of a fraudulent scheme managed from Canada. The Canadian court appointed a receiver to both companies.

23. The United States court recognized the Canadian receivership as a foreign main proceeding on the basis that, taking into account the location of those managing the debtors, the COMI of both companies was in Canada. The court looked at the location of the debtors, but found that it was not critical as there was no real business being operated by either entity. The court also looked to a third factor, the location of the assets of the debtors. Although one of the debtor

<sup>35</sup> *Ernst & Young*.

<sup>36</sup> *Eurofood*.

<sup>37</sup> *Eurofood*.

<sup>38</sup> 380 B.R. 154, at 162 (Bankr. E.D. Va. 2007), [CLOUT case no. 924].

<sup>39</sup> *In the matter of Yuval Ran* (2010), pp. 10-12.

entities had funds in a bank account in Colorado, those funds were regularly transferred to the debtor in Canada and the court concluded that the majority of assets were thus in the name of or ultimately controlled by the debtor entity in Canada. With respect to a further two factors, location of the majority of the debtors' creditors and the jurisdiction whose law would apply to most disputes, the court found that they were not critical to the COMI determination. The investors defrauded by the debtors' principals and their entities were citizens of several countries, including Canada, the United States and Israel and with respect to applicable law, jurisdiction lay equally in Canada and the United States.<sup>40</sup>

24. In *Stanford International Bank*, it was argued that where it was alleged the company in question was used as a vehicle for fraud, the court should not investigate the COMI of the company itself, but rather the COMI of the fraudsters organizing the fraud. The lower court said that by its very nature the existence of a fraud behind the scenes was unlikely to be ascertainable by third parties, the whole point being that the fraud was to be kept secret for as long as possible. The court also indicated that the approach of looking at the location of the fraudsters would prove difficult if all of them did not have their COMI in the same State.<sup>41</sup>

25. In the Canadian case concerning *Stanford International Bank* (not determined under legislation enacting the Model Law), the court considered that for Ponzi style frauds, the real and important connection was "the place of business of the nerve centre or as one could call it, the centre of the spider web of this fraud", which was held to be the Stanford Group headquarters in Houston, Texas rather than in Antigua.<sup>42</sup>

**(d) Time relevant to determining COMI**

26. A number of cases arising under both the Model Law and the EC Regulation have involved a debtor moving from one jurisdiction to another in close proximity to the commencement of insolvency proceedings. The Model Law does not address this possibility or make any mention of timing with respect to the determination of COMI. It has been suggested, for example, that the determination should be made with reference to the debtor's operational history and not merely by assessing where the COMI lay on the date of the application for commencement of insolvency proceedings or on the date of the application for recognition of those proceedings.

*(i) Cases under the Model Law*

27. In *Gookseung I*, the Korean court declined to recognize proceedings that had taken place in the United States in the previous year, noting that at the time of the application for recognition those proceedings had already been completed and the applicant, who had formerly been a debtor in possession, no longer qualified as a foreign representative.

28. In *Yuval Ran*, the United States lower court found that in order for the Israeli proceedings to be entitled to recognition as a foreign main proceeding, evidence had

<sup>40</sup> *Ernst & Young*, pp. 778-781.

<sup>41</sup> *Stanford International Bank*, para. 69.

<sup>42</sup> In the case of the Bankruptcy of *Stanford International Bank*, 11 September 2009, Superior Court, District of Montreal, Quebec, decision on the application of the SEC receiver, paras. 32-36.



to show that, at the time recognition was sought, the debtor's COMI was located in Israel. In so doing, it rejected the operational approach that looked at the history of the debtor's connection with Israel. While the debtor had had substantial interests in Israel in the past, at the time of the Chapter 15 application, he effectively had no interests in Israel. That decision was affirmed on appeal.

29. In the case of *Schefenacker*, an automotive supply group which consisted of a German holding company with subsidiaries in various jurisdictions, such as England, United States, Australia and Germany, was in financial trouble and moved its COMI to England as the first step in its restructuring process and in order to take advantage of English insolvency law and enter into a company voluntary arrangement. The holding company's place of incorporation and COMI was successfully moved to England through the use of German law. Main proceedings for the purposes of the Regulations were then commenced in England and recognised across Europe. Those objecting to the application for recognition in the United States focussed on the operating history of the subsidiaries and did not consider that the debtor was a duly organized holding company incorporated in England and Wales, with its operating centre in the United Kingdom. The United States court found that the COMI of the debtor was in the United Kingdom and recognized the proceedings as foreign proceedings. It did not decide whether they were main or non-main proceedings, on the basis that the relief sought could be granted in either case.

30. In *Betcorp*, the United States court took the view that rejecting the operational approach was correct; if COMI were to be assessed on that basis, there was an increased likelihood of conflicting COMI determinations, as courts may tend to attach greater importance to activities in their own countries or may simply weigh the evidence differently. The court also noted the importance of COMI being ascertainable by third parties, suggesting that if the debtor's main interests were in a particular country and third parties observed that situation, it should be irrelevant that the debtor's interests were previously centred in a different country.<sup>43</sup> The court concurred with the decision of the lower court in *Yuval Ran* that the correct time was when the Chapter 15 case commenced. It observed that that was consistent with English cases interpreting the EU Regulation, which seemed to select a time linked to the commencement or service of the relevant insolvency proceeding.<sup>44</sup>

31. In *British American Insurance*, the United States court relied on past case law under Chapter 15 in determining COMI, deciding that the court must look to a multiplicity of factors, none of which was exclusive and not all of which must be met. The court first looked to the timing of the determination and concluded that it should consider the facts in existence on the date the Chapter 15 application was filed.<sup>45</sup> The court held that that approach should also be followed in determining whether the debtor had an establishment in a particular place.<sup>46</sup>

32. In *Fairfield Sentry*, the United States court took the view that "even courts that had recently relegated the COMI focus to the time of the application for recognition, including *Yuval Ran*, *Betcorp* and *British American Insurance*, would likely support

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<sup>43</sup> *Betcorp*, p. 291.

<sup>44</sup> *Id.*, 292.

<sup>45</sup> *British American Insurance*, p. 906.

<sup>46</sup> *Id.*, p. 915.

a totality of circumstances approach where appropriate". The jurisprudence emerging from these courts, the judge said, did not preclude looking into a broader temporal COMI assessment where there may have been an opportunistic shift to establish COMI (i.e. insider exploitation, untoward manipulation, overt thwarting of third party expectations). The court found that there had been no opportunistic shifting of COMI or any biased activity or motivation to distort factors to establish COMI in the BVI; in the period between the cessation of business and the commencement of insolvency proceedings in BVI, the administrative nerve centre had existed in BVI and that was where the COMI was located.<sup>47</sup>

(ii) *Cases under the EC Regulation*

33. In several cases under the EC Regulation, the question of transfer of COMI has arisen. In *Shierson v Vlieland-Boddy*, it was held that the location of the debtor's COMI should be decided at the time when the court was asked to commence insolvency proceedings against the debtor. That could be the date of the hearing of the insolvency proceedings, but could be an earlier date such as the date on which a creditor sought injunctive relief against the debtor.

34. In *Re Staubitz-Schreiber*, a case involving personal insolvency, the debtor tried to move her COMI from Germany to Spain after an application to commence insolvency proceedings had been made in Germany, but before the court determined whether or not to commence that proceeding. The ECJ held that the debtor's COMI remained in Germany because it was in Germany at the time the application for commencement of insolvency proceedings was made, regardless of any subsequent attempt to move it to another Member State before the proceedings commenced.

35. Moving the jurisdiction of incorporation may not be sufficient to transfer a company's COMI, unless sufficient evidence can be advanced to rebut the presumption in article 16. In the case of *Hans Brochier*, a German construction company tried to move its registered office to England to take advantage of English insolvency law, but an English court held that its COMI remained in Germany.

36. In the case of *Hellas Telecommunications (Luxembourg) II SCA*, the company argued successfully that it had moved its COMI from Luxembourg to England, where it wished to restructure. The English court held that it had to consider COMI as at the date of the hearing, some three months after the COMI had been moved. It also held that it was satisfied the COMI had moved to England, based on the objective and ascertainable facts on which the company had relied, namely that its head office and principal operating address were now in London; the company's creditors were notified of its change of address around that time and an announcement was made by way of a press release that its activities were shifting to England; it opened a bank account in London and all payments were made into and from that bank account, although there still remained a bank account in Luxembourg to deal with minor miscellaneous payments; it had registered under the Companies Act in England, although its registered office remained in Luxembourg and it may remain liable to pay tax in Luxembourg; and negotiations between the company and its creditors have taken place in London.<sup>48</sup>

<sup>47</sup> *Fairfield Sentry*, p. 8.

<sup>48</sup> *Hellas*, para. 4.

**(e) Issues for consideration on COMI**

37. The Working Group may wish to consider whether a review of the cases discussed above suggests that further elaboration of the following issues would be desirable:

(a) Where the onus of proof lies in rebutting the registered office presumption;

(b) The evidence necessary to overcome the presumption that debtor's COMI is its registered office;

(c) The relevance of ascertainability by third parties to a determination of centre of main interests under the Model Law;

(d) Whether a list of indicative factors might be developed to assist in the determination of COMI and if so, the factors that might be included in that list;

(e) Whether the incidence of fraud has an impact on the factors to be considered in determining COMI; and

(f) Whether the time period in which a company maintains its COMI in a jurisdiction should be a factor in determining the COMI of a debtor. In particular, it may wish to consider whether the COMI of a debtor should be determined as at the date on which the company was actually transacting business and conducting business operations prior to insolvency or thereafter when the company is insolvent and under the direction of a liquidator or at the date of the application for recognition.

**4. Establishment****(a) Establishment of a company debtor**

38. Establishment is defined in paragraph (f) of article 2 of the Model Law. The Guide to Enactment provides no further clarification, except to note in paragraph 75 that the definition was inspired by article 2, subparagraph (h) of the European Union Convention on Insolvency Proceedings. The Virgos Schmit Report<sup>49</sup> on that Convention provides some further explanation of "establishment":

"Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional. The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an "establishment". A certain stability is required. The negative formula ("non-transitory") aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor."<sup>50</sup>

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<sup>49</sup> M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, prepared prior to the Convention being opened for signature on 23 November 2005. Although the Convention never entered into force, the Report has generally been accepted as an aid to interpretation of the various terms used in the Convention, especially "centre of main interests". Available online at <http://global.abi.org/articles/virgos-schmit-report-convention-insolvency-proceedings-now-re>.

<sup>50</sup> Id. para. 7.1.

39. In *Bear Stearns*, the court considered the alternative of recognizing the Cayman Islands proceedings as non-main proceedings. The court took the view that to do so, there must be an “establishment” in the Cayman Islands for the conduct of non-transitory economic activity, i.e., a local place of business. Here the bar was rather high, the court said, especially in view of the statutory prohibition against “exempted companies” engaging in business in the Cayman Islands except in furtherance of their business carried on outside of the Cayman Islands. The court found that there was no (pertinent) non-transitory economic activity conducted locally in the Cayman Islands; only those activities necessary to the debtor’s offshore “business”. Additionally, the only funds on deposit had migrated there after the Cayman Islands proceedings were initiated.

40. On appeal, the appellate court affirmed the decision of the lower court and further, made it clear that auditing activities carried out in preparation of incorporation documents did not constitute “operations” or “economic activity” for the purposes of satisfying the definition of “establishment”, nor did investigations carried out by the provisional liquidators into whether antecedent transactions could be avoided.<sup>51</sup>

41. In *British American Insurance*, the court cited *Bear Stearns* on the requirement for a “seat for local business activity”, concluding that the terms “economic activity” and “operations” required a showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property. The court held that the debtor did not have an establishment in the Bahamas where it had no business operation other than the insolvency representative’s activities pursuant to his appointment, which included retaining counsel and accountants, investigating assets and liabilities and reporting to the Bahamian courts. The court also referred to *Lavie v Ran*, where the court found that insolvency proceedings did not satisfy the requirement for economic activity.<sup>52</sup>

**(b) Establishment of an individual debtor**

42. In *In the matter of Yuval Ran*, the appellate court considered the issue of establishment from the point of view of the individual debtor. The appellate court found that the relevant time to consider whether the debtor had an establishment in Israel was the time the application for recognition was made. Noting the source of the definition of establishment in the Model Law, the court said that “equating a corporation’s principal place of business to an individual debtor’s primary or habitual residence, a place of business could conceivably align with the debtor having a secondary residence or possibly a place of employment in the country where the receiver claims that he has an establishment”.<sup>53</sup> The court found that that was not the case, nor did the debtor carry out any non-transitory economic activity there, even if there was evidence of previous economic activity. The receiver argued that the presence of debts and the insolvency proceedings in Israel constituted an “establishment” for the purposes of recognition. The court took the view that an insolvency proceeding was by definition a transitory action and to permit such an

<sup>51</sup> *Bear Stearns* (on appeal), p. 339.

<sup>52</sup> *British American Insurance*, pp. 914-915.

<sup>53</sup> *In the Matter of Yuval Ran* (2010), p. 16.

action to constitute the basis for finding non-transitory economic activity, would be inappropriate because it would go against the plain meaning of the statute. The court concluded that the existence of insolvency proceedings and debts in Israel would not qualify the Israeli proceedings for recognition as non-main proceedings.<sup>54</sup>

**(c) Issues for consideration**

43. The Working Group may wish to consider whether further explanation or clarification of the term “establishment” would be desirable.

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<sup>54</sup> Id., pp. 17-18.

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**C. Note by the Secretariat on directors' responsibilities and liabilities  
in insolvency and pre-insolvency cases, submitted to the Working  
Group on Insolvency Law at its thirty-ninth session**

**(A/CN.9/WG.V/WP.96)**

**[Original: English]**

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## **Introduction**

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V contained in document A/CN.9/691, paragraph 104, that activity be initiated on two insolvency topics, both of which were of current importance, and where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the second topic, proposed by the United Kingdom (A/CN.9/WG.V/WP.93/Add.4), INSOL International (A/CN.9/WG.V/WP.93/Add.3)



and the International Insolvency Institute (A/CN.9/582/Add.6), concerning the responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases.<sup>1</sup> In the light of concerns raised during extensive discussion, the Commission agreed that the focus of the work on that topic should only be upon those responsibilities and liabilities that arose in the context of insolvency, and that it was not intended to cover areas of criminal liability or to deal with core areas of company law.

4. The benefits of effective insolvency laws are widely recognized and accepted by most nations, as evidenced by the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) and the efforts of many nations in recent years to update their insolvency laws to take into account modern finance and business. In addition to providing a predictable legal process for addressing the financial difficulties of troubled firms and the necessary framework for the efficient restructuring or orderly liquidation of those firms, effective insolvency laws also permit an examination to be made of the circumstances giving rise to insolvency and in particular the conduct of directors and officers of a company, perhaps revealing inappropriate behaviour on the part of those responsible for that failure, including unfair dispositions of assets or property that are potentially recoverable. Inefficient, antiquated and inconsistent guidelines on director and officer obligations as a company approaches insolvency have the potential to undermine the benefits that the Legislative Guide is intended to produce.

5. The importance of commencing proceedings at an early stage cannot be overestimated. Financial decline typically occurs more rapidly than many parties would believe and as the financial position of an enterprise worsens, the options available for a viable restructuring also rapidly diminish. While there has been an appropriate refocusing of insolvency laws in many countries to increase the options for restructuring and rescue of enterprises, there has been little focus on creating appropriate incentives for directors and officers to use those various options. Far too often, it is left to creditors to commence those proceedings because the directors have failed to act on a timely basis. Notwithstanding that many insolvency laws purport to impose an obligation on directors to commence insolvency proceedings within a certain period of the commencement of insolvency, those obligations are rarely enforced. This is frequently because it is necessary to prove that the directors' actions were fraudulent.

6. For that reason, some jurisdictions have replaced the "fraudulent trading" tests with a "wrongful trading" test, which provides that directors may be liable if they continue trading beyond the point where they knew or should have known that the company would be unable to avoid insolvent liquidation.

7. In addition to encouraging the earlier commencement of insolvency proceedings, effective provisions for the roles and duties of directors and officers would promote good corporate governance. A clear view of the liabilities of directors and officers could also lead to a more predictable legal position for those directors and limit the risks that insolvency practitioners will litigate against them. The more clearly the responsibilities are defined, the more predictable the legal position will be. In addition, it may encourage the more experienced managers, who

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<sup>1</sup> The first topic, concerning centre of main interests and related issues is discussed in A/CN.9/WG.V/WP.95 and Add.1.

may be reluctant to participate in management due to the risks related to failure, to do so.

## **I. Features of possible work**

### **A. Background**

8. Officer and director duties and liabilities are specified in different laws in different States, including company law, civil law and insolvency law. In some States, they may be included in more than one of those laws. In some jurisdictions, for example, director duties in insolvency and the vicinity of insolvency are regarded as a matter only for either insolvency or company law; other jurisdictions include relevant provisions in both laws. Those laws are typically reinforced by complementary elements of tort law or criminal law (not the subject of this paper). In common law systems, they may apply by virtue of common law, as well as pursuant to relevant legislation.

9. The application of laws addressing officer and director duties and liabilities are closely related to and interact with, other legal rules and statutory provisions on corporate governance. In some jurisdictions, they form a key part of policy frameworks, such as those protecting depositors in financial institutions, facilitating revenue collection, addressing priorities for certain categories of creditors over others (such as employees), as well as relevant legal, business and cultural frameworks in the local context.

10. Companies facing insolvency need robust management, as often there are difficult decisions and judgements to be made. Directors afraid of the possible financial repercussions of making such business decisions may prematurely close down a company rather than seek to trade out of difficulties. Accordingly, effective regulation in this area should seek to balance these often competing goals and the interests of different stakeholders: seeking to preserve the freedom of directors and officers to undertake their duties and exercise their judgement appropriately, while at the same time encouraging responsible behaviour, discouraging unreasonable risk-taking, promoting entrepreneurial activity, and encouraging, at an early stage, the refinancing or restructuring of companies facing insolvency.

11. While much has been done by the Organisation for Economic Co-operation and Development (OECD) to develop widely adopted principles of corporate governance that include the duties of directors of companies<sup>2</sup> outside of insolvency (see below, para. 29), little has been done internationally in the context of insolvency to harmonize the various approaches of national law.

12. Experience in the European Union highlights some of the difficulties. In 2002, a High Level Group of Company Law Experts (the Expert Group) established by the European Commission recommended that a rule on wrongful trading should be introduced at European Union (EU) level. The rule would hold company directors (including shadow directors) accountable for letting the company continue to do

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<sup>2</sup> OECD Principles of Corporate Governance, 2004, section VI (the OECD Principles).

business when it should be foreseen that it would not be able to pay its debts.<sup>3</sup> The Expert Group noted that national rules varied considerably. In some Member States there were no specific provisions, but a similar effect was achieved through general rules on directors' liability, sometimes by tort law. Where there was a general duty to apply for commencement of insolvency proceedings in the case of actual insolvency, it usually applied too late to be effective. The Expert Group suggested that the recommended rule would not interfere with the ongoing business decisions of directors, as long as an insolvency situation was not yet foreseeable. The rule would enhance both creditors' confidence and their willingness to do business with companies, as well as introduce an equivalent level of protection for creditors of companies across the EU. It would also avoid the need to harmonize the whole body of directors' liability rules in all Member States, an activity that was likely to prove extremely difficult. One of the issues at stake was whether such a rule was properly part of company law or insolvency law. The Expert Group took the view that the issue of whether directors should be responsible was at its most important prior to insolvency and was thus a key element of a corporate governance scheme, rather than of an insolvency regime. The European Commission subsequently supported the proposals for a wrongful trading rule and director disqualification.<sup>4</sup>

13. In 2006, however, the majority of respondents to a public consultation on future priorities for the 2003 Action Plan on the Modernisation of Company Law and Corporate Governance (which included the development of provisions on director responsibility), opposed the development of such harmonized provisions, based on the existing detail of national regulations.<sup>5</sup> Common EU rules, it was suggested, would lead to legal uncertainty as a result of the overlap with national regulations and the benefits of harmonization were outweighed by the potential costs and difficulties associated with it. Moreover, since the issue was closely related to private law, especially insolvency law, criminal law and procedural law, some respondents argued that it could not be dealt with at EU level in a pure company law context.

14. Notwithstanding the difficulties identified by the public consultation, the proposals that this note responds to suggest that it should be possible to crystallize, from effective insolvency regimes, basic principles to be reflected in officer and director duties in insolvency. Those principles could outline the particular features that best give effect to the public and international policy objectives sought to be achieved through those regimes and provide guidance to States on the circumstances that could lead to personal director liability. At the same time, they should recognize the pitfalls and threats to entrepreneurship that may result from overly draconian rules.

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<sup>3</sup> Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels 4 November 2002. The Group was established by the European Commission in 2001 (the Expert Group report), chapter 3, section 4, pp. 68-69.

<sup>4</sup> Communication from the Commission to the Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union — A Plan to Move Forward, Brussels, 21 May 2003 COM (2003) 284 final, section 3.1.3.

<sup>5</sup> Directorate General for Internal Markets and Services, Consultation and hearing on future priorities on the action plan for modernising company law and enhancing corporate governance in the European Union, 2006 (the 2006 EU Report).

15. The preamble to the OECD Principles suggests an alternative to harmonization of national laws that might be considered by the Working Group in discussing the issues outlined below:

“There is no single model of good corporate governance. However, work carried out [...] has identified some common elements that underlie good corporate governance. The Principles build on these common elements and are formulated to embrace the different models that exist.

“The Principles are non-binding and do not aim at detailed prescriptions for national legislation. Rather, they seek to identify objectives and suggest various means for achieving them. Their purpose is to serve as a reference point. They can be used by policy makers as they examine and develop the legal and regulatory frameworks for corporate governance that reflect their own economic, social, legal and cultural circumstances, and by market participants as they develop their own practices.”<sup>6</sup>

## **B. Issues to be considered**

16. This note outlines a number of related issues that might be considered in developing guidelines or principles on the duties and liabilities of directors in the context of insolvency, including:

(a) Identifying who may be considered a director or officer of a company for the purposes of deciding who should owe the various duties, including formally appointed directors and others;

(b) The nature of the duties of directors and the persons to whom they are owed outside of insolvency;

(c) Whether the nature of the duties and the persons to whom they are owed changes in the vicinity of insolvency and the time at which that change occurs;

(d) Breach of duty and the nature of the liability for breach, the focus of this note being upon civil, rather than criminal, liability;

(e) Defences available for breach of duty;

(f) Enforcement of a breach of duty, including the party that may pursue a breach and possible consequences of breach, including fines, payment of damages and director disqualification.

17. Different States adopted different approaches to these issues. The discussion below provides a broad indication of some of those different approaches to facilitate discussion by the Working Group, but it is necessarily selective.

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<sup>6</sup> OECD Principles, p. 13.

## **II. Before the onset of financial difficulty or insolvency**

### **A. Duties with respect to management and oversight of a company**

#### **1. Identifying who owes the duties: persons that may be considered a “director”**

18. In most States, a number of different persons associated with a company have duties with respect to management and oversight of the company’s operations. They may be owners of a company, formally appointed directors, officers or managers (who may serve as executive directors) and non-appointed individuals and entities, including third parties acting as de facto or “shadow” directors.

19. A de facto director is generally considered to be a person who acts as a director, but is not formally appointed as such. It may include anyone who at some stage takes part in the formation, promotion or management of the company. In small family-owned companies, that might include family members, former directors, consultants and even senior employees. Typically, to be considered a de facto director would require more than simply involvement in the management of the company and may be determined by a combination of acts, such as the signing of cheques; signing of company correspondence as “director”; allowing customers, creditors, suppliers and employees to perceive a person as a director or “decision maker”; and making financial decisions about the company’s future with the company’s bankers and accountants.

20. A shadow director may be a person, although not formally appointed as a director, in accordance with whose instructions the directors of a company are accustomed to act. Generally, would not include professional advisors acting in that capacity. To be considered a shadow director may require the capacity to influence the whole or a majority of the board, to make financial and commercial decisions which bind the company and, in some cases, that the company have ceded to the shadow director some or all of its management authority. In an enterprise group context, one group member may be a shadow director of another group member.

21. For ease of reference, these different categories of directors are referred to in this note as “directors”.

22. The OECD notes that notwithstanding the varieties of structures used for boards of directors of companies,<sup>7</sup> the Principles are intended to apply to whatever body is charged with the functions of governing the enterprise and monitoring management, with members of the board having specific duties in that regard.

#### **2. Functions of directors**

23. The OECD Principles indicate the functions typically carried out by boards of directors. They include: reviewing and guiding corporate strategy, risk policy,

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<sup>7</sup> Some countries have two-tier boards that separate supervisory and management functions, where the supervisory board is composed of non-executive members (generally, neither managers nor owners of the business) and the management board of executive members (officers or managers of the business). Other countries have unitary boards, which include both executive and non-executive members. Some countries may also have an additional statutory body for audit purposes: Annotations to the OECD Principles, section VI, The Responsibilities of the Board, p. 58.

annual budgets and business plans, setting performance objectives, monitoring corporate performance, overseeing major capital expenditure; monitoring corporate governance practices; selecting, appointing, and supporting the performance of the chief executive; ensuring the availability of adequate financial resources; addressing potential conflicts of interest; ensuring integrity of accounting and financial reporting systems; accounting to the stakeholders for the organization's performance; and overseeing disclosure and communication.<sup>8</sup>

## **B. The nature of the duties**

24. The national laws or policies of many States include some reference to standards or duties for directors in the performance of their functions. Laws generally impose duties on directors in carrying out those functions on the basis that although they manage and exercise control over a company, the company is (in theory) run for the benefit of the shareholders. The role and responsibilities of directors may vary with the nature and type of the business entity e.g., a public company as opposed to a limited, closely held or private company or family business, and with the jurisdiction in which the entity operates. For public companies, the duties are typically much more rigorous and complex than for other types of companies. Generally, the duties will apply to each director separately, rather than to the board as a whole.

25. The duties imposed on directors in carrying out their functions are fiduciary in nature, similar to those that the law imposes on others in positions of trust, such as agents and trustees. Two key elements of the fiduciary duty are, typically, a duty of care and a duty of loyalty, although in some States the only fiduciary duty is said to be that of loyalty.

26. The duty of care generally requires directors to act on a fully informed basis, honestly and in good faith. In some jurisdictions, the requirements of honesty and good faith form part of the duty of loyalty. Under some laws, these duties require directors to act in the best interests of the company and, in so doing, to exercise due diligence or the diligence expected of a responsible or a good business person. In many States, the duty of care does not extend to errors of business judgement provided, for example, directors are not grossly negligent and the decision was made with due diligence.<sup>9</sup> In some States, the business judgement rule establishes a presumption that in making a business decision, the directors of a company acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.<sup>10</sup> Such a rule can be rebutted by showing a breach of the duty of care or good faith.

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<sup>8</sup> Id., VI.B, p. 60.

<sup>9</sup> Id., VI.A, p. 59.

<sup>10</sup> Such a rule applies in the United States and a number of other jurisdictions. Variations of the business judgement rule have been developed. For example, the modified business judgement rule or the proportionality test, which requires directors to demonstrate that any action taken was reasonable in relation to the threat posed (*Unocal v. Mesa Petroleum*, 493 A.2d 946 (Del. 1985)). It was later modified to require a determination of whether the director's defensive measure had the effect of coercing shareholders choice, followed by application of the proportionality test (*Unitrin, Inc. v. American General Corp* 493 A.2d 946 (Del. 1985)).

27. The OECD Principles note that the duty of loyalty underlies observation or performance of many of the functions noted above (para. 23) and is key in the enterprise group context, since it requires a director to observe or perform those functions in relation to the company to which he or she is appointed, not in relation to the controlling member of the group.<sup>11</sup>

28. In some States,<sup>12</sup> the duties are set out in some detail in legislation and include, for example, in addition to a duty to act in the company's best interests, duties to obey the company's constitution and decisions taken under it; to be honest and remember that the company's property belongs to it and not to the director or to its shareholders; to be diligent, careful and well-informed about the company's affairs; to ensure the company keeps records of directors' decisions; and to avoid conflict of interest situations. More specific duties that States<sup>13</sup> impose on directors include duties to file a report on his or her performance once every three months; to report to the auditor or the auditing committee where a director becomes aware of any indication of a significant loss to the company; and to monitor the performance of other directors.

29. The OECD Principles, section VI, address the duties of directors:

(a) To act on a fully informed basis, in good faith, with due diligence and care, and in the best interests of the company and the shareholders;

(b) To treat all shareholders fairly, especially where board decisions may affect different shareholder groups differently;

(c) To apply high ethical standards, taking into account the interests of stakeholders;

(d) To fulfil key functions (such as those noted above in para. 23);

(e) To exercise objective and independent judgement on company affairs; and

(f) To ensure that they obtain accurate, relevant and timely information.

30. What amounts to the best interests of the company may vary from State to State. In one State, for example, it has been interpreted as distinct from the best interests of shareholders or creditors and means, from the economic perspective, maximizing the value of the company. In determining what amounts to the best interests of the company, directors may have regard to various factors, given the circumstances of the case, including the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.<sup>14</sup>

31. Further work undertaken on corporate governance by the OECD in the context of the financial crisis, suggests that one way in principle to improve board performance is to clearly define their duties and then to allow or encourage enforcement by shareholders and/or regulators. It notes that the standards set forth

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<sup>11</sup> Annotations to the OECD Principles, section VI.A, p. 59.

<sup>12</sup> For example, England: Companies Act, 2006.

<sup>13</sup> For example, Korea.

<sup>14</sup> Canada, *Peoples Department Stores Inc. v Wise* 2004 SCC 68, para. 41-42, see J. Sarra, Canada's Supreme Court Rules on Fiduciary Obligation Towards Creditors on Insolvency — *Peoples Department Stores v Wise*, *Int. Insolv. Rev.* Vol 15: 1-15 (2006).

in paragraphs (a) and (c) of paragraph 29 above, taken together, set strict normative standards for directors and reflect the legal position in a number of jurisdictions. The work also indicates that the Principles advocate long run wealth maximization and not simply “shareholder value”.<sup>15</sup>

32. Much has been written on the interpretation of the above duties in different States. It is beyond the scope of this paper to provide a detailed analysis of those different interpretations. The Working Group may wish to consider whether such an analysis would assist its future deliberations.

### **C. Persons to whom the duties are owed**

33. Laws vary as to the persons to whom the directors’ duties are owed when a company is solvent, some distinguishing, for that purpose, between the duty of care and the duty of loyalty. Typically, the duties are owed to the company itself, which in some States may be interpreted as including both shareholders and creditors of the company. In some States, they may also be owed to the shareholders, which may be interpreted as meaning a duty to shareholders generally, and not a duty to individual shareholders. Where a distinction is made in terms of focus, the duty of loyalty is owed only to the company, while the duty of care may also be owed to creditors and other stakeholders. Directors may be expected to have due regard to, and deal fairly with, the interests of those stakeholders, such as employees, customers, suppliers and local communities. The latter might involve, for example observance of environmental and social standards. As the OECD notes, the duties of boards are quite complex and may involve achieving a balance between constituencies that often have widely diverging views.<sup>16</sup>

## **III. The onset of financial difficulties or insolvency**

34. The following discussion is limited to a consideration of the duties of directors when the company is in a situation of financial distress or insolvency.

### **A. Duties arising on commencement of insolvency proceedings**

35. Many insolvency laws recognize that when insolvency proceedings commence the focus is upon maximizing value and preserving the estate for distribution to creditors. The duties of the directors and officers will thus differ both in substance and focus from those applicable when the company was solvent. Often they will be displaced from ongoing involvement in the company’s affairs by an insolvency representative, although under some insolvency laws they may still have an ongoing role, particularly in reorganization. The Legislative Guide, for example, addresses those duties in recommendations 108-114 and in the commentary, paragraphs 22-34. Recommendation 110 specifies in some detail the duties that should arise under the

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<sup>15</sup> Corporate governance and the financial crisis: conclusions and emerging good practice to enhance implementation of the principles, Directorate for Financial and Enterprise Affairs, OECD Steering Committee on Corporate Governance, 24 February 2010, para. 62.

<sup>16</sup> *Id.*, para. 63.



insolvency law on commencement of insolvency proceedings and continue throughout those proceedings, including duties to cooperate with and assist the insolvency representative to perform its duties; to provide accurate, reliable and complete information relating to the financial position of the company and its business affairs; and to cooperate with and assist the insolvency representative in taking effective control of the estate and facilitating recovery of assets and business records.

36. Recommendation 114 and paragraph 34 of the commentary address the imposition of sanctions where the debtor fails to comply with those duties. In some systems, directors and officers may be criminally liable for failure to observe those duties, in others they may be personally liable for any damage caused as a result of the breach of those duties.

## **B. Duties arising on insolvency and in the period approaching insolvency**

37. An issue that is increasingly receiving attention, but where there are significant divergences in approach, is whether the duties of directors of a company should be affected at some point before an application for or commencement of insolvency proceedings, variously described as the “twilight zone”, the “zone of insolvency” or the “vicinity of insolvency”. Although a somewhat nebulous concept, it is intended to convey a deterioration of the company’s financial stability which, if it remains unaddressed, is likely to lead to insolvency and commencement of insolvency proceedings. If the duties should be affected in that period, there is a related question of the time at which that should occur and how the requisite state of “insolvency” would be defined. Also relevant is the nature of the directors’ duties at that time and whether they differ from the duties applicable when a company is solvent.

### **1. Should directors have a duty to creditors in the vicinity of insolvency?**

38. In one State, it has been confirmed that directors owe no fiduciary duty to creditors at the point of, or in the vicinity of, insolvency, where the fiduciary duty in question is the duty of loyalty to the company (i.e. to act honestly and in good faith with a view to the best interests of the company). The content of that duty does not change with the financial health of the company and is, at all times, a duty to the company. The interests of the company are not to be confused with the interests of creditors or of other stakeholders.<sup>17</sup> A key reason for there being no change in the focus of directors’ duties at that time is the availability of a remedy which provides that where directors of a company have used their powers “in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer”<sup>18</sup> those interested parties may be entitled to gain relief from the company’s conduct. This remedy is based on the notion that companies have a responsibility to act as good corporate citizens and therefore must take into account the interests of all stakeholders who may be affected by the company’s actions. The focus is on behaviour that can be described

<sup>17</sup> Canada: *Peoples Department Stores Inc. v Wise* 2004 SCC 68, para. 43.

<sup>18</sup> Canadian Business Corporations Act 1985, section 241(2)(c).

as corporate behaviour and not personal or non-business related conduct. Relevant conduct may be conduct that is coercive, abusive, burdensome, harsh, in bad faith, an abuse of power, or involves some other kind of serious wrong.

39. The World Bank “Principles for Effective Insolvency and Creditor Rights Systems” recommend that “laws governing director and officer liability for decisions detrimental to creditors made when an enterprise is in financial distress or insolvent should promote responsible corporate behaviour while fostering reasonable risk taking. At a minimum, standards should hold management accountable for harm to creditors resulting from wilful, reckless, or grossly negligent conduct.”<sup>19</sup>

40. A number of commentators oppose the notion of directors having a duty to creditors before the commencement of insolvency proceedings on the basis that creditors are adequately protected by other provisions of the law, such as those dealing with fraudulent transfers, and can manage any risk through, for example, contracts and insurance.

41. A different approach is based on the analysis that imposing a duty to creditors acts as a counter incentive for directors to maximize their own position as shareholders by seeking to trade out of insolvency. Such a course of action may involve adopting high-risk strategies to save or increase value for shareholders, at the same time putting creditor’s interests at risk, and may reflect limited concern for chances of success because of the protection of limited liability if the course of action adopted fails. Once insolvency occurs, the shareholders no longer have anything of value and are replaced by creditors as the residual claimants. Accordingly, the analysis goes, directors’ fiduciary duties should then shift to creditors, instead of focusing on maximizing value for shareholders.

42. In some States, it is said that officers’ and directors’ duties *change* in the period approaching insolvency to protecting the creditors of the company, rather than the shareholders; in others, the notion is that they *expand* to include creditors, in addition to the shareholders. The duty to protect the interests of the company generally remains constant

43. While the underlying rationale for imposing on directors a duty to creditors in the event of insolvency may be the same in different jurisdictions, different approaches are taken to formulating the duty and determining the standard to be met. One approach is based on a trust doctrine, which treats directors as trustees of the company’s assets to be held for the benefit of creditors when the company is insolvent and imposes a duty to protect those assets for the creditors.

44. A different approach suggests that when directors know the company cannot meet its obligations as they fall due, they should be required to take action to monitor the financial situation of the company and avoid insolvency. If they nonetheless continue to carry on business that involves, for example, obtaining goods and services on credit, without disclosing the financial situation to those creditors, they should incur personal liability.

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<sup>19</sup> World Bank “Principles for Effective Insolvency and Creditor Rights Systems”, 2005, Part B: Risk Management and Corporate Workout, B2: Director and Officer Accountability.

45. An INSOL study on this topic points to the various advantages and disadvantages of imposing personal liability on directors and officers for a company becoming insolvent.<sup>20</sup> The advantages include:

- (a) Early stoppage to the company's decline with a view to protecting existing creditors from even greater losses and incoming creditors from becoming entangled in the company's financial difficulties;

- (b) Controlling and disciplining management by the imposition of tough sanctions; and

- (c) Providing an incentive to management to obtain competent professional advice when financial difficulties loom.

46. The disadvantages include:

- (a) The possibility of a premature closure of viable businesses which could have survived;

- (b) Inhibition of the pursuit of voluntary restructuring because directors are unwilling to trade out of difficulties;

- (c) Erosion of the legal status brought by incorporation and weakening of enterprise incentives. Too much risk may discourage directors and even if director insurance can be paid by the company, the cover is expensive and is often subject to wide exceptions;

- (d) Unpredictability, because liability depends on particular circumstances and also the future attitudes of the courts; and

- (e) An increased risk of unexpected liabilities for banks and others who might be deemed to be de facto directors by reason of their involvement in the company, particularly at the time of the insolvency.

47. As noted above, some commentators suggest that a duty to creditors should be regarded as additional to a duty to shareholders. In such a case, directors may be faced with potential conflicts. As an example, a company's financial situation might indicate that it will have to apply for commencement of insolvency in several weeks' time, in which case shareholders would have no remaining interest and creditors would not have their claims paid in full. Creditors would be likely to support a sale of the business for a purchase price covering the debt in full, but shareholders may want to hold out for a higher price or a different purchaser in the hope of some return, however minimal.<sup>21</sup> Directors would be faced with choosing the course of action that best served the interests of the company as a whole, having weighed the interests of the different stakeholders in the circumstances of the specific case.

48. The extent to which personal liability of directors provides significant protection for creditors varies with the circumstances. For example, directors of smaller firms are often principals, who are likely to lose their personal and business assets at the same time, leaving little to satisfy creditor claims. Large firms,

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<sup>20</sup> Directors in the Twilight Zone III (2009), INSOL International, Overview, p. 5.

<sup>21</sup> R. de R. Barondes et al, Twilight in the Zone of Insolvency: Fiduciary Duty and Creditors of Troubled Companies, 1 *J. Bus & Tech L* (2006-2007), 229 at 233.

however, frequently purchase liability insurance for their directors, which may compensate injured creditors, but at the same time protect directors, undercutting incentives to satisfy specified duties of care and other standards of behaviour. However, the number of spectacular company failures in some jurisdictions in recent years may have had a negative effect on director and officer liability insurance, making it increasingly expensive and risky. In addition to these considerations, the protection afforded to creditors may be affected by their ability to pursue a breach of the duty and, if directors are found liable, the consequences in terms of recovery or damages; it has been suggested that recovery for the benefit of the insolvency estate is potentially more of a benefit to secured than to unsecured creditors.<sup>22</sup> As the OECD Principles note, enforcement possibilities are weak in many jurisdictions due in part to poor powers of discovery and high costs,<sup>23</sup> a fact emphasized by many other commentators.

## 2. Determining commencement of the “vicinity of insolvency”

49. If directors were to have a duty to creditors in the vicinity of insolvency, there are various possibilities for determining the time at which that duty might arise.

50. One possibility may be the point at which an application for commencement of insolvency proceedings is made, arguably the possibility that creates the most certainty. If, however, the insolvency law provides for automatic commencement of proceedings following an application or the gap between application and commencement is very short (see recommendation 18 of the Legislative Guide), this option will have little effect.

51. Other possibilities focus on the duty arising when a company is in fact or technically insolvent, which may occur well before an application for commencement of insolvency proceedings is made. Taking the general approach of the Legislative Guide, insolvency might be said to have occurred in fact when a company becomes unable to pay its debts as and when they fall due, or when a company’s liabilities exceeds the value of its assets. A further possibility is when insolvency is imminent, i.e. where the company will generally be unable to pay its debts as they mature (see recommendation 15 of the Legislative Guide). These tests are increasingly used in insolvency laws as commencement standards and in some States are used as the basis for imposing an obligation on directors to apply for commencement of insolvency proceedings within a specified period of time, usually rather short, after a company becomes insolvent.

52. Some courts have tried to define what the “vicinity of insolvency” might mean. In one case, the court suggested that it occurred when the company could not “generate and/or obtain enough cash to pay for its projected obligations and fund its business requirements for working capital and capital expenditures with a reasonable cushion to cover the variability of its business needs over time.”<sup>24</sup> The court took the view that by the time the company could not pay its current debts, it would be too late to protect creditors. The period of heightened duty in that case

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<sup>22</sup> J. Payne and D. Prentice, *Civil Liability of Directors for Company Debts under English Law*, chap. 8, pp. 193-194, in I. Ramsay, ed., *Company Directors’ Liability for Insolvent Trading*, University of Melbourne, 2000.

<sup>23</sup> OECD Corporate governance and the financial crisis, see note 15, para. 63.

<sup>24</sup> USA: *Pereira v Cogan*, 294 B.R. 449, (S.D.N.Y. 2003).

was extended to four years before the actual crisis without regard to the foreseeability of a loss of liquidity. That length of period is reflected in the laws of other States, which allow directors to be held liable for performance of their duties in an improper manner for up to three years before the company became insolvent.

53. A different approach to devising a definition focuses on the point at which a director or officer knew, or ought to have known, that the company was insolvent or was likely to become insolvent or that there was no reasonable prospect that the company could avoid having to commence insolvency proceedings. Both of those tests are subjective and require wider consideration of circumstances and context, including, for example, examining the books of the company and its financial condition. One concern with that type of standard might be the difficulty of determining with certainty the exact point at which the director could be said to have contributed to the company's insolvency.

### **3. The nature of the duty**

54. Many insolvency or company laws include provisions addressing responsibility of directors in the period before insolvency proceedings commence, although approaches differ widely. Some impose liability for causing insolvency, while others focus more closely on the breach of specific duties, such as the duty of loyalty, the duty to enhance the interests of the company and the duty to act solely for the financial benefit of the creditors. Under some laws, the duty owed in the vicinity of insolvency adds to the duties owed by the directors when the company is solvent, requiring them to take certain steps to avoid or ameliorate financial difficulty and minimize potential losses to creditors. In some jurisdictions, the duty of care and the applicable standard may vary among different members of the board.<sup>25</sup>

55. Under some laws,<sup>26</sup> directors have an obligation to exercise the diligence expected of a responsible businessman that also includes a duty, if a crisis threatens, to consider all possible remedial steps, and as far as possible, to initiate appropriate measures. Those steps might include calling a shareholders' meeting if it appears to be in the best interests of the company and without undue delay, if it appears from the balance sheet that half or more of the share capital has been eroded (generally applicable where the law includes capital maintenance requirements). Directors may also have a duty to apply for commencement of insolvency proceedings, which would include reorganization or liquidation, within a specified period of time, usually fairly short such as three weeks, after the date on which the company became insolvent. Failure to do so may lead to personal liability, in full or in part, for any resulting losses incurred by the company and its creditors.

56. Under other laws, certain actions of directors, once a company is insolvent, may be rendered unlawful under, for example, wrongful or fraudulent trading provisions,<sup>27</sup> or as acts having worsened the economic situation of the company or having led to insolvency. The concept of wrongful trading may apply both to directors of independent companies and to directors of enterprise group members. The directors of an enterprise group member might be subject to the rules if they

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<sup>25</sup> For example, Switzerland.

<sup>26</sup> For example, Germany and a number of other civil law jurisdictions.

<sup>27</sup> For example, England (Insolvency Act 1986) and Ghana.

operated, as noted above, as de facto or “shadow” directors of another group member.

#### 4. The standard to be met

57. As with the description of the duty, the behaviour of directors is judged against different standards to determine whether or not they have failed to meet their obligations.

58. Wrongful trading legislation, as noted above (see above, paras. 6, 12 and 56), typically focuses on the point at which a director or officer knew, or ought to have known, that the company was insolvent or was likely to become insolvent. The director may be judged in that regard against the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company. That type of test is subjective and more may be expected of a director of a large company with sophisticated accounting systems and procedures. Similarly, if the director’s skills and experience exceed those required for the job, the judgement may be made against the skills and experience possessed, instead of against those required for the job. On the other hand, inadequate skill and experience for the job may not excuse a director and they could be judged against the skill and experience required for the job.<sup>28</sup>

59. Another approach<sup>29</sup> requires that there be reasonable grounds for suspecting the company was insolvent or would become insolvent at the time of incurring the debt leading to insolvency. The suspicion must involve a positive feeling of actual fear or misgiving amounting to an opinion which is not supported by sufficient evidence. This is a lower threshold than expecting or knowing the company is insolvent. The standard is that of the awareness of a reasonable person in a like position in a company in the company’s circumstances.<sup>30</sup>

60. A further approach, focusing on mismanagement, judges the director against the standards of a normally well-advised director. Examples of behaviour or actions that might give rise to liability include imprudence, incompetence, lack of attention, failure to act, engaging in transactions that were not at arm’s length or of a commercial nature and improperly extending credit beyond the company’s means, while the most common failures have involved directors permitting the company to trade while manifestly insolvent and to have embarked on projects beyond the company’s financial capacity and which were not in its best interests.<sup>31</sup> Other examples that also focus on mismanagement include where directors have failed to undertake sufficient research into the financial soundness of business partners or other important factors before entering into contracts, where directors fail to provide sufficient information to enable the supervisory board to exercise supervision over management, where directors neglect the proper financial administration of the

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<sup>28</sup> G. Siegel, and P. Rosen, Are United States Courts developing a United Kingdom approach to the liability of directors of insolvent companies?, April, 2004, p. 3, quoting T. E. Cooke and A. Hicks, Wrongful Trading — Predicting Insolvency, *J.B.L.* (1993), 338 at 338-339.

<sup>29</sup> For example, Australia: Corporations Act 2001, S588G.

<sup>30</sup> See H. H. Rajak, Director and Officer Liability in the Zone of Insolvency: a Comparative Analysis, *PER* 2008(1), p. 23.

<sup>31</sup> For example, France: Commercial Code 2000. See P. Omar, The European initiative on wrongful trading, *Insolv. L.* 2003, 239 at 246.

company, where they also neglect to take preventative measures against clearly foreseeable risks and where bad personnel management by the directors leads to unrest and strikes.<sup>32</sup>

61. A number of jurisdictions, rather than considering the actions of directors before, or in the vicinity of, insolvency, focus on remedying transactions and other actions that took place before the commencement of insolvency proceedings through the use of avoidance powers once insolvency proceedings commence. Permitting a company to enter into such a transaction may support a finding of liability under, for example, wrongful trading laws.

## **5. Defences**

62. Under some laws, where directors do have a duty to creditors in the vicinity of insolvency, they may nevertheless rely on certain defences, such as the business judgement rule (see above, para. 26), to show that they have behaved reasonably. Such a rule establishes a presumption that directors have, for example, acted in good faith and had a rational belief that they acted in the best interests of the company, that they have had no material personal interest, and that they have properly informed themselves. Many courts are reluctant to second guess a director who has no conflict of interest and who has satisfied the duties of care and loyalty or to make decisions with the benefit of hindsight. A slightly different approach gives directors the benefit of the doubt on the assumption that business risks are an unavoidable and incidental part of management. It may also be the case that the business judgement rule provides a defence to some, but not all, of the duties specified under the law. In one State, for example, it does not provide a defence to wrongful or insolvent trading provisions.<sup>33</sup>

## **6. Enforcement of the directors' duties**

### **(a) Who may bring an action**

63. A number of laws limit the right to bring an action against a director by reference to the nature of the action, the person with the power to pursue it and the time at which it is brought. The exercise of avoidance powers under recommendation 87 of the Legislative Guide is not included in summary below.

64. Under a number of laws, where insolvency proceedings have commenced, it is only the insolvency representative who, having reviewed a director's actions prior to insolvency, has the right to proceed against the director to, for example, recover compensation for the benefit of creditors in respect of any loss caused to the company. Wrongful trading laws, for example, may permit the insolvency representative to pursue directors and officers for contributions to the insolvency estate where their behaviour has contributed to the commencement of insolvency proceedings or constitutes an act of mismanagement.

65. Where the company is near insolvency, that right might be exercised by the company itself and, in some cases by creditors, although the law of many jurisdictions, with a few exceptions,<sup>34</sup> denies creditors the standing to sue the

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<sup>32</sup> For example, the Netherlands, *id.* at 247-248.

<sup>33</sup> For example, Australia, note 29.

<sup>34</sup> For example, Germany and Japan.

directors of a company before it has made an application for commencement of proceedings. In some States, the court may have inherent power to pursue such an action. Where creditors can take legal action, it will generally be limited to those who have directly and individually suffered harm as a result of the actions of a director. A difficulty often encountered in bringing such an action is proving the connection between the managerial behaviour and the actual damage creditors have suffered. Typically, shareholders are not able to bring actions against directors for breach of duty, either before or after insolvency. However, under some laws in some circumstances, such as where the insolvency representative takes no action, shareholders may have a derivative right. Other laws take a more liberal approach, permitting a wider range of parties to bring an action against a director for breach of a duty in the vicinity of insolvency.

66. A potential difficulty arising in those cases that permit the insolvency representative to bring an action relates to payment of their costs in the event that the action against the director is unsuccessful. As is often the case with avoidance proceedings, insolvency representatives may be unwilling to expend assets of the insolvency estate to pursue litigation unless there is a very good chance of success.

**(b) Extent of liability**

*(i) Damages and compensation*

67. Where directors are found liable for actions or omissions in the vicinity of insolvency, the extent of the liability varies. Under some laws, directors may be liable for loss or damage suffered by individual creditors, employees and the company itself. They may also be liable for payments that result in a reduction of the insolvent estate. Some laws permit the court to adjust the level of liability to match the nature and seriousness of the mismanagement or other act leading to liability. In some cases, the liability may attach to specific directors, while in others, the liability of members of the board may be joint and several.

68. Some laws provide that a director can be found liable for the difference between the value of the company's assets at the time it should have ceased trading and the time it actually ceased trading, where the amount recovered is for the benefit of the insolvency estate.<sup>35</sup> A slightly different approach may allow recovery from the directors of the difference between available assets and the sum necessary for the company to meet its debts.

69. A constraint on director liability in some jurisdictions is the extent of the power provided for shareholder assemblies to dispose of damages claims. While a number of laws do not give shareholders a right to waive or settle damages claims to the detriment of creditors, some do give shareholders a limited right to do so.

70. Where laws provide for director liability, cases in which directors are found liable are, as noted above, apparently rare. In some States, there are few, if any, examples of directors of large companies being held liable under those provisions, although there are examples with respect to closely held companies.<sup>36</sup> In other

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<sup>35</sup> Siegel, note 28 at 10.

<sup>36</sup> For example, Japan.



States, the likelihood of a director of a large company being held liable greatly exceeds that of a director of a smaller company.<sup>37</sup>

(ii) *Disqualification*

71. A consequence provided for under a few laws where insolvency proceedings commence is disqualification of a director from being a director or from taking part in the running of a company. Under one law,<sup>38</sup> disqualifications of between two and 15 years may be ordered where the individual is found to be “unfit” to act as a director. Factors relevant to that determination include: breach of a fiduciary duty, misapplication of moneys and failure to keep proper account and make returns. It may also include acts relevant to the company’s insolvency, such as the person’s responsibility for the company entering into transactions liable to be avoided under grounds similar to those in recommendation 87 of the Legislative Guide or the company continuing to trade when the director knew or should have known that it was insolvent. The various factors are generally considered cumulatively in determining unfitness in a specific case. In jurisdictions providing for disqualification those found to be unfit often have displayed a lack of commercial probity, gross negligence or serious incompetence, but it is not necessarily always the case.

72. Disqualification may sit alongside other sanctions and personal liability as described above, or may be brought independently where the overall conduct of the individual as a director merits such a sanction. Enforcement of laws that permit disqualification is uneven.

73. The Expert Group recommended that director’s disqualification should be imposed, at the EU level, as a sanction for misleading financial and non-financial statements and other forms of misconduct by directors.<sup>39</sup> Many contributors to the 2006 EU Report<sup>40</sup> opposed the adoption of any new legislation on disqualification on the basis of existing national legislative frameworks, some considering that harmonization might even pose constitutional challenges. Many contributors (both opponents and supporters of the proposal to introduce director disqualification) pointed out, however, that it was very important to develop a system of information exchange and/or to set up better cooperation between authorities in different Member States for information exchange purposes. It was generally agreed that a director disqualified in one Member State should not be able to act as director in another Member State.

## IV. The scope and content of possible guidelines

74. Working Group V might wish to consider the following matters in developing guidelines on the duties and liabilities of directors in the vicinity of insolvency:

- (a) Defining the persons by whom the duties are owed;
- (b) Identifying the persons to whom the duties are owed;

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<sup>37</sup> For example, Germany.

<sup>38</sup> Company Directors Disqualification Act 1986 (Eng).

<sup>39</sup> See note 3, p. 69.

<sup>40</sup> See note 5, pp. 14-15.

(c) Defining the time at which they arise in the period before commencement of insolvency proceedings;

(d) Specifying the nature of the duties owed or the types of misconduct to be covered, for example:

(i) Wrongful trading — where a director or officer ought to have known that insolvency was unavoidable and the director or officer has failed to take reasonable steps to minimize losses to creditors;

(ii) Breach of duty — where a director or officer has misapplied or retained money or property of the company or where a misfeasance or breach of duty, fiduciary or otherwise, has caused the misapplication of assets or a loss to the company; and

(iii) Misconduct involving company money or property — where a director or officer causes or allows a preference or a transaction at an undervalue to the detriment of creditors; and

(e) Identifying the remedies available for that behaviour or breach of duty.

**D. Note by the Secretariat on judicial materials on the UNCITRAL  
Model Law on Cross-Border Insolvency, submitted to the Working  
Group on Insolvency Law at its thirty-ninth session**

**(A/CN.9/WG.V/WP.97 and Add.1-2)**

**[Original: English]**

1. At its forty-third session (2010), the Commission heard a proposal by the Secretariat which noted that participants in the judicial colloquia that had been held by UNCITRAL in cooperation with INSOL and the World Bank had indicated a desire for information and guidance for judges on cross-border related issues and in particular on the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law). To that end, the Commission was informed that the Secretariat had been working on the preparation of a draft text that provided a judicial perspective on the use and interpretation of the Model Law. The Commission agreed that the Secretariat should be mandated to develop that text in the same flexible manner, resources permitting, as was achieved with respect to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. That would involve consultation, principally with judges, but also with insolvency practitioners and professionals; consideration, at an appropriate stage, by Working Group V; and finalization and adoption by the Commission, possibly in 2011.<sup>1</sup>

2. The text set forth below as The Judicial Perspective on the Model Law responds to that mandate and was developed in consultation with judges and insolvency experts. The introduction to the text explains its purpose and the manner in which the material is organized.

**The UNCITRAL Model Law on Cross-Border Insolvency:  
the judicial perspective**

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<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), para. 261.*

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## Introduction

### A. Purpose and scope

1. This text discusses the UNCITRAL Model Law from a judge’s perspective. Recognizing that some enacting States have amended the Model Law to suit local circumstances, different approaches might be required if a judge concludes that the omission or modification of a particular article from the text as enacted necessitates that course. This text is based on the Model Law as endorsed by the General Assembly of the United Nations in December 1997. It makes no reference to or expresses views on adaptations to the Model Law made in some enacting States.

2. Although this text makes references to decisions given in a number of jurisdictions, no attempt is made to critique the decisions, beyond pointing out issues that another judge may want to consider should a similar case come before him or her. Nor has any attempt been made to provide references to all relevant decisions touching on the interpretation issues raised by the Model Law. Rather, the intention is to use decided cases solely to illustrate particular strands of reasoning that might be adopted in addressing specific issues. In each case, the judge will determine the case at hand on the basis of domestic law, including the terms of legislation enacting the Model Law.

3. This text does not purport to instruct judges on how to deal with applications for recognition and relief under the legislation enacting the Model Law. As a matter of principle, such an approach would run counter to principles of judicial independence. In addition, in practical terms, no single approach is possible or desirable. Flexibility of approach is all important in an area where the economic dynamics of a situation may change suddenly. All that can be offered is general guidance on the issues a particular judge might need to consider, based on the intentions of those who crafted the Model Law and the experiences of those who have used it in practice.

4. Deliberately, this text is ordered to reflect the sequence in which particular decisions would generally be made by the receiving court, under the Model Law, as distinct from an article by article analysis.

## **B. Glossary**

### **1. Terms and explanations**

5. The following paragraphs explain the meaning and use of certain expressions that appear frequently in this document. Many of these terms are common to the UNCITRAL Model Law, the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. Their use in this document is consistent with their use in those texts.

(a) CLOUT: References to CLOUT are to the Case Law on UNCITRAL Texts reporting system. Abstracts of cases are available in the six United Nations languages on the internet at [http://www.uncitral.org/uncitral/en/case\\_law/abstracts.html](http://www.uncitral.org/uncitral/en/case_law/abstracts.html);

(b) “Cross-border agreement”: An oral or written agreement intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest;

(c) “Enacting State”: A State that has enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency;

(d) “Insolvency representative”: A person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or liquidation of the insolvency estate;

(e) “Judge”: A judicial officer or other person appointed to exercise the powers of a court or other competent authority having jurisdiction under legislation based on the Model Law;

(f) “Receiving court”: The court in the enacting State from which recognition and relief is sought.

### **2. Reference material**

#### **(a) References to cases**

6. References to specific cases are included throughout this text and particularly in the footnotes. In general, those references are to cases cited in the annex, so only a short-form reference is included in the text, e.g. *Bear Stearns* refers to the proceedings concerning Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd (in provisional liquidation). References to page or paragraph numbers in association with those cases are references to the relevant portion of the version of the judgement cited in the Annex.

#### **(b) References to texts**

7. This text includes references to several texts on cross-border insolvency, including:

- (a) “UNCITRAL Model Law”: UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997);
- (b) “Guide to Enactment”: The Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency;
- (c) “Legislative Guide”: UNCITRAL Legislative Guide on Insolvency Law (2004);
- (d) “UNCITRAL Practice Guide”: UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);
- (e) “EC Regulation”: European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings;
- (f) “European Convention”: European Union Convention on insolvency proceedings;
- (g) “Virgos Schmit Report”: M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996.

## I. Background

### A. Scope and application of the Model Law

8. In December 1997, the General Assembly of the United Nations endorsed the Model Law on Cross-Border Insolvency (the Model Law), developed and adopted by the United Nations Commission on International Trade Law (UNCITRAL).
9. The Model Law does not purport to address substantive domestic insolvency law. Rather, it provides procedural mechanisms to facilitate more efficient disposition of cases in which an insolvent debtor has assets or debts in more than one State. As at [*to be updated on completion of text*] States had enacted legislation based on the Model Law.<sup>2</sup>
10. The Model Law is designed to apply where:<sup>3</sup>
  - (a) Assistance is sought in a State (the enacting State) by a foreign court or a foreign representative in connection with a foreign proceeding;
  - (b) Assistance is sought in the foreign State in connection with a specified proceeding under the laws of that State;
  - (c) A foreign proceeding and a proceeding under specified laws of the enacting State are taking place concurrently, in respect of the same debtor;
  - (d) Creditors or other interested persons are requesting the commencement of, or participation in, a proceeding under specified laws of the enacting State.

<sup>2</sup> Australia (2008), British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2003), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), and the United States of America (2005).

<sup>3</sup> UNCITRAL Model Law, art. 1(1).

The Model Law anticipates that a representative (the foreign representative) will have been appointed to administer the insolvent debtor's assets in one or more States or to act as a representative of the foreign proceedings, at the time an application under the Model Law is made.<sup>4</sup>

11. The Model Law requires an enacting State to specify the court or other competent authority that has power to deal with issues arising under it.<sup>5</sup> Acknowledging that some States will nominate administrative bodies rather than courts, the definition of "foreign court" includes both judicial and other authorities competent to control or supervise a foreign proceeding.<sup>6</sup>

12. The Model Law envisages that particular entities, such as banks or insurance companies, the failure of which might create systemic risks within the enacting State, may be excluded from the operation of the Model Law.<sup>7</sup>

13. There are four principles on which the Model Law is built. They are:

(a) *The "access" principle*: This principle establishes the circumstances in which a "foreign representative"<sup>8</sup> has rights of access to the court (the receiving court) in the enacting State from which recognition and relief is sought;<sup>9</sup>

(b) *The "recognition" principle*: Under this principle the receiving court may make an order recognizing the foreign proceeding, either as a foreign "main" or "non-main" proceeding;<sup>10</sup>

(c) *The "relief" principle*: This principle is referable to three distinct situations. In cases where an application for recognition is pending, interim relief may be granted to protect assets within the jurisdiction of the receiving court.<sup>11</sup> If a proceeding is recognized as a "main" proceeding, automatic relief follows.<sup>12</sup> Additional discretionary relief is available in respect of "main" proceedings and relief of the same character may be given in a proceeding that is recognized as "non-main";<sup>13</sup>

(d) *The "cooperation" and "coordination" principle*: This principle places obligations on both courts and insolvency representatives in different States to communicate and cooperate, to ensure that the single debtor's insolvent estate is administered fairly and efficiently, with a view to maximizing benefits to creditors.<sup>14</sup>

14. Those principles are designed to meet the following public policy objectives:<sup>15</sup>

(a) The need for greater legal certainty for trade and investment;

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<sup>4</sup> See also UNCITRAL Model Law, art. 5 as to the ability of an enacting State to specify those representatives who may seek recognition and relief in a foreign court.

<sup>5</sup> Ibid., art. 4.

<sup>6</sup> Ibid., art. 2(e); definition of "foreign court".

<sup>7</sup> Ibid., art. 1(2).

<sup>8</sup> As defined by art. 2(d) of the UNCITRAL Model Law.

<sup>9</sup> Ibid., art. 9.

<sup>10</sup> Ibid., art. 17.

<sup>11</sup> Ibid., art. 19.

<sup>12</sup> Ibid., art. 20.

<sup>13</sup> Ibid., art. 21.

<sup>14</sup> Ibid., arts. 25, 26, 27, 29 and 30.

<sup>15</sup> Preamble to the UNCITRAL Model Law; see also Guide to Enactment, para 3.

(b) The need for fair and efficient management of international insolvency proceedings, in the interests of all creditors and other interested persons, including the debtor;

(c) Protection and maximization of the value of the debtor's assets for distribution to creditors, whether by reorganization or liquidation;

(d) The desirability and need for courts and other competent authorities to communicate and cooperate when dealing with insolvency proceedings in multiple States;

(e) The facilitation of the rescue of financially troubled businesses, with the aim of protecting investment and preserving employment.

15. In December 2009, the General Assembly endorsed the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the UNCITRAL Practice Guide).<sup>16</sup> The Practice Guide discusses, by reference to actual cases, various means by which cooperation among insolvency representatives, courts or other competent bodies may be enhanced, to increase the fairness and efficiency of the administration of the estates of an insolvent debtor who has assets or creditors in more than one jurisdiction. Depending on applicable domestic law and the subject matter of a particular cross-border agreement, in some cases there may be a need for a court (or other competent authority) to approve the agreement. The Practice Guide provides examples of cross-border insolvency agreements (cross-border agreements) that are used to facilitate cooperation.<sup>17</sup>

## **B. A judge's perspective<sup>18</sup>**

16. While the UNCITRAL Model Law emphasizes the desirability of a uniform approach to its interpretation based on its international origins,<sup>19</sup> the domestic law of most States is likely to require interpretation in accordance with national law; unless the enacting State has endorsed the "international" approach in its own legislation.<sup>20</sup> Even so, any court considering legislation based on the Model Law is likely to find the international jurisprudence of assistance to its interpretation.

17. In approaching his or her tasks, the judge's perspective is necessarily different from that of an insolvency representative. A judicial officer's obligation is to determine impartially questions submitted by a party, based on information (evidence) placed before him or her. His or her obligation is to act judicially; meaning that all interested parties should, in the absence of exceptional circumstances, be given an opportunity to be heard on all issues that might materially affect the ultimate decision, to ensure due process is followed. In some

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<sup>16</sup> The text is available at from [www.uncitral.org](http://www.uncitral.org) under "UNCITRAL Texts and Status".

<sup>17</sup> See generally Practice Guide, chap. III and the case summaries included in Annex I.

<sup>18</sup> See the extended definition of the term "Judge" in the glossary.

<sup>19</sup> In States that enact the Model Law in an unmodified form, its terms must be interpreted having regard "to its international origin and to the need to promote uniformity in its application and the observance of good faith": UNCITRAL Model Law, article 8.

<sup>20</sup> Indeed the UNCITRAL Model Law itself makes it clear that the terms of any relevant Treaty or agreement to which an enacting State is a party will take precedence over its terms: art. 3.



States, persons presiding over competent administrative authorities<sup>21</sup> may not be affected by such constraints. While applicable domestic law in some States may require judges to satisfy themselves independently that any order sought should be made, the national law of other States may contemplate that the court simply give effect to the parties' wishes.

18. Some differences in approach to the interpretation of the terms of the Model Law (or any adaptation of its language) may arise from the way in which judges from different legal traditions approach their respective tasks. Although general propositions are fraught with difficulty, the greater codification of law in some jurisdictions may tend to focus more attention on the text of the Model Law than would be the case in other jurisdictions without the same degree of codification or in which many superior courts have an inherent jurisdiction to determine legal questions in a manner that is not contrary to any statute or regulation<sup>22</sup> or have authority to develop particular aspects of the law for which there is no codified rule.<sup>23</sup>

19. These different approaches could affect a receiving court's inclination to act on the Model Law's principle of cooperation between courts and coordination of multiple proceedings.<sup>24</sup> If the domestic law of the enacting State incorporates the cooperation and coordination provisions of the Model Law, there will be a codified recognition of steps that can be taken in that regard.

20. Without explicit adoption of such provisions,<sup>25</sup> there may be doubt as to whether, as a matter of domestic law, a court is entitled to engage in dialogue with a foreign court or to approve a cross-border agreement entered into by insolvency representatives in different States and other interested parties. The court's ability to do so will depend on other provisions of relevant domestic law. On the other hand, those courts which possess an inherent jurisdiction are likely to have greater flexibility in determining what steps can be taken between courts, in order to give effect to the Model Law's emphasis on cooperation and coordination.

21. Due process is a concept which is well understood in jurisdictions of all legal traditions. Minimum standards require a transparent process, notification to the parties of any communications that may take place between relevant courts and the ability for parties to be heard on any issues that arise, whether by physical presence or through an opportunity to make submissions in writing. Irrespective of the legal tradition, it is desirable that safeguards be in place to ensure due process is followed.<sup>26</sup> Those principles assume even greater importance in cases where court-to-court communications take place.

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<sup>21</sup> That is, authorities that come within the definition of "foreign court", UNCITRAL Model Law, art. 2(e).

<sup>22</sup> For a discussion of the inherent jurisdiction see Master Jacob in *The Inherent Jurisdiction of the Court*, (1970) Current Legal Problems 23.

<sup>23</sup> Examples are the development of the law of equity and negligence in common law systems.

<sup>24</sup> UNCITRAL Model Law, arts. 25, 26, 27, 29 and 30. See further paras. 163-185 below.

<sup>25</sup> For example, in cases involving Member States of the European Union (except Denmark) the European Regulation on Insolvency Proceedings, while requiring cross-border cooperation among insolvency representatives, makes no reference to cooperation between courts.

<sup>26</sup> See further paras. 152-185 below.

22. Unlike an insolvency representative directly involved in the administration of an insolvent estate, a particular judge is unlikely to have specific knowledge of the issues raised on an initial application to the court, even though urgency often exists in insolvency cases involving complex issues and large sums of money.<sup>27</sup> Judges who have not experienced proceedings of this type before might require assistance from the foreign representative,<sup>28</sup> generally through his or her legal counsel. That assistance could include succinct, yet informative, briefs and evidence.

23. From an institutional perspective, there is a need for a judge to be given enough time to read and digest the information proffered before embarking upon a hearing. The pre-hearing reading time required in any given case will be dictated by the urgency with which the application must be addressed, the size of the relevant insolvency administrations, their complexity, the number of States involved, the macro-economic consequences of particular decisions and relevant public policy factors.

24. Over 80 judges from some 40 States, attending a judicial colloquium in Vancouver in June 2009,<sup>29</sup> expressed a view that consideration be given to the provision of assistance to judges (subject to the overriding need to maintain judicial independent and the integrity of a particular State's judicial system), on ways to approach questions arising under the Model Law. This text is intended to provide the type of assistance requested by judges at the Vancouver Colloquium. Its final form has evolved as a result of [*consultation process to be outlined*].

### C. The purpose of the UNCITRAL Model Law

25. The UNCITRAL Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Enacting States are encouraged to use the Model Law to make useful additions and improvements to national insolvency regimes, in order to resolve more readily problems arising in cross-border insolvency cases.

26. As mentioned earlier, the Model Law respects differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that help in several modest but significant ways. These include:

(a) Providing foreign representatives with rights of access to the courts of the enacting State. This permits the foreign representative to seek a temporary "breathing space", and allows the receiving court to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

(b) Determining when a foreign insolvency proceeding should be accorded "recognition" and what the consequences of recognition may be;

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<sup>27</sup> UNCITRAL Model Law, art. 17(3) emphasizes the need for speedy resolution of applications for recognition.

<sup>28</sup> As defined in the UNCITRAL Model Law, art. 2(d).

<sup>29</sup> The Eighth UNCITRAL/INSOL/World Bank Multi-national Judicial Colloquium, Vancouver 20-21 June 2009. For a report of the Colloquium see: <http://www.uncitral.org/pdf/English/news/eighthJC.pdf>.

(c) Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

(d) Permitting courts in the enacting State to cooperate effectively with courts and representatives involved in a foreign insolvency proceeding;

(e) Authorizing courts in the enacting State and persons administering insolvency proceedings in that State to seek assistance abroad;

(f) Establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in another State;

(g) Establishing rules for coordination of relief granted in the enacting State in favour of two or more insolvency proceedings involving the same debtor that may take place in multiple States.

27. The Guide to Enactment of the UNCITRAL Model Law (the Guide to Enactment) emphasizes the centrality of cooperation in cross-border insolvency cases, in order to achieve efficient conduct of those proceedings and optimal results. A key element is cooperation both between the courts involved in the various proceedings and between those courts and the insolvency representatives appointed in the different proceedings.<sup>30</sup> An essential element of cooperation is likely to be encouragement of communication among the insolvency representatives and/or other administering authorities of the States involved.<sup>31</sup> While the Model Law provides authorization for cross-border cooperation and communication between courts, it does not specify how that cooperation and communication might be achieved, leaving it up to each jurisdiction to determine by application of its own domestic laws or practices. It does, however, suggest various ways in which cooperation might be implemented.<sup>32</sup>

28. The ability of courts, with the appropriate involvement of the parties, to communicate “directly” and to request information and assistance “directly” from foreign courts or foreign representatives is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. As insolvency proceedings are inherently chaotic and value evaporates quickly with the passage of time, this ability is critical when there is a need for a court to act with urgency.

## **II. Interpretation and application of the Model Law**

### **A. The “access” principle**

29. The UNCITRAL Model Law envisages a proceeding being opened by an application made to the receiving court by an insolvency representative of a debtor who has been appointed in another State — the “foreign representative”. The application may seek:

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<sup>30</sup> UNCITRAL Model Law, arts. 25 and 26.

<sup>31</sup> For example, see the discussion of the use of cross-border agreements in the UNCITRAL Practice Guide.

<sup>32</sup> UNCITRAL Model Law, art. 27.

- (a) To commence a proceeding under the laws of the enacting State;<sup>33</sup>
- (b) To enable the foreign representative to participate in an existing proceeding in that State;<sup>34</sup>
- (c) To obtain recognition of the foreign representative's status for the purposes of seeking relief under the Model Law;<sup>35</sup>
- (d) To the extent that domestic law permits, to intervene in any proceeding to which the debtor is a party.<sup>36</sup>

30. Article 2 of the UNCITRAL Model Law defines both "foreign proceeding" and "foreign representative".

31. The definitions of "foreign representative" and "foreign proceeding" are linked. In order to come within the definition of a "foreign representative", a person must be administering a "collective judicial or administrative proceeding ... pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation", or be acting as a representative of the foreign proceeding.<sup>37</sup> A "foreign representative", is entitled, as of right, to apply directly to the court.<sup>38</sup>

32. In some circumstances, it might be argued that a particular entity administered by a "foreign representative" is not a "debtor" for the purposes of the domestic law to be applied by the receiving court.<sup>39</sup> A question of that type arose in *Rubin v Eurofinance*. In that case, receivers and managers had been appointed by the United States' court over a debtor referred to as "The Consumers Trust". A trust of that description is not recognized as a legal entity under English law but is, as a "business trust", in the United States. On a recognition application to the English Court, it was argued that the trust was not a "debtor" as a matter of English law. The judge rejected that submission holding that, having regard to the international origins of the UNCITRAL Model Law, a "parochial interpretation" of the term "debtor" would be "perverse".<sup>40</sup> The judge raised a separate question whether the relief provisions of the Model Law could work in respect of a debtor not recognized as a matter of English law, but on the facts of the case, it was not necessary to determine that point.<sup>41</sup> On appeal, the appellate court confirmed that conclusion with respect to the nature of the applicant.<sup>42</sup>

33. Whether the "foreign representative" is authorized to act as a representative of a debtor's liquidation or reorganization is determined by the applicable law of the

<sup>33</sup> Ibid., art. 11 and Guide to Enactment, paras. 97-99.

<sup>34</sup> Ibid., art. 12 and paras. 100-102.

<sup>35</sup> Ibid., art. 15 and paras. 112-121.

<sup>36</sup> Ibid., art. 24 and paras. 168-172.

<sup>37</sup> UNCITRAL Model Law, art. 2(a). The definition of the term "foreign court" is discussed at para. 11 above.

<sup>38</sup> Ibid., art. 9.

<sup>39</sup> The term "debtor" is not defined in the Model Law.

<sup>40</sup> *Rubin v Eurofinance*, paras. 39 and 40.

<sup>41</sup> Ibid., para. 41.

<sup>42</sup> *Rubin v Eurofinance* (on appeal), [reference to be completed].

State in which the insolvency proceedings began.<sup>43</sup> In some cases expert evidence of applicable law may be desirable, to determine whether the particular proceeding comes within the scope of the definitions. In other cases, where the procedure in issue is well-known to the receiving court, expert evidence may not be necessary. Where the decision appointing the foreign representative indicates that that person satisfies the definition in paragraph (d) of article 2, the court may rely on the presumption established by article 16 of the Model Law.

34. In *Stanford International Bank*, the English first instance court expressed a view that a receiver, appointed in the United States, would not be a “foreign representative” as defined because no authorization had been provided, at that stage, to administer a liquidation or reorganization of the debtor company.<sup>44</sup> That observation was made in the context of a receivership found ultimately not to be a collective proceeding under a law relating to insolvency.

35. The UNCITRAL Model Law envisages a “foreign representative” as including one appointed on an “interim basis” but not one whose appointment has not yet commenced; for example, by virtue of a stay of an order appointing the insolvency representative pending an appeal.<sup>45</sup> One approach to determining whether a “foreign representative” has standing is to consider whether the definition of “foreign proceeding” is met before determining whether the applicant has been authorized<sup>46</sup> to administer a qualifying reorganization or liquidation of the debtor’s assets or affairs, or to act as a representative of the foreign proceeding.

36. On that approach, a judge would need to be satisfied that:

(a) The “foreign proceeding” in respect of which recognition is sought is a (interim or final) judicial or administrative proceeding in a foreign State;

(b) The proceeding is “collective” in nature;<sup>47</sup>

(c) The judicial or administrative proceeding arose out of a law relating to insolvency in which proceeding the debtor’s assets and affairs are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(d) The control or supervision is being effected by a “foreign court”; namely “a judicial or other authority competent to control or supervise a foreign proceeding”;<sup>48</sup> and

(e) The applicant has been authorized in the foreign proceeding “to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding”.

37. The foreign representative’s ability to seek early recognition (and the consequential ability to seek relief)<sup>49</sup> is often essential for the effective protection of the assets of the debtor from dissipation or concealment. For that reason, the

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<sup>43</sup> UNCITRAL Model Law, art. 5.

<sup>44</sup> *Stanford International Bank*, para. 85.

<sup>45</sup> See the definition of “foreign representative” in UNCITRAL Model Law, art. 2(d).

<sup>46</sup> For the purposes of the Model Law, art 2(d).

<sup>47</sup> See below, paras. 66-70.

<sup>48</sup> UNCITRAL Model Law, art. 2(e).

<sup>49</sup> *Ibid.*, see, in particular, arts. 20, 21, 23 and 24. As to interim relief, while the recognition application is pending, see art. 19.

receiving court is obliged to decide the application “at the earliest possible time”.<sup>50</sup> The phrase “at the earliest possible time” has a degree of elasticity. Some cases may be so straight-forward that the recognition process can be completed within a matter of days. In other cases, particularly if recognition is contested, “the earliest possible time” might be measured in months. Interim relief will be available in the event that some order is necessary while the recognition application is pending.<sup>51</sup>

## **B. The “recognition” principle**

### **1. Introductory comment**

38. The object of the “recognition” principle is to avoid lengthy and time-consuming processes by providing prompt resolution of an application for recognition. This brings certainty to the process and enables the receiving court, once recognition has been given, to determine questions of relief in a timely fashion.

39. What follows is a general outline of the recognition principle. A more detailed discussion of its component parts is contained below in paragraphs 56-114.

### **2. Evidential requirements**

40. A foreign representative will make an application under the UNCITRAL Model Law in order to seek recognition of the foreign proceeding. Article 15 of the Model Law establishes the requirements to be met by that application. In deciding whether a foreign proceeding should be recognized, the receiving court is limited to the jurisdictional pre-conditions set out in the definition.<sup>52</sup> It is no part of the receiving court’s function to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law.

### **3. Substantive powers to recognize a foreign proceeding**

41. The receiving court’s power to recognize a foreign proceeding is derived from article 17 of the UNCITRAL Model Law.

42. To facilitate recognition, article 16 creates certain presumptions concerning the authenticity of documents and the content of the order commencing the foreign proceedings and appointing the foreign representative.

43. While an application for recognition of a foreign proceeding is pending, the foreign representative has a continuing duty of disclosure. He or she must inform the receiving court promptly of any substantial change in the status of the recognized foreign proceeding or of his or her appointment and any other foreign proceeding regarding the same debtor of which the foreign representative becomes aware.<sup>53</sup>

44. Article 17(2) determines the status to be afforded to the foreign proceeding, for recognition purposes. That article envisages recognition as either a “foreign

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<sup>50</sup> Ibid., art. 17(3).

<sup>51</sup> See below, para 120 and following.

<sup>52</sup> UNCITRAL Model Law, art. 2(a).

<sup>53</sup> Ibid., art. 18.

main proceeding”<sup>54</sup> or a “foreign non-main proceeding”.<sup>55</sup> The former is a foreign proceeding that is taking place in the State where “the debtor has the centre of its main interests”, while the latter is a foreign proceeding taking place in a State where the debtor has “an establishment”. The term “establishment” means “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”.<sup>56</sup> Implicitly, the UNCITRAL Model Law does not provide for recognition of other types of insolvency proceedings, for example those commenced in a State where there is only a presence of assets.<sup>57</sup>

45. *Bear Stearns*<sup>58</sup> is an illustration of a case in which a “foreign proceeding” was held to be neither a “foreign main proceeding” nor a “foreign non-main proceeding”. Both the court at first instance and the appellate court held that a provisional liquidation commenced in the Cayman Islands did not qualify under either head because the evidence did not establish either that the debtor’s principal place of business was situated in the Cayman Islands or that some non-transitory activity occurred in that State.

#### 4. Reciprocity

46. There is no requirement of reciprocity in the UNCITRAL Model Law. It is not envisaged that a foreign proceeding will be denied recognition solely on the grounds that a court in the State in which the foreign proceeding was commenced would not provide equivalent relief to an insolvency representative from the enacting State. Nevertheless, judges should be aware that some States have included reciprocity provisions, in relation to recognition, when enacting legislation based on the Model Law.<sup>59</sup>

#### 5. The “public policy” exception

47. The receiving court retains an ability to deny recognition if, to do so, would be “manifestly contrary” to the public policy of the State in which the receiving court is situated. The notion of “public policy” is grounded in domestic law and may differ from State to State. For that reason, there is no uniform definition of “public policy” in the Model Law.

48. In some States, the expression “public policy” may be given a broad meaning, in that it might relate in principle to any mandatory rule of national law. However, in many States the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees. In those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when to do otherwise would contravene those fundamental principles.

49. For the applicability of the public policy exception in the context of the UNCITRAL Model Law, it is important to distinguish between the notion of public policy as it applies to domestic affairs, and the notion of public policy as it is used

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<sup>54</sup> Ibid., see definition in art. 2(b).

<sup>55</sup> Ibid., see definition in art. 2(c).

<sup>56</sup> Ibid., see definition in art. 2(f).

<sup>57</sup> See Guide to Enactment, paras. 73 and 128.

<sup>58</sup> Full citations for the cases included in the text are set forth in the Annex.

<sup>59</sup> E.g. Romania, Mexico, South Africa.

in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the reality that international cooperation would be unduly hampered if “public policy” was interpreted broadly in that context.

50. The purpose of the expression “manifestly”, used in many international legal texts as a qualifier of the expression “public policy”, is to emphasize that public policy exceptions should be interpreted restrictively and that the exception is only intended to be invoked under exceptional circumstances, involving matters of fundamental importance for the enacting State.<sup>60</sup>

51. Apart from the public policy exception, a receiving court is not entitled to evaluate the merits of the foreign court’s decision, by which the proceeding has been commenced or the foreign representative appointed.

## 6. “Main” and “non-main” foreign proceedings

52. A “foreign proceeding” can only be recognized as either “main” or “non-main”. The basic distinction between foreign proceedings categorized as “main” and “non-main” proceedings affects the availability of relief flowing from recognition. Recognition of a “main” proceeding triggers an automatic stay of individual creditor actions or executions concerning the assets of the debtor<sup>61</sup> and an automatic “freeze” of those assets,<sup>62</sup> subject to certain exceptions.<sup>63</sup>

## 7. Review or rescission of recognition order

53. It is possible, in limited circumstances, for the receiving court to review a decision to recognize a foreign proceeding as either “main” or “non-main”. If it is demonstrated that the grounds for making a recognition order were “fully or partially lacking or have ceased to exist” the receiving court may revisit its earlier order.<sup>64</sup>

54. Examples of circumstances in which modification or termination of an earlier recognition order might be appropriate are:

- (a) If the recognized foreign proceeding has been terminated;
- (b) If the order commencing the foreign insolvency proceedings has been reversed by an appellate court in that State;
- (c) If the nature of the recognized foreign proceeding has changed, perhaps by a reorganization proceeding having been converted into a liquidation proceeding;

<sup>60</sup> For example, see below, para. 110.

<sup>61</sup> UNCITRAL Model Law, arts. 20(1)(a) and (b).

<sup>62</sup> Ibid., art. 20(1)(c).

<sup>63</sup> Ibid., art. 20(2). Recognition of “main” and “non-main” foreign proceedings is discussed in more detail in paras. 75-114 below.

<sup>64</sup> Ibid., art. 17(4).



(d) If new facts have emerged that require or justify a change in the court's decision; for example, if a foreign representative has breached conditions on which relief had been granted.<sup>65</sup>

55. A decision on recognition may also be subject to appeal or review, under applicable domestic law. Some appeal procedures under national laws give an appeal court authority to review the merits of the case in its entirety, including factual aspects. Domestic appeal procedures of an enacting State are not affected by the terms of the UNCITRAL Model Law.

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<sup>65</sup> See Guide to Enactment, paras. 129-131.

**A/CN.9/WG.V/WP.97/Add.1 (Original: English)**

**Note by the Secretariat on judicial materials on the UNCITRAL  
Model Law on Cross-Border Insolvency, submitted to the Working  
Group on Insolvency Law  
at its thirty-ninth session**

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## **II. Interpretation and application of the Model Law**

### **C. The process of recognition**

#### **1. Introductory comments**

56. To qualify as a “foreign proceeding” the foreign representative must persuade the receiving court that the relevant proceeding is:<sup>1</sup>

(a) A (interim or final) collective judicial or administrative proceeding in a foreign State;

(b) The proceeding is brought pursuant to a law relating to insolvency, in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court;

(c) The proceeding is for the purpose of reorganization or liquidation.

57. In unpacking the elements of the definition of “foreign proceeding”, questions arise over the meaning of the terms “collective judicial or administrative proceeding”, the nature of a “law relating to insolvency” and whether there is “control or supervision by a foreign court”. Those concepts reflect jurisdictional requirements, and, logically, fall to be determined before deciding whether the “foreign proceeding” is a “main” or “non-main” proceeding.<sup>2</sup>

<sup>1</sup> Ibid., art. 2(a), definition of “foreign proceeding”.

<sup>2</sup> Ibid., art. 17(2) which identifies the need to determine the status of the foreign proceeding the receiving court is recognizing.

58. If the receiving court were to find that a “foreign proceeding” existed, it turns its attention to the status of that proceeding. The terms “foreign main proceeding” and “foreign non-main proceeding” are defined in article 2.

59. The critical question, in determining whether a foreign proceeding (in respect of a corporate debtor) should be characterised as “main” is whether it is taking place “in the State where the debtor has the centre of its main interests”.<sup>3</sup> In the case of a natural person, the “centre of main interests” is equated to the person’s “habitual residence”.<sup>4</sup>

60. Demonstration of the existence of a “non-main proceeding” requires proof of a lesser connection, namely that the debtor has “an establishment” within the State where the foreign proceeding is taking place. The term “establishment” is defined as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”.<sup>5</sup> The term “non-transitory” could refer either to the duration of a relevant economic activity or to a location at which such activity is carried on.

61. As noted above,<sup>6</sup> the decision to recognize as either a “main” or “non-main” proceeding has important ramifications. Once a foreign proceeding is recognized as the “main” proceeding automatic relief follows, in the nature of stays of various enforcement actions that could otherwise be taken in the receiving court’s jurisdiction.<sup>7</sup> On the other hand, only discretionary relief is available to a foreign representative in respect of a “non-main” proceeding.<sup>8</sup>

62. From an evidential perspective, the receiving court is entitled:

(a) To presume that any decision or certificate of the type to which article 15(2) refers is authentic;<sup>9</sup>

(b) To presume that all documents submitted in support of the application for recognition are authentic, whether or not they have been “legalised”;<sup>10</sup>

(c) “In the absence of proof to the contrary”, to presume “the debtor’s registered office or habitual residence in the case of an individual” to be the centre of the debtor’s main interests.<sup>11</sup>

63. Ordinarily, whether a “foreign proceeding” is of a character that meets the criteria of a “main” proceeding will be a matter of expert evidence on the relevant domestic law of the State in which the proceeding was initiated. Determination of whether an “establishment” exists (to demonstrate a non-main proceeding) involves a question of fact. Depending upon applicable national law, the receiving court might be able to rely, in the absence of expert evidence, on reproduction of statutes

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<sup>3</sup> See the discussion in paras. 75-110 below.

<sup>4</sup> UNCITRAL Model Law, art. 16(3), in the context of a presumption of “centre of main interests” for both corporate and natural persons. See paras 58, 81-104 below. For a discussion of the term “habitual residence” in this context, see *Re Stojevic* [2007] BPIR 141, at paras. 56-57.

<sup>5</sup> UNCITRAL Model Law, art. 2(f) and the discussion in paras. 111-114 below.

<sup>6</sup> See para. 52.

<sup>7</sup> UNCITRAL Model Law, art. 20. See also paras. 126-133 below.

<sup>8</sup> *Ibid.*, art. 21. See also paras. 134-151 below.

<sup>9</sup> *Ibid.*, art. 16(1).

<sup>10</sup> *Ibid.*, art. 16(2).

<sup>11</sup> *Ibid.*, art. 16(3).

and other aids to interpretation to determine the status of the particular form of insolvency proceeding in issue.<sup>12</sup>

64. A number of the decided cases considering the meaning of “foreign proceeding”, “foreign main proceeding” and “foreign non-main proceeding” have involved members of groups of companies. The UNCITRAL Model Law is directed to individual entities, not a group structure.<sup>13</sup> For Model Law purposes, the focus is on each and every member of an enterprise group as a distinct legal entity.

65. In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under the laws of the recognizing State, proof that the debtor is insolvent.<sup>14</sup>

## 2. Collective judicial or administrative proceeding

66. The UNCITRAL Model Law was intended to apply only to particular types of insolvency regimes. The notion of a “collective” insolvency proceeding is based on the ability of a single insolvency representative to control the realization of assets for the purpose of pro rata distribution among all creditors (subject to domestic statutory priorities), as opposed to a proceeding designed to assist a particular creditor to obtain payment or a process designed for some purpose other than to address the insolvency of the debtor, rather than the debtor’s specific assets.

67. Within the parameters of the definition of “foreign proceedings”, a variety of collective proceedings might be eligible for recognition. It was anticipated that some of those proceedings would be compulsory, while others might be voluntary. Some might relate to the liquidation of assets of a debtor; others might focus on the reorganization of the debtor’s affairs. The Model Law was also intended to cover circumstances in which a debtor (corporate or individual) retained some measure of control over its assets, albeit subject to supervision by a court or other competent authority.<sup>15</sup>

68. Judges may be asked to determine whether there is a “collective” insolvency proceeding that engages the Model Law. Several cases may be of assistance.

69. In *Betcorp*, a voluntary liquidation, commenced under Australian law, was held, by a court in the United States, to be an administrative proceeding falling within the scope of the Model Law. Because the voluntary liquidation realized assets for the benefit of all creditors, the requisite aspect of a “collective” proceeding was held to be present.<sup>16</sup> In *Gold & Honey*, a receivership commenced under Israeli law, was held by a United States court not to be an insolvency or collective proceeding on the basis that it did not require the receivers to consider the rights and obligations of all creditors and was primarily designed to allow a certain

<sup>12</sup> An illustration of that approach can be found in *Betcorp*, in which the United States Bankruptcy Court used explanatory memoranda which accompanies draft legislation and is prepared to assist Parliament in order to understand the purpose and structure of the legislation under consideration in that case. Such a memo may be used by a court as an aid to resolving ambiguities, but it is not bound to do so.

<sup>13</sup> See also *Eurofood*, para. 37.

<sup>14</sup> UNCITRAL Model Law, art. 31.

<sup>15</sup> Guide to Enactment, para 24. For e.g. a so-called debtor in possession.

<sup>16</sup> *Betcorp*, p. 281.

party to collect its debts.<sup>17</sup> In *British American Insurance*, the court concurred with the courts in both *Betcorp* and *Gold & Honey* as to the meaning of “collective”, noting that such proceedings contemplated both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action.<sup>18</sup>

70. In the other case, *Stanford International Bank*, a receivership order made by a court in the United States was held, by the court in England, not to be a collective proceeding pursuant to an insolvency law. The receiving court held that the order was made after an intervention by the United States’ Securities Exchange Commission “to prevent a massive ongoing fraud”. The purpose of the order was to prevent detriment to investors, rather than to reorganize the corporation or to realize assets for the benefit of all creditors.<sup>19</sup> That view was upheld on appeal, largely for the reasons given in the English lower court.<sup>20</sup>

### 3. Subject to control or supervision by a “foreign court”

71. No distinction is drawn, in the definition of “foreign court”<sup>21</sup> between a reorganization or liquidation proceeding controlled or supervised by a judicial or administrative body. That approach was taken to ensure that those legal systems in which control or supervision was undertaken by non-judicial authorities would still fall within the definition of “foreign proceeding”.<sup>22</sup>

72. The concept of “control or supervision” has received little judicial attention to date. There are two possible approaches, the first of which was discussed in *Betcorp*. Notwithstanding the type of proceeding for which recognition was sought is commenced without any court involvement by a vote of the company concerned, the court held that the “control or supervision” criterion<sup>23</sup> was met, based on administrative or judicial oversight of the liquidators responsible for administering the collective proceeding on behalf of all creditors. The judge held that the Australian Securities and Investment Commission had responsibilities for supervising liquidators in the performance of their duties, could require liquidators to obtain permission before undertaking certain actions (e.g. destruction of books and records) and had the ability to remove or revoke the authority of any person to be a liquidator. On that basis, the judge considered that the Australian Securities and Investment Commission was “an authority competent to control and supervise a foreign proceeding” for the purposes of the definition of “foreign proceeding” under the UNCITRAL Model Law.<sup>24</sup>

73. A different view is that the existence of some regulatory regime does not, of itself, constitute control or supervision of the assets and affairs of the debtor, particularly in cases where the regulator’s powers are restricted to ensuring that

<sup>17</sup> *Gold & Honey*, p. 370.

<sup>18</sup> *British American Insurance*, p. 902.

<sup>19</sup> *Stanford International Bank*, paras. 73 and 84.

<sup>20</sup> *Stanford International Bank Ltd* (on appeal), paras. 26-27.

<sup>21</sup> UNCITRAL Model Law, art. 2(e).

<sup>22</sup> Guide to Enactment, para 74.

<sup>23</sup> UNCITRAL Model Law, art. 2(a).

<sup>24</sup> *Betcorp*, p. 284. In support of that proposition the judge relied on *Tradex Swiss AG* 384 BR 34 at 42 (2008), in which case the Swiss Federal Banking Commission was held to be a “foreign court” because it controlled and supervised liquidation of entities in the brokerage trade.

insolvency representatives perform their functions properly, as opposed to supervising particular insolvency proceedings.

74. The court in *Betcorp* held, in addition to the conclusion with respect to the regulator, that the voluntary liquidation proceeding was subject to supervision by a judicial authority; the Australian courts. That view was based on three factors: (a) the ability of liquidators and creditors in a voluntary liquidation to seek court determination of any question arising in the liquidation; (b) the general supervisory jurisdiction of Australian courts over actions of liquidators; and (c) the ability of any person “aggrieved by any act, omission or decision” of a liquidator to appeal to an Australian court, which could “confirm, reverse or modify the act or decision or remedy the omission, as the case may be”.<sup>25</sup>

#### 4. The “main” proceeding: centre of main interests

75. In the case of a corporate debtor, to recognize a foreign proceeding as a “main” proceeding the receiving court must determine that the “centre of [the debtor’s] main interests” was situated within the State in which the foreign proceeding originated.<sup>26</sup> The origin of the concept of “centre of main interests” and the way in which it has been applied in decided cases might be of assistance to judges grappling with this issue.

76. For the purposes of the UNCITRAL Model Law, a deliberate decision was taken not to define “centre of main interests”. The notion was taken from the Convention on Insolvency Proceedings of the European Union (the European Convention), for reasons of consistency.<sup>27</sup> At the time the Model Law was finalized, the European Convention had not come into force and it subsequently lapsed for lack of ratification by all Member States.<sup>28</sup>

77. Subsequently, the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation) applied to Member States (except Denmark) of the European Union as a means of dealing with cross-border insolvency issues within the European Union. The concept of “main proceedings” and “centre of main interests” were carried forward into the text of the EC Regulation.<sup>29</sup> In contrast to the UNCITRAL Model Law provision, the EC Regulation stresses the need for the centre of main interests to be “ascertainable by third parties”.<sup>30</sup> The Guide to Enactment notes that the notion of “centre of main interests” corresponds to the formulation in article 3 of the European Convention and acknowledges the desirability of “building on the emerging harmonization as regards the notion of ‘main’ proceeding”.<sup>31</sup> Although the concepts in the two texts

<sup>25</sup> *Betcorp*, pp. 283-284.

<sup>26</sup> UNCITRAL Model Law, art. 2(b).

<sup>27</sup> See Guide to Enactment, para. 31; cf art. 3 of the European Convention.

<sup>28</sup> For relevant history see the opinions of Advocates General in *Re Staubitz-Schreiber* [2006] ECR I-701 and *Eurofood*, at para 2. For a more extensive discussion see Moss, Fletcher and Isaacs, *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (2nd ed. 2009 Oxford University Press), paras 1.01-1.25.

<sup>29</sup> EC Regulation, Recitals (12) and (13) set out below.

<sup>30</sup> *Ibid.*, Recital (13).

<sup>31</sup> Guide to Enactment, para. 31. See A/52/17, para. 153 which indicates that “... the interpretation of the term in the context of the Convention would be useful also in the context of the Model

are similar, however, they serve a different purpose. The determination of “centre of main interests” under the EC Regulation relates to the jurisdiction in which main proceedings should be commenced. The determination of “centre of main interests” under the Model Law relates to the effects of recognition, principal amongst those being the relief available to assist the foreign proceeding.

78. Recitals (12) and (13) of the EC Regulation state:

“(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor’s assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.<sup>32</sup>

“(13) The “centre of main interests” should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”

79. In anticipation of ratification of the Convention by all Member States, an explanatory report on the European Convention had been prepared (the Virgos-Schmit Report).<sup>33</sup> That report provided guidance on the concept of “main insolvency proceedings” and, notwithstanding the subsequent demise of the Convention, has been accepted generally as an aid to interpretation of the term “centre of main interests” in the EC Regulation.

80. The Virgos-Schmit report explained the concept of “main insolvency proceedings” as follows:

**“73. Main insolvency proceedings**

“Article 3(1) enables main insolvency universal proceedings to be opened in the Contracting State where the debtor has his centre of main interests. Main insolvency proceedings have universal scope. They aim at encompassing all the debtor’s assets on a world-wide basis and at affecting all creditors, wherever located.

“Only one set of main proceedings may be opened in the territory covered by the Convention.

...

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[Law].” It should be noted that the EC Regulation does not define centre of main interests — see recital 13 below.

<sup>32</sup> The EC Regulation refers to secondary proceedings while the Model Law uses non-main proceedings. Secondary proceedings under the EC Regulation are winding up proceedings: art. 3.3.

<sup>33</sup> M. Virgos and E. Schmit, *Report on the Convention on Insolvency Proceedings*, prepared prior to the Convention being open for signature on 23 November 1995. The Report is available online at [http://global.abi.org/sites/global.abi.org/files/insolvency\\_report.pdf](http://global.abi.org/sites/global.abi.org/files/insolvency_report.pdf).

“75. The concept of “centre of main interests” must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

“The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor’s potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.

“By using the term “interests”, the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression “main” serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

“In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence.

“Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor’s centre of main interests is the place of his registered office. This place normally corresponds to the debtor’s head office.”

81. There have now been a number of court decisions which consider the meaning of the phrase “centre of main interests”, either in the context of the EC Regulation or domestic laws based on the UNCITRAL Model Law. A number of subtle differences in approach have emerged. But, the differences may be more apparent than real.

82. The leading European decision is *Eurofood*, which arose out of a dispute between Irish and Italian courts about whether an insolvent subsidiary company with a registered office in a State different from the parent company had its “centre of main interests” in the State of its registered office or that of the parent company.

83. To answer that question, the European Court of Justice (ECJ) had to determine the strength of the presumption that the registered office would be regarded as the centre of a particular company’s main interests. For the purpose of the EC Regulation, the presumption is found in article 3(1):<sup>34</sup>

#### *Article 3*

#### **International jurisdiction**

“1. The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.”

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<sup>34</sup> Compare UNCITRAL Model Law, art. 16(3). See also Virgos-Schmit in para. 76.



84. The ECJ held that, “in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community Legislature in favour of the registered office ... can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect”.<sup>35</sup>

85. In considering the presumption, the ECJ suggested that it could be rebutted in the case of a “letterbox company” which does not carry out any business in the territory of the State in which its registered office is situated.<sup>36</sup> In contrast, it took the view that “the mere fact” that a parent company makes economic choices (for example, for tax reasons) as to where the registered office of the subsidiary might be situated, will not be enough to rebut the presumption.<sup>37</sup>

86. *Eurofood* places significant weight on the need for predictability in determining the centre of main interests of a debtor. In contrast to *Eurofood*, the first appellate court decision in the United States, *SPhinX*, took a more expansive view of the power to determine the centre of main interests.

87. Under Chapter 15 of the United States Bankruptcy Code (the chapter adopting the UNCITRAL Model Law) the wording of the presumption was changed from “proof” to the contrary to “evidence” to the contrary.<sup>38</sup> The legislative history to that change suggests it was one reflecting terminology, namely that the way in which the word “evidence” is used in the United States may more closely reflect the term “proof”, as used in some other English speaking States.<sup>39</sup> *SPhinX* and subsequent decisions of the United States courts must be read in that context.

88. *SPhinX* involved a petition by the provisional insolvency representatives of a company registered in the Cayman Islands for recognition of that regime as a “main proceeding”. *SPhinX* suggests that a finding of improper forum shopping might be a factor that could be taken into account in determining the centre of the debtor company’s interests. The appellate Court said:<sup>40</sup>

“Collectively, these improper purpose and rebuttal analyses, combined with pragmatic considerations, led the Bankruptcy Court to conclude, where so many objective factors point to the Cayman Islands not being the debtor’s COMI, and no negative consequences would appear to result from recognising the Cayman Islands proceedings as non-main proceedings, that is the better choice.

“Overall, it was appropriate for the Bankruptcy Court to consider the factors it considered, to retain its flexibility, and to reach a pragmatic resolution supported by the facts found. No authority has been cited to the contrary.”

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<sup>35</sup> *Eurofood*, para. 34.

<sup>36</sup> *Ibid.*, para. 35.

<sup>37</sup> *Ibid.*, para 36. See also the full summary of the Court’s conclusions on this topic at para. 37 of the judgment.

<sup>38</sup> Section 1516(c) of the US Bankruptcy Code: “[in] the absence of evidence to the contrary, the debtor’s registered office ... is presumed to be the centre of the debtor’s main interests.”

<sup>39</sup> HR Rep No 31, 109th Cong, 1st Session 1516 (2005).

<sup>40</sup> *SPhinX*, p. 21.

89. In *Bear Stearns*, the United States' court gave further consideration to the question of determination of the centre of main interests of a debtor. Again, the application for recognition involved a company registered in the Cayman Islands which had been placed into provisional liquidation in that jurisdiction.

90. The court identified the rationale for the change made to the presumption by the United States' legislation, replacing "proof" with "evidence". The judge said, by reference to the legislative history of the provision:

"The presumption that the place of the registered office is also the centre of the debtor's main interest is included for speed and convenience of proof where there is no serious controversy."<sup>41</sup>

91. The judge stated that this "permits and encourages fast action in cases where speed may be essential, while leaving the debtor's true "centre" open to dispute in cases where the facts are more doubtful". He added that this "presumption is not a preferred alternative where there is a separation between a corporation's jurisdiction of incorporation and its real seat".<sup>42</sup>

92. The court, in *Bear Stearns*, referred to the burden of displacing the presumption. The court regarded the onus as being on the foreign representative seeking recognition to demonstrate the centre of main interests was in some place other than the registered office.<sup>43</sup> In the particular case, the court regarded the presumption as having been displaced by the evidence adduced by the foreign representative in support of the petition. All evidence pointed towards the principal place of business being in the United States.

93. After discussing the *Eurofood* judgment, the United States' court expressed the view that the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties generally equates with the concept of the "principal place of business" in United States law.<sup>44</sup> More recently, the term "principal place of business" has been defined as the "nerve centre" for the purposes of certain laws by the United States Supreme Court in *Hertz Corp v Friend*.<sup>45</sup> That approach appears to have been followed in *Fairfield Sentry*, for Model Law purposes.<sup>46</sup>

94. The decision in *Bear Stearns* was appealed, on the grounds that the judgment did not "accede" to principles of comity and cooperation and an asserted erroneous interpretation of the presumption by the judge. On appeal, the appellate judge had no difficulty in holding that principles of comity had been overtaken by the concept of recognition. The appellate judge held that "recognition" ought to be distinguished from "relief". The *Bear Stearns* decision was followed in *Atlas Shipping*, where the court held that once a court has recognized a foreign main proceeding, Chapter 15 specifically contemplates that the court will exercise its discretion to fashion

<sup>41</sup> See note 104.

<sup>42</sup> *Bear Stearns*, p.128.

<sup>43</sup> *Ibid.*, p. 128.

<sup>44</sup> *Ibid.*, p. 129.

<sup>45</sup> 130 S Ct 1181 (2010).

<sup>46</sup> *Fairfield Sentry*, p. 6. The Supreme Court indicated that courts should focus on the actual place where the coordination, direction and control of the corporation was taking place, observing that the location would likely be obvious to members of the public dealing with it.

appropriate post-recognition relief consistent with the principles of comity.<sup>47</sup> It was also followed in *Metcalf and Mansfield*, in which the United States court was asked to enforce certain orders for relief issued by a Canadian court, orders that were broader than would have been permitted under United States' law. The court noted that principles of comity did not require the relief granted in the foreign proceedings and the relief available in the United States to be identical. The key determination was whether the procedures used in the foreign proceeding met the fundamental standards of fairness in the United States; the court held that the Canadian procedures met that test.<sup>48</sup>

95. In *SPhinX*, the appellate court considered that it might be appropriate to regard the presumption as rebutted if there were no opposition by a party to such a finding. In *Bear Stearns*, the appellate court affirmed the lower court's decision that the burden lay on a foreign representative to rebut the presumption and that the court had a duty, independently, to determine whether that had been done, irrespective of whether party opposition was or was not present.<sup>49</sup>

96. In common with the lower court, the appellate court accepted that the concept of centre of main interests and the presumption were derived from the European Convention, that the "centre of main interests" equated to the "principal place of business". The appellate court also affirmed a list of factors set out in the first instance decision, to be taken into account in assessing whether centre of main interests has been established in accordance with the application for recognition. The factors identified were:<sup>50</sup>

- (a) The location of the debtor's headquarters;
- (b) The location of those who direct the debtor company;
- (c) The location of the debtor's primary assets;
- (d) The location of the majority of creditors, or at least those affected by the case;
- (e) Applicable law in relation to disputes that might arise between debtor and creditor.

97. In *Betcorp*, although the centre of main interests of the Australian company did not appear to be seriously in dispute, the judge offered some thoughts on the subject. He concluded that "... a commonality of cases analysing debtors' [centre of main interests] demonstrates that courts do not apply any rigid formula or consistently find one factor dispositive; instead courts analyse a variety of factors to discern, objectively, where a particular debtor has its principal place of business. That inquiry examines the debtors' administration, management and operations along with whether reasonable and ordinary third parties can discern or perceive where the debtor is conducting these various functions".<sup>51</sup> The judge held that the time at which the centre of main interests should be determined reflected the time at

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<sup>47</sup> *Atlas Shipping*, p. 78.

<sup>48</sup> *Metcalf and Mansfield*, pp. 697-698.

<sup>49</sup> *Bear Stearns*, p. 335.

<sup>50</sup> *Bear Stearns*, p. 128; *Bear Stearns* (on appeal), p. 336.

<sup>51</sup> *Betcorp*, p. 292.

which the application for recognition was made.<sup>52</sup> That interpretation seems to arise from the tense in which the definition of “foreign main proceeding” is expressed. A similar problem arises in relation to the place of an “establishment”, under the definition of “foreign non-main proceeding”. The approach in *Betcorp* was followed in *Yuval Ran* and *British American Insurance*.

98. The remaining decisions are those at first instance and on appeal in *Stanford International Bank*. That case involved an application for recognition in England of a proceeding commenced in Antigua. It considered whether a “head office functions” test, articulated in earlier decisions by English courts was still good law, having regard to *Eurofood*.

99. At first instance, the judge accepted a submission that ascertainment by third parties is an overarching consideration, following the approach set out in *Eurofood*.<sup>53</sup> The judge made that decision in the context of the Cross-Border Insolvency Regulations 2006 (enacting the UNCITRAL Model Law in Great Britain), rather than under the EC Regulation. In determining what was meant by the term “ascertainable” the judge referred to information in the public domain and what a typical third party would learn from dealings with the debtor.<sup>54</sup> In doing so, the judge declined to follow an earlier decision of his own in which he had applied the “head office functions” test.<sup>55</sup>

100. The judge observed that the difference in approach, in relation to rebuttal of the presumption, between United States and European courts was that the United States’ courts placed the burden on the person asserting that the particular proceedings were “main proceedings”, while *Eurofood* put the burden on the party seeking to rebut the presumption.<sup>56</sup>

101. The judge expressed some doubt about whether the factors listed in *Bear Stearns*,<sup>57</sup> had been qualified by a requirement of “ascertainability”, indicating that it had been a requirement of *Eurofood*. However, even though the specific list of criteria was not qualified in that way by the United States’ court, it would seem plausible that an informed creditor could be aware, at least, of the location of those who directed the debtor company, its headquarters, the place where primary assets could be found and whether the debtor was trading domestically or internationally.<sup>58</sup> The importance of the first instance observation in *Stanford International Bank* lies in its implicit emphasis on the need for evidence of what factors were ascertainable to third parties dealing with the debtor.

102. The decision in *Stanford International Bank* was upheld on appeal. In the principal judgment, the presiding judge held there was a clear correlation between the words used in the UNCITRAL Model Law and the EC Regulation, both in relation to “centre of main interests” and the presumption.<sup>59</sup> After discussing United States’ and other authorities, he held that the first instance judge was correct to

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<sup>52</sup> Ibid.

<sup>53</sup> *Stanford International Bank*, para. 61.

<sup>54</sup> Ibid., para. 62.

<sup>55</sup> Ibid., para. 61.

<sup>56</sup> Ibid., paras. 63 and 65.

<sup>57</sup> See para. 96 above.

<sup>58</sup> *Stanford International Bank*, para. 67. Compare the list of factors set out at para. 92 above.

<sup>59</sup> *Stanford International Bank*, (on appeal), para. 39.

follow *Eurofood* and confirmed that the explanation in the Virgos-Schmit Report<sup>60</sup> (concerning ascertainability) was equally apposite for Model Law proceedings. The presiding judge did not necessarily see the United States as applying a different onus on rebutting the presumption, but left that question open.<sup>61</sup>

103. The presiding judge was joined by one other member of the court, who agreed with his reasons.<sup>62</sup> The third member of the court, while agreeing generally with the views expressed by the presiding judge, expressed a view on the “head office functions” test:<sup>63</sup>

“I respectfully differ [from the presiding judge] to a small extent on the test to be applied to review the first instance decision on where the [centre of main interests] is situated. What the judge has to do is to make findings as to what activities were conducted in each potential [centre of main interests] and then ask whether they amounted to the carrying on of head office functions and then quantitatively and qualitatively whether they were more significant than those conducted at the registered office.”

Those observations might be seen as suggesting that a court is required to judge objectively, on evidence before it, where the centre of main interests of the debtor lies, as opposed to making that finding based on evidence of what was actually ascertainable by creditors and other interested parties who dealt with the debtor during the course of its trading life. The remaining appellate judgments in *Stanford International Bank* and the decision in *Eurofood* tend to support the latter proposition.

104. A review of cases dealing with the vexed question of the “centre of main interests” indicates the following areas of conflict:

(a) On whom does the onus of proof lie to rebut the “registered office” presumption?

(b) Should “centre of main interests” be interpreted differently under the Model Law and the European Regulation, given the different purposes for which that test is used?

(c) What objectively ascertainable circumstances can be taken into account in determining where the “centre of main interests” is located? In particular:

(i) Should the issue to be addressed by reference to the principal place of business (or “nerve centre”), by reference to what those dealing with the company would regard as the actual place where coordination, direction and control of the debtor occurred?

(ii) What factors are ascertainable objectively by third parties in the sense contemplated by *Eurofood*? In particular, at what time does the inquiry into the centre of main interests occur — is it at the time the debtor is trading with third parties, at the time it is placed into a collective insolvency proceeding or at the time of the recognition hearing?

<sup>60</sup> Virgos-Schmit report, para. 75.

<sup>61</sup> *Stanford International Bank*, (on appeal) para 55.

<sup>62</sup> *Ibid.*, para. 159.

<sup>63</sup> *Ibid.*, para. 153.

(iii) Can the court take into account attempts by the debtor to seek a better forum, from its perspective, in determining whether recognition should be granted?

(d) What degree of judicial or administrative control over a “foreign proceeding” is required in order to meet that aspect of the definition?

105. The issues identified are ones which, in interpreting domestic legislation based on the UNCITRAL Model Law, a judge will need to consider, having regard to the international jurisprudence and relevant public policy factors.

106. As noted previously,<sup>64</sup> the party on whom the onus of displacing the presumption lies is unlikely to be determinative in the vast majority of cases. Ordinarily, from the evidence adduced by relevant parties, it will be clear whether the place in which the registered office is situated constitutes the centre of main interests. Only in a case where the evidence is in a state of equipoise is it likely that the burden of displacing the presumption will be determinative of the application for recognition.

107. While there are differences in approach to determination of the centre of main interests of a debtor, the general trend of the decided cases seems to support objective ascertainment by third parties dealing with the debtor at relevant times.<sup>65</sup> The issue lies more in the focus in some jurisdictions on specific factors, such as the “nerve centre” or “head office” of the particular entity to which the recognition application is directed.

108. On a recognition application, ought the court be able to take account of abuse of its processes as a ground to decline recognition? There is nothing in the UNCITRAL Model Law itself which suggests that extraneous circumstances, such as abuse of process, should be taken into account on a recognition application. The Model Law envisages the application being determined by reference to the specific criteria set out in the definitions of “foreign proceeding”, “foreign main proceeding” and “foreign non-main proceeding”. Yet, there is plainly a problem if illegitimate forum shopping has resulted in a debtor being placed in a more advantageous position, with consequential prejudice to creditors. The Model Law does not prevent receiving courts from applying domestic law, particularly procedural rules, to respond to any abuse of process.

109. An alternative way of dealing with the illegitimate forum shopping concern may be to consider whether recognition could be refused on grounds of public policy.<sup>66</sup> Viewed in that way, the issue of illegitimate forum shopping falls within the wider ambit of abuse of the processes of a court. A case could be made to support the proposition that an application for recognition as a main proceeding is an abuse of process if those responsible for pursuing the application know that the centre of main interests was elsewhere and yet deliberately decide to move the registered office to a different location to argue otherwise and/or to suppress information of that type when applying for recognition. An approach based on the “public policy” exception has the advantage of separating the recognition inquiry

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<sup>64</sup> See para. 92 above.

<sup>65</sup> *Eurofood* and *Bear Stearns*.

<sup>66</sup> See the discussion of the public policy exception at paras. 47-51 above.

and any abuse of process issues in a manner reflecting the terms and spirit of the UNCITRAL Model Law.

110. In *Gold & Honey*, a United States court refused recognition of Israeli proceedings on public policy grounds. In that case, after liquidation proceedings had been commenced in the United States and, after the automatic stay had come into force, a receivership order was made in respect of a debtor company in Israel. The judge declined to recognize that proceeding because to do so “would reward and legitimize [the] violation of both the automatic stay and [subsequent orders of the court] regarding the stay”.<sup>67</sup> Because recognition “would severely hinder United States bankruptcy courts’ abilities to carry out two of the most fundamental policies and purposes of the automatic stay — namely, preventing one creditor from obtaining an advantage over other creditors, and providing for the efficient and orderly distribution of a debtor’s assets to all creditors in accordance with their relative priorities”,<sup>68</sup> the judge considered that the high threshold required to establish the public policy exception had been met.

## 5. Non-main proceedings — “establishment”

111. In order to be recognized as a “non-main proceeding” a debtor must have “an establishment” in the foreign jurisdiction. The term “establishment” forms part of the UNCITRAL Model Law’s definition of “foreign non-main proceeding”. It is also used, in the EC Regulation, to assist courts of Member States to determine whether jurisdiction exists to open insolvency proceedings, when the centre of main interests is in another Member State. Article 3(2) of the EC Regulations states:

### *Article 3*

#### **International jurisdiction**

“2. Where the centre of a debtor’s main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.”

112. Whether an “establishment” exists is largely a question of fact. Necessarily, that factual question will turn on specific evidence adduced. It must be established that the debtor “carries out a non-transitory economic activity with human means and goods or services” within the relevant State.<sup>69</sup> There is, however, a legal issue as to whether the term “non-transitory” is referable to the duration of a relevant economic activity or to the specific location at which the activity is carried on.<sup>70</sup>

113. The term “establishment” has been discussed in some of the authorities. In *Bear Stearns*,<sup>71</sup> “establishment” was equated with “a local place of business”. In that case, the court held there was no evidence to establish that non-transitory economic activity was taking place in the Cayman Islands. On appeal, the appellate

<sup>67</sup> *Gold & Honey*, p. 371.

<sup>68</sup> *Ibid.*, p. 372.

<sup>69</sup> UNCITRAL Model Law, art. 2(f).

<sup>70</sup> *Fairfield Sentry*, pp. 8-9.

<sup>71</sup> *Bear Stearns*, p. 131.

court made it clear that auditing activities carried out in preparation of incorporation documents did not constitute “operations” or “economic activity” for the purposes of an “establishment”, nor did investigations carried out by the provisional liquidators into whether antecedent transactions could be avoided.<sup>72</sup>

114. It may be that more emphasis should be given to the words “with human means and goods and services”, in the definition of “establishment”. A business operation, run by human beings and involving goods or services, seems to be implicit in the type of local business activity which will be sufficient to meet the definition of the term “establishment”.

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<sup>72</sup> *Bear Stearns* (on appeal), p.339.



## A/CN.9/WG.V/WP.97/Add.2 (Original: English)

**Note by the Secretariat on judicial materials on the UNCITRAL  
Model Law on Cross-Border Insolvency, submitted to the Working  
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## Annex

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**II. Interpretation and application of the Model Law (*continued*)****D. Relief****1. Introductory comments**

115. There are three types of relief available under the UNCITRAL Model Law:

(a) Interim (urgent) relief that can be sought at any time after the application to recognize a foreign proceeding has been made;<sup>1</sup>

(b) Automatic relief consequent upon recognition of a foreign proceeding as a “foreign main proceeding”;<sup>2</sup>

(c) Discretionary relief consequent upon recognition as either a main or non-main proceeding.<sup>3</sup>

116. By virtue of the definition of “foreign proceeding”,<sup>4</sup> the effects of recognition extend also to foreign “interim proceedings”.<sup>5</sup> That solution is necessary because

<sup>1</sup> UNCITRAL Model Law, art. 19.

<sup>2</sup> Ibid., art. 20.

<sup>3</sup> Ibid., art. 21.

interim proceedings are not distinguished from other insolvency proceedings, merely because they are of an interim nature.

117. If, after recognition, the foreign “interim proceeding” ceases to have a sufficient basis for the automatic effects of article 20, the automatic stay could be terminated pursuant to the law of the enacting State, as indicated in article 20(2).<sup>6</sup>

118. Nothing in the Model Law limits the power of a court or other competent authority to provide additional assistance to a foreign representative under other laws of the enacting State.<sup>7</sup>

119. Consideration of a particular statute enacting the Model Law is required in order to determine whether any type of relief (automatic or discretionary) envisaged by the Model Law has been removed or modified in the enacting State.<sup>8</sup> Once available relief has been identified, it is open to the receiving court, in addition to automatic relief flowing from a recognized “main” proceeding, to craft any appropriate relief required.

## 2. Interim relief<sup>9</sup>

120. Article 19 deals with “urgently needed” relief that may be ordered at the discretion of the court and is available as of the moment of the application for recognition.<sup>10</sup>

121. Article 19 authorizes the court to grant the type of relief that is usually available only in collective insolvency proceedings,<sup>11</sup> as opposed to the “individual” type of relief that may be granted before the commencement of insolvency proceedings under domestic rules of civil procedure.<sup>12</sup> However, discretionary “collective” relief under article 19 is somewhat narrower than the relief under article 21.

122. The restriction of interim relief to a “collective” basis is consistent with the need to establish, for recognition purposes, that a “collective” foreign proceeding

<sup>4</sup> Ibid., see art. 2(a).

<sup>5</sup> An example is the appointment of an interim [provisional] liquidator prior to the making of a formal order putting a debtor company into liquidation, which is possible under the law of numerous States: see for e.g. s 246 Companies Act 1993 and r 31.32 of the High Court Rules of New Zealand.

<sup>6</sup> UNCITRAL Model Law, art. 20(2).

<sup>7</sup> Ibid., art. 7. This article is designed to encompass relief based on comity or exequatur, the use of letters rogatory or under any other law of a particular State.

<sup>8</sup> States that have enacted legislation based on the Model Law have taken different approaches. For example, in the United States the scope of the automatic stay is wider (to conform with Chapter 11 of its Bankruptcy Code), and in Mexico the stay does not operate to prevent pursuit of individual actions as opposed to enforcement. Japan and ROK provide that the relief available upon recognition is subject to the discretion of the court on a case-by-case basis, rather than applying automatically as provided by the Model Law.

<sup>9</sup> The summary that follows is based substantially on the Guide to Enactment, paras. 135-140.

<sup>10</sup> The receiving court is entitled to tailor relief to meet any public policy objections. For a discussion of the “public policy” exception, in relation to questions of relief, see *Ephedra and Tricontinental Exchange* and paras. 47-51 above.

<sup>11</sup> I.e. the same type of relief available under article 21.

<sup>12</sup> I.e. measures covering specific assets identified by a creditor.

exists.<sup>13</sup> Collective measures, albeit in a restricted form, may be urgently needed, before the decision on recognition, in order to protect the assets of the debtor and the interests of the creditors.<sup>14</sup> Extension of available interim relief beyond collective relief would frustrate those objectives. On the other hand, because recognition has not yet been granted, interim relief should, in principle, be restricted to urgent and provisional measures.

123. The urgency of the measures is alluded to in the opening words of article 19(1). Article 19(1)(a) restricts a stay to execution proceedings, and article 19(1)(b) refers to perishable assets and assets susceptible to devaluation or otherwise in jeopardy. Otherwise, the measures available under article 19 are essentially the same as those available under article 21.

124. Article 19 relief is provisional in nature. The relief terminates when the application for recognition is determined.<sup>15</sup> However, the court is given the opportunity to extend the measure.<sup>16</sup> The court might wish to do so, for example, to avoid a hiatus between provisional relief granted before recognition and substantive discretionary relief issued afterwards.

125. Article 19(4) emphasizes that any relief granted in favour of a foreign non-main proceeding must be consistent (or should not interfere) with the foreign main proceeding.<sup>17</sup> In order to foster coordination of pre-recognition relief with any foreign main proceeding, the foreign representative applying for recognition is required to attach to the application for recognition a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.<sup>18</sup>

### 3. Automatic relief on recognition of “main proceeding”<sup>19</sup>

126. Article 20 addresses the effects of recognition of a foreign main proceeding, in particular the automatic effects and the conditions to which it is subject.

127. While relief under articles 19 and 21 is discretionary, the effects provided by article 20 are not; they flow automatically from recognition of the foreign main proceeding. Another difference between discretionary relief under articles 19 and 21 and the effects under article 20 is that discretionary relief may be issued in favour of main as well as non-main proceedings, while the automatic effects apply only to main proceedings. The automatic effects of recognition are different to the effects of an exequatur order.

128. The automatic consequences envisaged in article 20 are intended to allow time for steps to be taken to organize an orderly and fair cross-border insolvency proceeding; even if the effects of commencement of the foreign insolvency proceeding in the country of origin are different from the effects of article 20 in the recognizing State. This approach reflects a basic principle underlying the

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<sup>13</sup> See also the discussion of *Rubin v Eurofinance* at para. 141 below.

<sup>14</sup> Ibid.

<sup>15</sup> UNCITRAL Model Law, art. 19(3).

<sup>16</sup> Ibid., art. 21(1)(f).

<sup>17</sup> Ibid., see also arts. 29 and 30.

<sup>18</sup> Ibid., art. 15(3).

<sup>19</sup> The summary that follows is based substantially on the Guide to Enactment, paras. 141-153.

UNCITRAL Model Law, according to which recognition of foreign proceedings by the court of the enacting State grants effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency.

129. If recognition should, in any given case, produce results that would be contrary to the legitimate interests of an interested party, including the debtor, the law of the recognizing State may provide possibilities for protecting those interests.<sup>20</sup>

130. Article 20(1)(a) refers not only to “individual actions” but also to “individual proceedings” in order to cover, in addition to “actions” instituted by creditors in a court against the debtor or its assets, enforcement measures initiated by creditors outside the court system, measures that creditors are allowed to take under certain conditions in some States. Article 20(1)(b) was added to make it abundantly clear that executions against the assets of the debtor are covered by the stay.

131. Notwithstanding the “automatic” or “mandatory” nature of the effects of recognition under article 20, it is expressly provided that the scope of those effects depends on exceptions or limitations that may exist in the law of the enacting State. Those exceptions may be, for example, the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, initiation of court actions for claims that have arisen after the commencement of the insolvency proceeding (or after recognition of a foreign main proceeding), or completion of open financial-market transactions.

132. Sometimes it may be desirable for the court to modify or terminate the effects of article 20. Domestic rules governing the power of a court to do so vary. In some legal systems the courts are authorized to make individual exceptions upon request by an interested party, under conditions prescribed by local law.<sup>21</sup> In view of that situation, article 20(2) provides that the modification or termination of the stay and the suspension provided in the article is subject to the provisions of law of the enacting State relating to insolvency.

133. Article 20(4) clarifies that the automatic stay and suspension pursuant to article 20 do not prevent anyone, including the foreign representative or foreign creditors, from requesting the commencement of a local insolvency proceeding and participating in that proceeding.<sup>22</sup> If a local proceeding is initiated, article 29 deals with the coordination of the foreign and the local proceedings.<sup>23</sup>

#### **4. Post-recognition relief<sup>24</sup>**

##### *(i) The provisions of the Model Law*

134. Article 21 deals with the relief that may be granted on recognition of a foreign proceeding, indicating some of the types of relief that may be available.

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<sup>20</sup> See UNCITRAL Model Law, arts. 20(2) and 22. See also paras. 136 and 143-144 below.

<sup>21</sup> For example, UNCITRAL Model Law, art. 22(3).

<sup>22</sup> The right to apply to commence a local insolvency proceeding and to participate in it is, in a general way, dealt with in the Model Law, arts. 11-13.

<sup>23</sup> See paras. 173-176 below.

<sup>24</sup> This summary is taken substantially from the Guide to Enactment, paras. 154-160.

135. Post-recognition relief under article 21 is discretionary. The types of relief listed in article 21(1) are those most frequently used in insolvency proceedings. However, the list is not exhaustive. It is not intended to restrict the receiving court unnecessarily in its ability to grant any type of relief that is available and necessary under the law of the enacting State, to meet the circumstances of a particular case.<sup>25</sup>

136. It is in the nature of discretionary relief that the court may tailor it to the case at hand. This idea is reinforced by article 22(2), according to which the court may subject the relief granted to conditions it considers appropriate. In each case it will be necessary for a judge to determine the relief most appropriate to the circumstances of the particular case and any conditions on which the relief should be granted.

137. The “turnover” of assets to the foreign representative (or another person), as envisaged in article 21(2), remains discretionary. The UNCITRAL Model Law contains several safeguards designed to ensure the protection of local interests, before assets are turned over to the foreign representative.<sup>26</sup> In *Atlas Shipping*, the United States court granted relief sought under the equivalent of article 21(1)(e) and 21(2) with respect to funds held in United States bank accounts and subject to maritime attachment orders granted both before and after the commencement of insolvency proceedings in Denmark. The judge indicated that the relief granted was without prejudice to the creditors’ rights, if any, to assert in the Danish bankruptcy court their rights to the previously garnished funds.<sup>27</sup> The judge also observed that the turnover of the funds to the foreign representative would be more economical and efficient in that it would permit all of Atlas’ creditors worldwide to pursue their rights and remedies in one court of competent jurisdiction.

138. One salient factor to be taken into account in tailoring the relief is whether it is for a foreign main or non-main proceeding. It is necessary to bear in mind that the interests and the authority of a representative of a foreign non-main proceeding are usually narrower than the interests and the authority of a representative of a foreign main proceeding. The latter will, generally, seek to gain control over all assets of the insolvent debtor.

139. Article 21(3) reflects that idea by providing:

(a) That relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding, and;

(b) If the foreign representative seeks information concerning the debtor’s assets or affairs, the relief must concern information required in that proceeding.

Those provisions suggest that relief in favour of a foreign non-main proceeding should not give unnecessarily broad powers to the foreign representative and that

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<sup>25</sup> The receiving court is entitled to tailor relief to meet any public policy objections. For a discussion of the “public policy” exception, in relation to questions of relief, see *Ephreda and Tri-Continental* and paras. 47-51 above.

<sup>26</sup> Those safeguards include: the general statement of the principle of protection of local interests in art. 22(1); the provision in art. 21(2) that the court should not authorize the turnover of assets until it is assured that the local creditors’ interests are protected; and art. 22(2), according to which the court may subject the relief it grants to conditions it considers appropriate.

<sup>27</sup> *Atlas Shipping*, at p. 742.

such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.

140. In determining whether or not to grant discretionary relief under article 21, or in modifying or terminating any relief granted, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor are adequately protected. That is one of the reasons why the court may grant relief on such conditions as it considers appropriate.<sup>28</sup> Either a foreign representative or a person affected by relief may apply to modify or terminate the relief; or, the court may do so on its own motion.<sup>29</sup>

141. An example of a case in which relief was initially refused is *Rubin v Eurofinance*. The receiving court was asked to grant relief to enforce an order to pay money to a particular creditor, given as a result of a judgment entered in the United States. An issue arose about whether relief of that type was contemplated by the Model Law. The judge accepted that the proceeding in which judgment was entered was “part and parcel” of Chapter 11 insolvency proceedings<sup>30</sup> in the United States. While accepting, as a matter of English law, that the court could give effect to orders made in the course of foreign insolvency proceedings, the judge drew a distinction between a case in which an order was made to provide a mechanism of collective execution against property of a debtor by creditors whose rights were admitted or established<sup>31</sup> (which would justify relief) and a judgment for money entered in favour of a single creditor (which would not). The judge considered that the order made in the Chapter 11 proceedings fell into the second category, meaning that the judgment could not be enforced under the terms of the UNCITRAL Model Law. For enforcement purposes, the usual rules of English private international law continued to apply.

142. On appeal, the appellate court agreed that the proceedings were part of the Chapter 11 proceedings, but disagreed with the conclusion of the lower court, finding that the judgements in question were for the purposes of the collective enforcement regime of the insolvency proceedings. As such, the court held, they were governed by the private international law rules relating to insolvency and not by the ordinary private international law rules preventing enforcement of judgements because the defendants were not subject to the jurisdiction of the foreign court.<sup>32</sup>

143. Article 22 of the UNCITRAL Model Law addresses the need for adequate protection of the interests of creditors and other interested persons in granting or denying relief on recognition of foreign proceedings; the conditions such relief may be subject to; and modification or termination of that relief.

144. The idea underlying article 22 is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that

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<sup>28</sup> See para. 136 above.

<sup>29</sup> UNCITRAL Model Law, art. 22.

<sup>30</sup> *Rubin v Eurofinance*, para. 47.

<sup>31</sup> *Ibid.*, at para. 58, citing *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 (PC), at para. 13.

<sup>32</sup> *Rubin v Eurofinance* (on appeal), para. 61.

may be affected by such relief.<sup>33</sup> This balance is essential to achieve the objectives of cross-border insolvency legislation.

(ii) *Approaches to questions of discretionary relief*

145. Because discretionary post-recognition relief will always be tailored to meet the circumstances of a particular case, it is not feasible to refer to particular examples of relief in a text of this kind. However, different policy choices may be open to a court in deciding whether and, if so, to what extent relief should be granted. An informative example of different stances that can be taken to granting discretionary relief (albeit in a proceeding to which the UNCITRAL Model Law did not apply) is a case concerning Australian liquidation proceedings, where relief was sought in England. Although both England and Australia have enacted statutes based on the Model Law, neither was in force at the time that proceeding was commenced in England.<sup>34</sup>

146. The Australia liquidator took steps to realize and protect assets in England, mostly reinsurance claims on policies taken out in London, requesting the English courts to remit those assets to Australia for distribution among all creditors of the companies in accordance with Australian law. Australian law provided for assets realized from reinsurance moneys to be paid in priority to insurance companies, while English law (at the time) did not. The question was whether the English court ought to grant relief which would have entailed a distribution to creditors inconsistent with the priorities required under English law. At first instance, the request was denied.<sup>35</sup> That decision was upheld on appeal.<sup>36</sup> On a second appeal, the earlier decisions were overturned and relief was granted in favour of the Australian liquidators.<sup>37</sup>

147. On the second appeal, the final court held that jurisdiction did exist to make the order sought and that, as a matter of discretion, the order should be made. Although the five judges who heard the appeal agreed on the result, they diverged in their reasons for reaching that conclusion:

(a) One view was that, as a matter of principle, a single insolvency estate should emerge in which all creditors (wherever situated) were entitled and required to prove their claims. Although the Australian legislation created different priorities, they did not give rise to a fundamental public policy consideration that might militate against relief being granted.<sup>38</sup> On that basis, the main proceeding in Australia should be allowed to have universal effect;<sup>39</sup>

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<sup>33</sup> See generally Guide to Enactment, paras. 161-164.

<sup>34</sup> The application by the Australian liquidators was dealt with under the Insolvency Act 1986 (UK), s 426(4), under which courts having jurisdiction in relation to insolvency law in any part of the United Kingdom were obliged to assist courts having corresponding jurisdiction in a specified country, one of which was Australia.

<sup>35</sup> *Re HIH*.

<sup>36</sup> *Re HIH* (first appeal).

<sup>37</sup> *McGrath v Riddell*.

<sup>38</sup> Compare the discussion of public policy in *Re Gold & Honey Ltd* at para. 110 above.

<sup>39</sup> *McGrath v Riddell*, paras. 30, 36 and 63.

(b) A second view was that as Australia had been designated as a country to which assistance could be given under the Insolvency Act 1986,<sup>40</sup> there was no reason why effect should not be given to the statutory requirement to assist the Australian liquidators. There was no fundamental public policy consideration that would disentitle the Australian liquidators from obtaining relief.<sup>41</sup>

(c) The third approach relied on four specific factors to grant relief:<sup>42</sup>

(i) The companies in liquidation were Australian insurance companies;

(ii) Australian law made specific provision for the distribution of assets in the case of the insolvency of such companies;

(iii) The Australian priority rules did not conflict with any provisions of English law in force at the material time designed to protect the holders of policies written in England;

(iv) The policy underlying the Australian priority rules accorded (by the time of the decision of the final court) with changes made to the law in England.

(iii) *Relief in cases involving suspect antecedent transactions*

148. Article 23<sup>43</sup> provides standing for a foreign representative, on recognition, to initiate certain proceedings aimed at illegitimate antecedent transactions. The specific types of proceeding to which article 23 refer are likely to be identified in the adopting legislation of the enacting State.

149. When the foreign proceeding has been recognized as a “non-main proceeding”, it is necessary for the court to consider specifically whether any action to be taken under the article 23 authority “should be administered in the foreign non-main proceeding”.<sup>44</sup> Again, this distinguishes the nature of a “main” proceeding from that of a “non-main” proceeding and emphasizes that the relief in a “non-main” proceeding is likely to be more restrictive than for a “main” proceeding.

150. Article 23 is drafted narrowly. To the extent the enacting State authorizes particular actions to be taken by a foreign representative, they may only be taken if an insolvency representative within the enacting State could have brought those proceedings.<sup>45</sup> No substantive rights are created by article 23. Nor are conflict of laws rules stated; in each case it will be a question of looking at the national conflict of laws rule to determine whether any proceeding of the type contemplated under article 23 can properly proceed.

151. In *Condor Insurance*, the appellate court was asked to consider the jurisdiction of a bankruptcy court to offer avoidance relief under foreign law in a Chapter 15 proceeding. Reversing the decisions of the first and second instance courts, the appellate court held that the bankruptcy court did have that power. The case involved the recognition in the United States of foreign main proceedings commenced in Nevis, following which the foreign representatives commenced a

<sup>40</sup> Note 170.

<sup>41</sup> *McGrath v Riddell*, paras. 59, 62 and 76-77.

<sup>42</sup> *Ibid.*, para. 42.

<sup>43</sup> See also Guide to Enactment, paras. 165-167.

<sup>44</sup> UNCITRAL Model Law, art. 23(2).

<sup>45</sup> *Ibid.*, art. 23(1).



proceeding alleging Nevis law claims against the debtor to recover certain assets fraudulently transferred to the United States. Chapter 15 excepts avoidance powers from the relief that may be granted under the equivalent of article 21(1)(g), providing instead under article 23 that such powers may be exercised in a full bankruptcy proceeding. However, Chapter 15 does not, the appellate court found, deny the foreign representative powers of avoidance provided by applicable foreign law and the language used in the legislation suggests the need for a broad reading of the powers granted to the court in order to advance the goals of comity to foreign jurisdictions.<sup>46</sup> Prior to this appellate decision, a similar interpretation had been approved in *Atlas Shipping*, where the court had concluded that the decision of the second instance court in *Condor Insurance* was open to question: the conclusion that a foreign representative was prevented from bringing avoidance actions based on foreign law was “not supported by anything specifically in the legislative history.”<sup>47</sup>

## E. Cooperation and coordination

### 1. Introductory comments

152. Articles 25-27 of the UNCITRAL Model Law are designed to promote cooperation between insolvency representatives and the courts of different States to ensure insolvency proceedings affecting a single debtor are dealt with in a manner best designed to meet the needs of all of its creditors. The objective is to maximize returns to creditors (in liquidation and reorganization proceedings) and (in organization proceedings) to facilitate protection of investment and the preservation of employment,<sup>48</sup> through fair and efficient administration of the insolvent estate.

153. Court cooperation and coordination are core elements of the Model Law. Cooperation is often the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets<sup>49</sup> or to find the best solutions for the reorganization of the enterprise. Cooperation leads to the better coordination of the various insolvency proceedings, streamlining them with the object of achieving greater benefits for creditors.

154. Articles 25 and 26 not only authorize cross-border cooperation, they mandate it. They provide that the court and the insolvency representative “shall cooperate to the maximum extent possible”. These articles were designed to overcome a widespread lack, in national laws, of rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border insolvencies. Enactment of these provisions is particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited. Even in jurisdictions in which there is a tradition of wider judicial latitude, this legislative framework for cooperation may prove useful.

155. The articles leave the decision as to when and how to cooperate to the courts and, subject to the supervision of the courts, to the insolvency administrators. For a

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<sup>46</sup> *Condor Insurance* (on appeal), p. [reference to be completed].

<sup>47</sup> *Atlas Shipping*, p. 744.

<sup>48</sup> UNCITRAL Model Law, Preamble (e).

<sup>49</sup> E.g., when items of production equipment located in two States are worth more if sold together than if sold separately.

court (or a person or body referred to in articles 25 and 26) to cooperate with a foreign court or a foreign representative regarding a foreign proceeding, the UNCITRAL Model Law does not require a previous formal decision to recognize that foreign proceeding.

156. The ability of courts, with appropriate involvement of the parties, to communicate “directly” and to request information and assistance “directly” from foreign courts or foreign representatives is intended to avoid the use of traditional but time consuming procedures, such as letters rogatory and exequatur. This ability is critical when the courts need to act with urgency.

## 2. Cooperation

157. The importance of granting the courts flexibility and discretion in cooperating with foreign courts or foreign representatives was emphasized at the Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency,<sup>50</sup> held prior to completion of the UNCITRAL Model Law. At that Colloquium, reports of a number of cases in which judicial cooperation in fact occurred were given by the judges involved in the cases.

158. From those reports a number of points emerged:

(a) Communication between courts is possible, but should be done carefully and with appropriate safeguards for the protection of substantive and procedural rights of the parties;

(b) Communication should be done openly, with advance notice to the parties involved<sup>51</sup> and in the presence of those parties, except in extreme circumstances;

(c) Communications that might be exchanged are various and include: exchanges of formal court orders or judgments; supply of informal writings of general information, questions and observations; and transmission of transcripts of court proceedings;

(d) Means of communication include, for example, telephone, video-link, facsimile and electronic-mail;

(e) Where communication is necessary and is used appropriately, there can be considerable benefits for the persons involved in, and affected by, the cross-border insolvency.

159. A number of cases illustrate how communication between courts and insolvency representatives has helped to coordinate multiple proceedings and to ensure more speedy completion of the administration of the insolvent debtor’s estate.

160. In *Maxwell Communications*<sup>52</sup> judges in New York and England raised independently with the parties’ legal representative in each country the possibility

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<sup>50</sup> A report of the meeting is available at <http://www.uncitral.org/pdf/english/news/SecondJC.pdf> and at [www.insol.org](http://www.insol.org). The Colloquium was held in New Orleans, 22-23 March 1997. See also UNCITRAL document A/52/17, paras. 17-22.

<sup>51</sup> This is now set out specifically in various court rules, for example, Rule 2002(q)(2) of the United States Federal Rules of Bankruptcy Procedure.

that a cross-border agreement be negotiated to assist in coordinating the two sets of proceedings. A facilitator was appointed by each of the courts and resolution of a number of difficult issues emerged.<sup>53</sup>

161. In some cases either telephone or video-link conferences have been held, involving judges and legal representatives in each jurisdiction. An example, from 2001, involved a joint hearing by video-link involving judges in the United States of America and Canada and representatives of all parties, in each jurisdiction. In a procedural sense, the hearing was conducted simultaneously. Each judge heard argument on substantive issues with which his court was concerned prior to deciding on an appropriate outcome. While parties and the judge in the other jurisdiction saw and heard what occurred during substantive argument in the other, they did not actively participate in that part of the hearing.

162. At the conclusion of substantive argument in each court (with the consent of the parties) the two judges adjourned the hearing to speak to each other privately (by telephone), following which the joint hearing was resumed and each judge pronounced orders in the respective proceedings. In doing so, while one judge confirmed that they agreed on an outcome, it is clear that a decision was reached independently by each judge in respect only of the proceeding with which he was dealing.<sup>54</sup>

163. Reports from those involved in such hearings suggest that returns to creditors have been maximized considerably as a result of each court obtaining greater information about what is happening in the other jurisdiction and making positive attempts to coordinate proceedings in a manner that will best serve the interests of creditors.

164. Another example of cooperation is the exchange of correspondence containing or responding to requests for assistance from one of the courts involved in the proceeding. In *Perpetual Trustee Company Ltd v Lehman Bros. Special Financing Inc*<sup>55</sup> a series of requests led an English court to respond to the United States' court in a form that explained the steps and decisions taken in England and inviting the United States judge not to make formal orders, at that time, that might be in conflict with those made in England. The intention was to encourage further communication, if conflicting decisions emerged.<sup>56</sup>

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<sup>52</sup> In *re Maxwell Communication Corporation plc*, 93 F.3d 1036, 29 Bankr Ct. Dec. 788 (2nd Cir. (N.Y.) 21 August 1996) (No. 1527, 1530, 95-5078, 1528, 1531, 95-5082, 1529, 95-5076, 95-5084), and Cross-Border Insolvency Protocol and Order Approving Protocol in *Re Maxwell Communication plc* between the United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of England and Wales, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991).

<sup>53</sup> See also *Re Olympia and York Developments Ltd* Ontario Court of Justice, Toronto, Case No. B125/92 (26 July 1993), and United States Bankruptcy Court for the Southern District of New York, Case Nos. 92-B-42698-42701 (15 July 1993) (Reasons for Decision of the Ontario Court of Justice: (1993), 20 C.B.R. (3d) 165).

<sup>54</sup> Transcript of conference in *Re PSI-Net* (US Bankruptcy Court, Southern District of New York and Superior Court of Justice of Ontario), 26 September 2001.

<sup>55</sup> [2009] EWHC 2953 at paras. 12-23.

<sup>56</sup> *Ibid.*, at paras. 41-50. [*Conflicting decisions in Lehman cases: eg Lehman Bros Special Finance Inc v BNY Corporate Trust Services* 422 BR 407 (2010) to be considered.]

165. Cooperation can also be achieved through cross-border agreements in which the parties to them and any appointed representative of the court liaise to coordinate the insolvency proceedings in issue.<sup>57</sup>

166. Article 26, on international cooperation between the insolvency representatives to administer assets of insolvent debtors, reflects the important role that such persons can play in devising and implementing cross-border agreements, within the parameters of their authority. The provision makes it clear that an insolvency representative acts under the overall supervision of the competent court. The court's ability to promote cross-border agreements to facilitate coordination of proceedings is an example of the operation of the "cooperation" principle.<sup>58</sup>

167. In 2000, the American Law Institute developed the Court-to-Court Guidelines<sup>59</sup> as part of its work on transnational insolvency in the countries of the North American Free Trade Agreement (NAFTA). A team of judges, lawyers and academics from the three NAFTA countries, Canada, Mexico and the United States, worked jointly on that project. The Court-to-Court Guidelines are intended to encourage and facilitate cooperation in international cases. They are not intended to alter or change the domestic rules or procedures that are applicable in any country, nor to affect or curtail the substantive rights of any party in proceedings before the courts. The Guidelines have been endorsed by a number of courts in different countries and used in a number of cross-border cases.<sup>60</sup>

168. In relation to cooperation, there is an important difference between the terms of the UNCITRAL Model Law and that of the EC Regulation. The EC Regulation does not contain any provision for court-to-court communication. Rather, duties are placed on insolvency representatives in both main and secondary proceedings commenced in a Member State "to communicate information to each other", "to cooperate with each other" and for the liquidator in the secondary proceedings to give the insolvency representative in the main proceeding "an early opportunity of submitting proposals" on that proceeding or the use of assets in the secondary proceeding.<sup>61</sup>

### 3. Coordination

169. Articles 28 and 29 address concurrent proceedings, specifically the commencement of a local proceeding after recognition of a foreign main proceeding and the manner in which relief should be tailored to ensure consistency between concurrent proceedings.

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<sup>57</sup> For examples of the use of this technique, see the UNCITRAL Practice Guide, chap. II, paras. 2-3. Cases using this technique have included *Maxwell*, *Matlack* and *Nakash*.

<sup>58</sup> UNCITRAL Model Law, art. 26(1) and (2) (as well as any other national law impacting on the practicalities of cooperation).

<sup>59</sup> Available in some 13 languages at: <http://www.iiiglobal.org/component/jdownloads/?task=viewcategory&catid=394> [visited 4 June 2010].

<sup>60</sup> An example of a cross-border insolvency agreement endorsed by courts in Ontario and Delaware is that in *Re Matlack Inc*, Superior Court of Justice of Ontario, Case No. 01-CL-4109, and the United States Bankruptcy Court for the District of Delaware, Case No. 01-01114 (2001). It demonstrates how the ALI Guidelines were adapted for use in an actual case. The Guidelines have also been adopted in a number of other cross-border insolvency agreements; see the case summaries in Annex I to the UNCITRAL Practice Guide.

<sup>61</sup> EC Regulation, art. 31.

170. Article 28, in conjunction with article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of a local insolvency proceeding concerning the same debtor as long as the debtor has assets in the State.

171. Ordinarily, the local proceeding of the kind envisaged in the article would be limited to the assets located in the State. However, in some situations a meaningful administration of the local insolvency proceeding may have to include certain assets abroad, especially when there is no foreign proceeding necessary or available in the State where the assets are situated.<sup>62</sup> In order to allow such limited cross-border reach of a local proceeding, article 28 provides that the effects of the proceedings may extend where necessary to other property of the debtor that should be administered in the proceedings in the enacting State.

172. Two restrictions are included in article 28 concerning the possible extension of effects of a local proceeding to assets located abroad:

(a) The extension is permissible “to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27”, and;

(b) Those foreign assets must be subject to administration in the enacting State “under the law of [the enacting State]”.

Those restrictions emphasize that any local insolvency proceeding instituted after recognition of a foreign main proceeding deals only with the assets of the debtor in the State in which the local proceeding is started, subject only to the need to encourage cooperation and coordination in respect of the foreign main proceeding.

173. Article 29 provides guidance to the court on the approach to be taken to cases where the debtor is subject to a foreign proceeding and a local proceeding at the same time. The salient principle is that the commencement of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. This principle is essential for achieving the objectives of the UNCITRAL Model Law in that it allows the receiving court, in all circumstances, to provide relief in favour of the foreign proceeding.

174. Nevertheless, article 29 maintains a pre-eminence of the local proceeding over the foreign proceeding. This has been done in the following ways:

(a) Any relief to be granted to the foreign proceeding must be consistent with the local proceeding;<sup>63</sup>

(b) Any relief that has already been granted to the foreign proceeding must be reviewed and modified or terminated to ensure consistency with the local proceeding;<sup>64</sup>

(c) If the foreign proceeding is a main proceeding, the automatic effects pursuant to article 20 are to be modified and terminated if inconsistent with the local proceeding;<sup>65</sup>

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<sup>62</sup> For example: where the local establishment would have an operating plant in a foreign jurisdiction; where it would be possible to sell the debtor’s assets in the enacting State and the assets abroad as a “going concern”; or where assets were fraudulently transferred abroad from the enacting State.

<sup>63</sup> UNCITRAL Model Law, art. 29(a)(i).

<sup>64</sup> Ibid., art. 29(b)(i).

(d) Where a local proceeding is pending at the time a foreign proceeding is recognized as a main proceeding, the foreign proceeding does not enjoy the automatic effects of article 20.<sup>66</sup>

175. Article 29 avoids establishing a rigid hierarchy between the proceedings since that would unnecessarily hinder the ability of the court to cooperate and exercise its discretion under articles 19 and 21.

176. Article 29(c) incorporates the principle that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding or must concern information required in that proceeding. This principle is also expressed in article 21(3) and is restated in article 29 to place emphasis on the need for its application when coordinating local and foreign proceedings.

177. Article 30 deals with cases where the debtor is subject to insolvency proceedings in more than one foreign State and foreign representatives of more than one foreign proceeding seek recognition or relief in the enacting State. The provision applies whether or not an insolvency proceeding is pending in the enacting State. If, in addition to two or more foreign proceedings, there is a proceeding in the enacting State, the court will have to act pursuant to both articles 29 and 30.

178. The objective of article 30 is similar to that of article 29. It is designed to aid cooperation through proper coordination. Consistency of approach will be achieved by appropriate tailoring of relief to be granted or by modifying or terminating relief already granted.

179. Unlike article 29 (which as a matter of principle gives primacy to the local proceeding), article 30 gives preference to the foreign main proceeding, if there is one. In the case of more than one foreign non-main proceeding, the provision does not, of itself, treat any foreign proceeding preferentially. Priority for the foreign main proceeding is reflected in the requirement that any relief in favour of a foreign non-main proceeding (whether already granted or to be granted) must be consistent with the foreign main proceeding.<sup>67</sup>

180. Relief granted under article 30 may be terminated or modified if another foreign non-main proceeding is revealed after the order is made. An order terminating or modifying earlier relief may only be made if it is “for the purpose of facilitating coordination of the proceedings”.<sup>68</sup>

181. In relation to concurrent proceedings, there are particular rules relating to payment of debts.

182. The rule set forth in article 32 (sometimes referred to as the “hotchpot” rule) is a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to avoid situations in which a creditor might obtain more favourable treatment than the other

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<sup>65</sup> Ibid., art. 29(b)(ii). Those automatic effects do not terminate automatically since they may be beneficial, and the court may wish to maintain them.

<sup>66</sup> Ibid., art. 29(a)(ii).

<sup>67</sup> Ibid., art. 30(a) and (b).

<sup>68</sup> Ibid., art. 30(c).

creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions.

183. For example, assume an unsecured creditor has received 5 percent of its claim in a foreign insolvency proceeding but is also participating in an insolvency proceeding in the enacting State, where the rate of distribution is 15 percent. In order to put the creditor in the equal position as the other creditors in the enacting State, the creditor would receive 10 percent of its claim in the enacting State. Implicitly, article 32 empowers the receiving court to make orders to give effect to that rule.

184. Article 32 does not affect the ranking of claims as established by the law of the enacting State, and is solely intended to establish the equal treatment of creditors of the same class. To the extent claims of secured creditors or creditors with rights *in rem* are paid in full, a matter that depends on the law of the State where the proceeding is conducted, those claims are not affected by the provision.

185. The expression “secured claims”<sup>69</sup> is used to refer generally to claims guaranteed by particular assets, while the words “rights *in rem*” are intended to indicate rights relating to a particular property that are enforceable also against third parties. A given right may fall within the ambit of both expressions, depending on the classification and terminology of the applicable law. The enacting State may use another term or terms for expressing these concepts.

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<sup>69</sup> See the definition of “secured claim”, UNCITRAL Legislative Guide, Glossary, para. 12(nn).

## Annex

### References to cases cited

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425 BR 884 (2010) [CLOUT case no. 1008]

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*McGrath v Riddell [2008] UKHL 21*

*In re Metcalfe and Mansfield Alternative Investments, et al*

421 B.R. 683 (Bankr. S.D.N.Y. January 2010); [CLOUT case no. 1006]

*In re Yuval Ran, Lavie v Ran*

607 F. 3d 1017 (5th Cir. 2010)

*Rubin v Eurofinance SA*

[2009] EWHC 2129; on appeal [2010] EWCA CIV 895

*Re SPhinX Ltd*

371 B.R. 10 (Bankr. S.D.N.Y. July 2007) [CLOUT case no. 768]

*Stanford International Bank Ltd*

[2009] EWHC 1441 (Ch) [CLOUT case no. 923], On appeal [2010] EWCA Civ 137 [CLOUT case no. 1004]

*In re Tricontinental Exchange Ltd*

349 B.R. 627 (Bankr. E.D. Cal. 2006) [CLOUT Case no. 766]



**E. Note by the Secretariat on judicial materials on the UNCITRAL  
Model Law on Cross-Border Insolvency — compilation of comments  
by Governments**

**(A/CN.9/733 and Add.1)**

**[Original: Spanish]**

Working Group V (Insolvency Law), pursuant to the Commission's mandate, considered, at its thirty-ninth session (Vienna, 6-10 December 2010), a draft text setting forth judicial materials on the Model Law (A/CN.9/715, paras. 110-116). At that session, the Working Group invited comments from States on their experience with the Model Law to be submitted to the Secretariat for possible consideration in the preparation of a revised draft (see A/CN.9/715, para. 116). The Secretariat also encouraged States to send comments on the judicial materials to enable the materials to be finalized and adopted at the forty-fourth Commission session in 2011 (see Agenda item 5). The text of the comments received is reproduced as an annex to this note in the form in which they were received by the Secretariat.

**Annex**

**Comments received from Governments on the judicial  
materials on the UNCITRAL Model Law on Cross-Border  
Insolvency**

**Mexico**

[received: 14 April 2011]

[Original: Spanish]

The Government of Mexico wishes to express its agreement with the judicial materials, which are in line with the main points set out and submitted to the Commission by Mexico.

Insofar as the text is not binding on Member States — that is, it does not instruct judges on how to deal with applications for recognition of foreign proceedings — we have no substantial observations or comments to make. In particular, as stated in paragraph 3 of document A/CN.9/WG.V/WP.97, in section A (Purpose and scope), the document succeeds in providing “general guidance on the issues a particular judge might need to consider, based on the intentions of those who crafted the Model Law and the experiences of those who have used it in practice.”

**Spain**

[received: 4 April 2011]

[Original: Spanish]

Before making our detailed comments, we should like to extend our congratulations to UNCITRAL, particularly the members of the Secretariat, for the work that they have done. These documents — A/CN.9/WG.V/WP.97 and the two addenda — constitute an excellent text that adds to the body of materials

provided by the Commission for the benefit of the international community in the area of insolvency; it is particularly important at this time, given the current credit restrictions worldwide and their consequences. In particular, the judicial materials to which our comments refer, relating to the Model Law, the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, fill in the gaps in the range of useful texts and will help bring about a general reform of insolvency law in a number of countries.

As a general observation, the Secretariat must be congratulated on the judicial approach adopted and maintained throughout document A/CN.9/WG.V/WP.97. This is worth emphasizing, because it has succeeded in not compromising judicial independence or, in other words, it has put forward interpretations of certain aspects of the Model Law that have been considered by specific courts, at the same time pointing out that the solution may be different under different legal systems. Perhaps the only point to be made in this context, since it could possibly be excessive, would be to delete the last sentence in paragraph 40, which some may feel goes beyond the intended scope of the text.

A second general comment is that it would seem most appropriate to link the text with the reference texts: the provisions of the Model Law or the texts of the Legislative Guide and the Practice Guide.

This approach, indeed, forms the basis for all our main comments on document A/CN.9/WG.V/WP.97 and its addenda. Our comments apply, of course, to the Spanish version (to which we will mainly be referring, as will be seen), but on occasion it may seem best that a term should be brought into line with, for example, the Practice Guide. Thus, in paragraph 64, the phrase “members of groups of companies” could be rather “members of enterprise groups”, a form of words that is commoner in the Practice Guide. This is, certainly, a fairly minor — and arguable — point, but consistency between the various documents, using the same terminology, in English, would encourage the same consistency in the other languages; so it might be a good idea to carry out a harmonization exercise, which, however far it goes, could prove very useful.

Still on the subject of the English version, though not in relation to a term used in the previous texts, since it does not appear in them, we feel that an unfortunate adjective is used in the heading of section II B.3: perhaps the phrase would be equally satisfactory with the deletion of the word “substantive”.

The rest of our comments, of which there are few, relate to the advisability of aligning some terms in the Spanish text with those used in the English. Specifically, since search tools make for easier reference, it would be better to write “*bienes y derechos*” wherever the English version has “assets”, or “*entidad*” or “*compañía*” where the English has “company” or “corporation”. The phrase “corporate debtor” would thus always appear as “*entidad deudora*” or “*compañía deudora*” (see paras. 34, 59 and 75, among others). Similarly, there could be “*entidad fantasma*” or “*compañía fantasma*”, but not “*empresa fantasma*” (para. 85) and “*entidad filial*” or “*compañía filial*” (para. 82). The same applies to the contrast drawn in paragraph 67, where the Spanish text should use the phrase “(*social o individual*)” in referring to a debtor.

In paragraph 59, the word “*contra*” should be avoided, because this expression referring to a debtor distorts the substance of the insolvency proceedings; the word could be replaced by some such phrase as “*en relación a*”.

The definition of “insolvency representative” should reproduce that of the Legislative Guide or the Practice Guide.

The second sentence of paragraph 61 is perhaps not entirely successful and would benefit from revision.

Lastly, the names of courts are sometimes translated in the footnotes. This practice — of translating names of courts — may produce more confusion than clarity. The best way to proceed may be to follow the Practice Guide in giving brief citations of cases, with the details given at the end of the document (this should, of course, apply to both the English version and the other languages).

**(A/CN.9/733/Add.1) (Original: Spanish)****Note by the Secretariat on judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency — compilation of comments by Governments****Annex****Comments received from Governments on the judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency****Argentina**

[received: 17 May 2011]

[Original: Spanish]

With regard to the analysis of the judicial materials, we support the application of the law of the State in which the insolvency proceedings began (*lex fori*) in determining the authorization of the foreign representative to act as a representative of a debtor's liquidation or reorganization.

The "recognition" principle, based on procedural economy as is customary in such cases, is aimed at avoiding lengthy and time-consuming processes by providing prompt resolution of an application for recognition. It is therefore reasonable for the court not to consider whether the foreign proceeding was correctly commenced under applicable law, since in the area of international legal cooperation it is not the applicable law as such that is under scrutiny. Rather the question at issue is that the recognition of a foreign proceeding may be denied only if it is manifestly contrary to the international public policy of the State in which the receiving court is situated, which is a material, substantive, fundamental requirement. It should be stressed that we support a concept of international public policy based on fundamental principles of the prescriptive legislation governing international cases, which is not the same as the peremptory norms of domestic law, nor reducible to constitutional safeguards, although the concept does include them. The material under consideration is in the spirit of broad cooperation (indeed, cooperation and coordination are two key elements of the Model Law in question) and therefore the international public policy exception invoked by the enacting State should be interpreted restrictively and invoked only under exceptional circumstances.

Another positive aspect is that the foreign representative must inform the receiving court of any other foreign proceeding regarding the same debtor of which he or she becomes aware, bearing in mind the above-mentioned principle of procedural economy, which includes taking into consideration possible procedural obstacles such as international *lis alibi pendens*, especially in the area of insolvency as a universal process.

We welcome the definition of the "establishment" of a debtor (always a difficult concept to define, as shown, for example, by article 6 of the draft Code of Private International Law of Argentina, No. 2016-D-04) as any place of operations where the debtor carries out a non-transitory economic activity with human means

and goods or services, the aim being to indicate whether the proceeding at issue is a non-main proceeding. Likewise, on the basis of the EC Regulation (European Council (EC) Regulation No. 1346/2000 on insolvency proceedings), aimed, it should be noted, at allowing a determination of jurisdiction rather than cooperation, it is logical to define the main proceeding as that which is followed in a State where the debtor has the centre of its main interests, which, in the case of a physical person, equates to the person's habitual residence, in the absence of proof to the contrary.

It seems entirely appropriate that there should be no conditions of reciprocity. Let us recall that the Argentine Insolvency and Bankruptcy Act No. 24522 stipulates reciprocity under article 4, which has drawn criticism. We would note the vote and brilliant justification of Dr. Aida Kemelmajer de Carlucci in the Sabate Sas S.A. case, in ruling No. 20541/42086 Sabate Sas S.A., and in ruling No. 41030 Covisan S.A. — bankruptcy proceedings, late bankruptcy petition, no incident recorded, remedy of cassation (Supreme Court of Mendoza, Sala I, 28 April 2005 — Sabate Sas S.A. in: Covisan S.A. bankruptcy proceedings, late bankruptcy petition (La Ley, ed. 214-372, 29 July 2005). Please see María Elsa Uzal, *Apostillas sobre la reciprocidad en el artículo 4 de la ley de concursos, las transferencias de fondos y la prueba del derecho extranjero* [*Apostille conventions on reciprocity in article 4 of the Bankruptcy (Insolvency), Transfers of Funds and Evidence under Foreign Law Act*] (La Ley, 8 July 2005); Gabriela Salort de Ochansky, *El criterio de la reciprocidad, la carga de su prueba y las facultades judiciales* [*The criterion of reciprocity, the onus of proof and judicial powers*] (La Ley, 29 July 2005); Alfredo Mario Soto, *Una sentencia en homenaje a los 70 años del uso jurídico* [*A judicial opinion in tribute to 70 years of legal usage*] (El derecho, ed. 214-383, 2005)), where it is shown that this principle has its origins in the theory of *comitas gentium* or the comity of nations, dating back to the doctrine of the Dutch and Flemish Schools of the seventeenth and eighteenth centuries (Werner Goldschmidt, *Derecho Privado Internacional*, p. 72, 9th Edition, Buenos Aires, Lexis Nexis Desalma, 2002). At issue is an application of the right to retortion, which, according to much of the doctrine, is viewed as inappropriate.

With regard to the formal requirements of cooperation, the judicial material establishes that documents shall be presumed to be authentic, whether or not they are legalized, which would appear to be in keeping with the integration and globalization of our times.

As to the possibility that the receiving court take account of abuse of its processes, including improper forum shopping, the material suggests recourse to public policy as grounds to decline recognition. However, rather than a public policy exception, the situation here, we feel, is more akin to fraud and abuse, which constitute hindrances or limits based on manipulation of the facts, with the aim of ensuring the application of a law and thus getting round the original intention of the provision (See Alfredo Mario Soto, *Temas estructurales del derecho internacional privado* [*Structural themes in private international law*], Buenos Aires, Estudio, 2009).

Under the Model Law, the courts are entitled to communicate directly with the foreign courts or foreign representatives (by such means as fax, e-mail, video or telephone), without the need for requests or letters rogatory. It would be desirable to examine such a possibility within Argentine positive law, taking into account the need to have at our disposal the means to ensure more efficient cooperation with a

view to effective recognition while at the same time safeguarding the interests of the parties.

To summarize, based on what has been established above, we believe that the judicial material is an important element in the possible incorporation and subsequent application of the UNCITRAL Model Law on Cross-Border Insolvency in Argentina.

## V. ONLINE DISPUTE RESOLUTION

### A. Report of the Working Group on Online Dispute Resolution on the work of its twenty-second session (Vienna, 13-17 December 2010)

(A/CN.9/716)

[Original: English]

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### I. Introduction

1. At its thirty-third session (New York, 12 June-7 July 2000), the Commission held a preliminary exchange of views on proposals to include online dispute resolution in its future work programme.<sup>1</sup> At its thirty-fourth<sup>2</sup> (Vienna, 25 June-13 July 2001) and thirty-fifth<sup>3</sup> (New York, 17-28 June 2002) sessions, the Commission decided that future work on electronic commerce would include further research and studies on the question of online dispute resolution and that Working Group II (Arbitration and Conciliation) would cooperate with Working Group IV (Electronic Commerce) with respect to possible future work in that area. At its thirty-ninth (New York, 19 June-7 July 2006) to forty-first (New York, 16 June-

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<sup>1</sup> *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 385.

<sup>2</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, paras. 287 and 311.

<sup>3</sup> *Ibid.*, *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, paras. 180 and 205.

3 July 2008) sessions, the Commission took note of suggestions that the issue of online dispute resolution should be maintained as an item for future work.<sup>4</sup>

2. At its forty-second session (Vienna, 29 June-17 July 2009), the Commission had heard a recommendation that a study should be prepared on possible future work on the subject of online dispute resolution in cross-border electronic commerce transactions, with a view to addressing the types of e-commerce disputes that might be solved by online dispute resolution, the appropriateness of drafting procedural rules for online dispute resolution, the possibility or desirability to maintain a single database of certified online dispute resolution providers, and the issue of enforcement of awards made through the online dispute resolution process under the relevant international conventions.<sup>5</sup>

3. At its forty-third session (New York, 21 June-9 July 2010), the Commission had before it a note by the Secretariat on the issue of online dispute resolution which summarized the discussion at a colloquium organized jointly by the Secretariat, the Pace Institute of International Commercial Law and the Penn State Dickinson School of Law (A/CN.9/706).<sup>6</sup> The Commission also had before it a note from the Institute of International Commercial Law in support of possible future work by UNCITRAL in the field of online dispute resolution reproduced in document A/CN.9/710.

4. At that session, after discussion, the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions.<sup>7</sup> It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.

5. A detailed compilation of historical references regarding the consideration by the Commission of the current work of the Working Group can be found in document A/CN.9/WG.III/WP.104, paras. 5 to 11.

## II. Organization of the session

6. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-second session in Vienna from 13 to 17 December 2010. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Belarus, Bolivia (Plurinational State of), Canada, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Honduras, India, Iran (Islamic Republic of), Israel,

<sup>4</sup> Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 183 and 186-187; *Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), para. 177; and *Sixty-third Session, Supplement No. 17* (A/63/17), para. 316.

<sup>5</sup> Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 338, and A/CN.9/681/Add.2, para. 4.

<sup>6</sup> The Colloquium, entitled "A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant)" was held in Vienna, on 29 and 30 March 2010.

<sup>7</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.



Italy, Japan, Mexico, Nigeria, Philippines, Republic of Korea, Russian Federation, Spain, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

7. The session was also attended by observers from the following States: Ecuador, Indonesia, Panama, Slovakia, Slovenia, Sudan and Yemen.

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

(a) *Invited intergovernmental organizations*: European Commission;

(b) *Invited international non-governmental organizations*: American Bar Association (ABA), American National Standards Institute (ANSI), Asian Domain Name Dispute Resolution Centre (ADNDRC), Asociación Americana De Derecho Internacional Privado (ASADIP), Business Software Alliance (BSA), Center for International Legal Education (CILE), Centre de Recherche en Droit Public (CRDP), Council of Bars and Law Societies of Europe (CCBE), European Legal Studies Institute, Institute of Commercial Law (Penn State Dickinson School of Law), Institute of Law and Technology (Masaryk University), Internet Bar Association (IBO), Madrid Court of Arbitration, Pace Institute of International Commercial Law, and Swiss Arbitration Association (ASA).

9. The Working Group elected the following officers:

*Chairman*: Mr. Soo-geun OH (Republic of Korea)

*Rapporteur*: Mr. Tunde BUSARI (Nigeria)

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.104); and

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions (A/CN.9/WG.III/WP.105).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the preparation of legal standards on online dispute resolution for cross-border electronic commerce transactions.
5. Other business.
6. Adoption of the report.

### III. Deliberations and decisions

12. The Working Group engaged in discussions on the preparation of legal standards on online dispute resolution for cross-border electronic commerce transactions on the basis of document A/CN.9/WG.III/WP.105. The deliberations and decisions of the Working Group on that topic are reflected in Section IV below.

#### **IV. Preparation of legal standards on online dispute resolution for cross-border electronic commerce transactions**

13. The Working Group discussed legal standards on online dispute resolution (ODR) on the basis of document A/CN.9/WG.III/WP.105 and other documents referred to therein.

##### **A. General remarks**

14. The Working Group recalled the mandate of the Commission that work on that topic should focus on ODR relating to cross-border e-commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.<sup>8</sup>

15. In response to a question as to how ODR relates to the work of Working Group II on arbitration and conciliation, it was explained that there was no overlap of the work of Working Group III with any ongoing work of Working Group II, which was currently exploring the issue of transparency in investor-State arbitration and could be expected subsequently to consider issues in the field of international commercial arbitration. It was indicated that ODR raised separate issues, particularly those associated with the need for rapid resolution of high-volume, low-value disputes arising primarily from transactions carried out by way of electronic communications, and for that reason the Commission deemed it appropriate to task a separate working group with the ODR subject.

16. The view was generally shared that there was an absence of an agreed international standard on ODR, and that a need existed to address in a practical way disputes arising from the many low-value transactions, both B2B and B2C, which were occurring in very high-volumes worldwide and required a dispute resolution response which was rapid, effective and low-cost. In that regard, many delegations voiced the view that traditional dispute resolution mechanisms, including litigation through the courts, were inappropriate for addressing these types of disputes, being too costly and time-consuming in relation to the value of the transaction. The view was also expressed that enforcement of awards cross-border was difficult if not impossible in light of the lack of treaties providing for cross-border enforcement of awards in B2C transactions.

17. There was general agreement that any standard considered by the Working Group should become, as appropriate, consistent with existing UNCITRAL standards in arbitration, conciliation and electronic commerce.

18. It was pointed out that levels of knowledge and experience with electronic commerce and ODR varied greatly from State to State, and that the work should take account of that fact. It was also suggested that the Working Group's recommendations on ODR must be flexible in order to accommodate the differing circumstances of States, including: differences in culture and level of economic development; and the fact that the meaning of a "low value" transaction might differ from State to State.

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<sup>8</sup> Ibid.

19. It was also noted that consumer protection was an important public policy consideration, that legislation in that field was highly specific to particular States, and that care should be taken that any approach to ODR not detract from consumer rights at the national level. The Working Group recalled the Commission's decision in that regard.<sup>9</sup>

20. It was felt that the form of the work product to be produced (whether a model law, set of rules, guidelines or otherwise) could be addressed at a later stage, once the substantive issues relating to ODR had been addressed.

21. Without prejudice to the above, it was suggested that production of four instruments might be considered: fast-track procedural rules which complied with due process requirements; accreditation standards for ODR providers;<sup>10</sup> substantive principles for resolving cross-border disputes; and a cross-border enforcement mechanism.

22. Among the challenges mentioned were language differences between States and the need for ODR users to be able to communicate effectively during the process in their own language. One delegation pointed out that a new communications standard was being developed: E-Commerce Claims Redress Interchange (ECRI), which would facilitate the filing of cases by consumers and the subsequent dialogue between the parties in a multilingual environment.

23. Other issues raised included: how a global ODR system would be funded (and indeed whether States would be willing to fund it); and, in the context of enforcement and the validity of the arbitration agreement, whether the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)<sup>11</sup> was appropriate and applicable to those ODR cases leading to an arbitral award, as they dealt with disputes involving consumers. Reference was made to treaty obligations under the New York Convention.

## **B. Examples of online dispute resolution models and systems (A/CN.9/WG.III/WP.105, paras. 5-10)**

24. The Working Group took note of the examples provided in document A/CN.9/WG.III/WP.105. Several delegations described national and regional ODR models and their characteristics. It was explained that ICA-Net was a regional complaint-handling mechanism in the Asian region which was successful in resolving low-value B2C transactions. Some States also referenced eConsumer.gov and ECC-Net, which both maintained lists of ODR providers. Other ODR models, at the national level, were outlined and suggested as good examples. The experience of some States of empowering local judges to engage in conciliation of low-value disputes was described as frequently leading to resolutions that kept the cases out of the courts.

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<sup>9</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 256.

<sup>10</sup> "ODR provider" means an intermediary that administers the process and provides an ODR online platform for the parties to resolve their dispute by their chosen resolution method. See A/CN.9/WG.III/WP.105, paragraph 21.

<sup>11</sup> United Nations, *Treaty Series*, vol. 330, No. 4735.

25. One conciliation model, comprising several steps, was introduced: a party accessed an Internet web page and registered; the party then provided personal data and went on to describe the grievance, all of which information was encrypted; within five working days, the ODR provider notified the party by e-mail as to the next step in the process; a day of hearings via ODR online platform followed, which involved virtual sessions between the parties and between a party and the conciliator; the outcome of the process was not binding. A key advantage of this process was said to be its easy availability to parties wishing to use it.

26. Another model presented (and referred to in para. 10 of A/CN.9/WG.III/WP.105) was that of the International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association (AAA), which had set up a pilot project for manufacturer/supplier ODR. A case was initiated using AAA WebFile, an online platform for submitting complaints. The respondent had 12 days to respond and state any counterclaim, to which the claimant had a further 12 days to respond. Online negotiation then took place for 12 days. Where no settlement was reached, the arbitration phase commenced and a technical specialist (i.e. non-lawyer) was appointed as arbitrator, who then considered the case based on the documents submitted and rendered an award within 30 days after being appointed.

27. In a few States, so-called “chargebacks”, whereby in the case of consumer complaints credit card companies could refund purchase money to consumers where the transaction had been completed with a credit card, were also said to enjoy a high rate of success in resolving disputes. However, it was pointed out that this system would not work in jurisdictions where the necessary obligation of the credit card company to the cardholder was not mandated in relevant legislation, or in cases where payment was made by means other than credit card (e.g. wire transfer, debit card, cheque). It was also pointed out that, according to studies, the use of credit cards was decreasing worldwide and the use of mobile payments had increased dramatically.

28. After discussion, it was noted that the ODR process could be seen as having several phases: a negotiation phase, a conciliation phase and an arbitration phase.

29. Several delegations pointed to the value of including complaint-handling mechanisms and trustmarks in ODR. It was said that complaint-handling, negotiation and conciliation were methods of amicably resolving disputes that had proven to be very effective. It was also noted that the Working Group could derive useful lessons even from highly specialized ODR models, such as those dealing with Internet domain name disputes. In addition to Better Business Bureau (BBB) and Euro-Label mentioned in para. 5 of A/CN.9/WG.II/WP.105, it was suggested that the experience of TRUSTe, another widely known trustmark, might be relevant.

30. Delegations stressed the importance of emphasising negotiation and conciliation stages of ODR, which had been shown to successfully resolve the majority of cases before they reached arbitration or the courts. The example was given of a complaint-handling mechanism on eBay, which processed millions of cases per year, only a small percentage of which were unresolved. Also mentioned in this regard was Electronic Consumer Dispute Resolution (ECODIR), which was said to facilitate negotiation between buyer and seller and to result in a 70 per cent success rate without involvement of a mediator, which rose to 95 per cent once a

mediator joined the process, leaving only a small percentage of cases to be dealt with by arbitration. It was agreed that arbitration was a necessary component of ODR (since without it there could be no final resolution of those cases which were not settled in earlier stages) but several delegations urged that in any ODR most disputes would need to settle prior to the arbitration phase so that arbitration would occur in only a small percentage of cases that could not be resolved otherwise.

## **C. Standards on online dispute resolution (A/CN.9/WG.III/WP.105, paras. 11-18)**

### **1. Existing standards (A/CN.9/WG.III/WP.105, paras. 11-16)**

31. The Working Group took note that there were no recognized legal standards on cross-border ODR.

32. Additional texts were suggested as referring to core principles of ODR that the Working Group could consider: American Bar Association Task Force on E-commerce and ADR, Recommended best practices for online dispute resolution service providers;<sup>12</sup> Final Report and Recommendations of the American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution, Addressing Disputes in Electronic Commerce;<sup>13</sup> Alternative Dispute Resolution Guidelines Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce ("GDBe-Consumers International Agreement");<sup>14</sup> International Chamber of Commerce, Resolving disputes online, Best practices for Online Dispute Resolution (ODR) in B2C and C2C transactions 2003;<sup>15</sup> European Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes;<sup>16</sup> and European Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes not covered by Recommendation 98/257/EC.<sup>17</sup>

33. The Working Group was also referred to deliberations of the 11th Annual Summit of the Global Business Dialogue on e-Society (GBDe) held on 5 November 2009 in Munich, Germany and a colloquium on ODR and Consumers 2010 held on 2-3 November 2010 in Vancouver, Canada.<sup>18</sup>

### **2. Standards under consideration (A/CN.9/WG.III/WP.105, paras. 17-18)**

34. Proposals made to the Organization of American States (OAS) were also mentioned in order to inform and assist future deliberations of the Working Group. In this regard, one delegation requested that the draft Convention on Consumer Protection and Choice of Law, submitted in the framework of the OAS, be included among the reference materials for the Working Group. Some delegations were of the

<sup>12</sup> [www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf](http://www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf).

<sup>13</sup> [www.abanet.org/dispute/documents/FinalReport102802.pdf](http://www.abanet.org/dispute/documents/FinalReport102802.pdf).

<sup>14</sup> [www.gbd-e.org/pubs/ADR\\_Guideline.pdf](http://www.gbd-e.org/pubs/ADR_Guideline.pdf).

<sup>15</sup> [www.iccwbo.org/uploadedFiles/ICC/policy/e-business/pages/ResolvingDisputesOnline.pdf](http://www.iccwbo.org/uploadedFiles/ICC/policy/e-business/pages/ResolvingDisputesOnline.pdf).

<sup>16</sup> COM (1998) 198 final — Official Journal L 115 of 17.4.1998.

<sup>17</sup> COM (2001) 161 — Official Journal L 109 of 19.4.2001.

<sup>18</sup> [www.odrandconsumers2010.org/](http://www.odrandconsumers2010.org/).

view that regional instruments were not considered relevant in an international negotiation. It was also noted that the “Blue Button” concept (para. 18 of A/CN.9/WG.III/WP.105) was not an ODR proposal per se, although it was a supporting instrument which could be useful in the development of legal standards applicable for ODR.

## **D. Issues for possible consideration (A/CN.9/WG.III/WP.105, paras. 19-90)**

### **1. Definitions (A/CN.9/WG.III/WP.105, paras. 19-23)**

35. Some delegations regarded the definition of ODR contained in paragraph 20 of A/CN.9/WG.III/WP.105 as overly broad, and suggested that ODR be limited to instances where procedural aspects of a case are conducted online.

36. It was also noted that, to the extent any standard resulting from the current work would be a non-binding one, then a broad definition would be appropriate since parties could elect to use it or not.

37. There were several other suggestions: that the phrase “in whole or in part online” was ambiguous, in that “in part” should be defined; that the definition should emphasize the automated and streamlined processes made possible by technology, and stress the cross-border nature of the disputes being resolved; that the definition should distinguish ODR from traditional dispute resolution modes that made use of information and communications technology; to foresee the use of information and communications technology in traditional judicial systems as well; that a broad-based definition should accommodate the resolution of cases that arose off-line as well as those stemming from online transactions.

38. There was broad agreement that any definition be open enough not to exclude relevant technological developments which might arise in future, and should preserve the principle of technological neutrality.

39. A series of questions were proposed which, it was said, could assist in clarifying the parameters of ODR by eliciting information on such matters as: the types of disputes being dealt with; the parties; whether the case was domestic or cross-border; the value at stake; which (if any) neutral would facilitate resolution and whether for a fee or gratis; how parties accessed the neutral and how the neutral would deal with the dispute; the end result (consensus agreement or award); and the effect of no successful result being reached.

40. There was broad agreement that consideration of a definition of ODR could more usefully be deferred to a later point in the discussion, when the components of the concept had been more fully elaborated.

### **2. Scope of work (A/CN.9/WG.III/WP.105, paras. 24-27)**

41. Delegations took note of the mandate given to the Working Group by the Commission.<sup>19</sup> A suggestion was also made that any standard should also apply to

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<sup>19</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

consumer-to-consumer (C2C) transactions, between private non-commercial parties. It was noted that at the forty-third session of the Commission, States had agreed that traditional judicial mechanisms did not work for high-volume, low-value disputes resulting from a cross-border e-commerce transaction, hence the request to this Working Group to devise an appropriate model for dispute resolution.

42. Several delegations emphasized the importance of non-interference with the rights of consumers under national consumer protection laws (one reason for this being to inspire a climate of confidence in ODR among consumers) and that it was not within the remit of the Working Group to address harmonization of national consumer protection laws. Several delegations expressed the view that the goal of the current work was to create a separate global system for the resolution of cross-border disputes involving B2B and B2C transactions. Those delegations were of the view that in the case of high-volume, low-value cross-border transactions, consumers were unlikely to exercise any rights they might have as the cost of doing so was prohibitive in relation to the value of the purchase and in any event it would be difficult if not impossible to enforce the award. It was pointed out that, at present in the case of most cross-border consumer transactions, consumers had, in practice, no rights and so the creation of an ODR standard could have the effect of creating such rights.

43. The point was made that with the use of “amicable” resolution methods such as complaint-handling, negotiation and conciliation, parties would be freely consenting to a settlement and thus their rights under consumer laws would not be imperilled. Some delegations were of the view that in the case of arbitration, however, a standard would be needed to preserve the protections of consumer laws and this raised the larger question of what would be the applicable law in an ODR arbitration. In this regard the question was asked whether the Working Group could devise a simpler enforcement mechanism than that provided by the New York Convention, given the low-value of the transactions involved and the need for a speedy resolution. It was also suggested that an ODR standard might embody “core principles” of consumer protection law.

44. A further suggestion was made that consumers might be offered a choice between proceeding to arbitration under the terms of an arbitration agreement or relying on their own consumer protection laws, and that such an option might work, without infringing the consumer’s rights under applicable law.

45. In response, it was suggested that, in the European Union, the Rome I Regulation<sup>20</sup> might invalidate such an option since it mandated the law of the consumer’s jurisdiction as the applicable law; hence, conflict of laws considerations might have to be taken into account when considering such an option. It was observed that an option such as the “Blue Button” proposal might be worth exploring as a solution to the applicable law issue, since a multiplicity of applicable laws might discourage the growth of electronic commerce. In this regard, the point was made that small business vendors were unwilling to sell cross-border in Europe due to the restrictions imposed by the Rome I Regulation, and the “Blue Button” was designed to provide consumers with the ability to secure a wider range of products and lower prices.

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<sup>20</sup> Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

46. Some delegations suggested that an ODR standard could usefully mandate ODR providers to report suspected fraud or other illegal conduct by vendors to law enforcement authorities, as suggested in the GDBe — Consumers International Agreement.

47. A suggestion to avoid obstacles mentioned was that ODR could be limited in its application to certain types of disputes that did not generate the controversies discussed; this might in fact constitute the majority of cases.

48. After discussion it was concluded that the focus of the Working Group should be on resolution of high-volume, low-value disputes and that any rules devised would likely affect consumers but should not infringe their rights under consumer protection laws.

### **3. Identification and authentication (A/CN.9/WG.III/WP.105, paras. 28-31)**

49. The discussion highlighted that the low-value of the transactions and the need for speedy resolutions indicated that complex identification and authentication provisions (paras. 28-31 of A/CN.9/WG.III/WP.105) might not be necessary. In that regard, reference was made to article 7 (2) (b) of the UNCITRAL Model Law on Electronic Commerce (MLEC): that identification and authentication methods should be reliable and appropriate for the purposes for which they were used. It was concluded that further discussion of these matters could be deferred to a later point in the deliberations.

### **4. Commencement of proceeding (A/CN.9/WG.III/WP.105, paras. 32-36)**

50. Several delegations supported the notion that any dispute resolution agreement (para. 35 of A/CN.9/WG.III/WP.105) should be flagged to make it very clear to the consumer what obligations he/she was taking on and the implications of any choice of law being made (particularly where it was not the law of the consumer's own jurisdiction), and also that such an agreement should be separate from the main provisions of the contract to better draw the consumer's attention to it.

51. One view was that once conciliation commenced, parties should be free to consent to convert the process to arbitration, though in response it was noted that where conciliation had not worked it was rare that parties would wish to move on to arbitration.

52. One delegation indicated that some national consumer protection laws might provide that consumers were not bound by arbitration agreements entered into before a dispute arose. The understanding of the Working Group was that the vast majority of national consumer protection laws allowed consumers to enter into arbitration agreements before a dispute arose.

53. One approach suggested was that vendors be bound by an arbitration agreement from the time it was entered into, but that consumers could be given the option to be bound by it only after the dispute arose. Another approach put forward was that both parties to the dispute could "opt-in" to an arbitration agreement, in that way making clear the stage at which the arbitration agreement became applicable. It was indicated that a number of States required clear and adequate notice of the arbitration and its consequences in a B2C transaction, including a statement of its mandatory or optional character, and/or that the pre-dispute



agreement to arbitrate be contained in a separate instrument in order to ensure that the consumer has made an informed choice.

54. The idea was expressed that consumer protection agencies might assist or represent consumers entering into the dispute resolution process, particularly to help those inexperienced with the workings of ODR.

55. It was widely agreed that the aim should be to formulate simple, user-friendly generic rules that reflected the low-value of claims involved, the need for a speedy procedure, and that emphasized conciliation since the majority of cases were resolved at that stage.

56. It was suggested that forms of communication for starting the process and communicating during it should adhere to the principle of technological neutrality.

57. The Working Group was also apprised of the work of other bodies in this area which might be helpful in its further deliberations, including: the 2007 report of the Association of Southeast Asian Nations (ASEAN) Coordinating Committee on Consumer Protection technical meeting that addressed the issue of cross-border redress mechanisms, including commencement of proceedings.

**5. Submission of complaint, statements and evidence (A/CN.9/WG.III/WP.105, paras. 37-42)**

58. A number of observations were made regarding submission of complaint, statements and evidence, including: that no rule should preclude the use of technology or dispute resolution methods that might be developed in the future; that time periods for filing of documents and evidence should be kept short so as to ensure a speedy procedure; and that one option might be to follow the example of the WIPO Electronic Case Facility (WIPO ECAF), which was designed to expedite proceedings. (This facility allowed all actors in a case to submit communications electronically to an online docket. Parties received e-mail alerts of any such submission being made and had an opportunity to view and search the docket at any time.)

59. With regard to the admissibility of evidence, it was pointed out that under the laws of some jurisdictions, evidence in electronic form was not admissible and that this should be borne in mind in the development of legal standards.

60. The issue was raised as to the possible liability of an ODR provider to ensure proper and timely exchange of documents between parties during the proceedings.

**6. Number and appointment of conciliators or members of the arbitral tribunal (A/CN.9/WG.III/WP.105, paras. 43-45)**

61. In this area, it was suggested to have a rule to address situations of deadlock where the parties could not agree on a sole arbitrator. That raised the question as to who would make the appointment in such cases; possible answers included relying on consumer protection authorities or drawing from a list maintained by the ODR provider (which the provider might keep private or make public). Overall, it was agreed that the paramount concern was to ensure impartiality and professionalism of the arbitrator.

62. A rule that, in the absence of an agreement by the parties otherwise, there should be a sole arbitrator, was generally agreed to, in light of the low-value of the disputes and the need for speedy process.

63. There was consensus that conciliators or members of the arbitral tribunal (“neutrals”) ought not necessarily to be lawyers, although they should be required to have relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question.

64. Also, in the interests of speed, some favoured a rule that neutrals be nominated by the ODR provider. In this regard, it was noted that care should be taken to ensure that the ODR provider, in exercising this role, did so in a transparent and even-handed manner.

65. The need for an accreditation system for neutrals was highlighted. Two phases were suggested: first, an initial accreditation stage focusing on technical experience and experience in dispute resolution; second, a periodic review involving feedback from ODR users to ensure that neutrals continued to be qualified for their roles and were discharging them in a fair manner. Reference was made to the Independent Standards Commission of the International Mediation Institute, which had established an international certification scheme for neutrals.

**7. Impartiality and independence of conciliators or members of the arbitral tribunal (A/CN.9/WG.III/WP.105, paras. 46-47)**

66. There was broad agreement on several basic principles, namely that independence, neutrality and impartiality were essential attributes for any arbitrator, and that transparency of the arbitration process and of the operations of the ODR provider were crucial to ensure user confidence in ODR. This was thought to be particularly true in the context of ODR, which involved processes in which the parties did not meet face to face. The need for requiring a statement of availability from the arbitrators, in which they would indicate that they are in a position to be available to assume their duties in a timely manner, and to remain engaged throughout the process, was also stressed.

67. Codes of conduct for neutrals were felt to be important, and some existing standards were referred to as potentially helpful references in that regard, including the American Bar Association Task Force on E-commerce and ADR, “Recommended Best Practices for ODR”, and the European Code of Conduct for Mediators 2004.<sup>21</sup>

68. It was emphasized by some delegations that disclosure of any relationship that would compromise impartiality was an important factor, as was disclosure of the remuneration paid to the neutral and transparency with regard to payment arrangements.

69. The impartiality of ODR providers was felt to be equally important, given that they might be suggesting or appointing neutrals and could have a supervisory role over the proceedings. The fact that providers might be financed by business interests was thought to be a significant matter for disclosure, in the interests of transparency.

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<sup>21</sup> [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.pdf](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf).

70. It was noted that providing an opportunity for parties to challenge the appointment of neutrals should be considered, and that one model provided a mechanism for such challenges to be made within 15 days of the notice of appointment (ICDR)<sup>22</sup> and another within 48 hours (OAS/ODR proposal).

71. Other suggestions were that: providers be given the authority to replace neutrals who were not fulfilling their duties and that a form of declaration by neutrals as to their impartiality be included as an annex to any set of rules.

**8. Confidentiality and issues related to security of communications  
(A/CN.9/WG.III/WP.105, paras. 48-50)**

72. Several delegations expressed support for allowing exceptions to complete confidentiality of ODR arbitration awards, given that disclosure of arbitration outcomes was becoming more common and in light of the desirability of establishing a body of precedent for the guidance of future ODR parties and neutrals. Examples of databases containing summaries of dispute resolution decisions were referred to, including: Case Law on UNCITRAL Texts (CLOUT), the Court of Arbitration for Sport and the ICANN UDRP cases of the WIPO Arbitration and Mediation Center.

73. In one delegation's view, if any rules devised were to be simple in form and therefore subject to much interpretation (and if many neutrals might be non-lawyers), access to case precedents would be necessary in order to support consistency of application of the rules in ODR cases.

74. Another advantage noted for making results of arbitrations available would be to alert the public to possible questionable business practices and practitioners. In this regard, it was noted that if a vendor failed to implement an award against her/him, publication might serve as an inducement to that vendor to do so.

75. It was felt that disclosure of award information would also promote use of ODR as its practices and results became known, and in this context the example of ICANN UDRP was referred to. It was also recognized that publication of statistics on cases would be useful for purposes of monitoring the use of ODR and how well it was functioning.

76. It was observed that, unlike regular commercial arbitration where parties could choose litigation instead, consumers had no such choice in practice in cross-border low-value cases and so ODR would be their only option. This was suggested as a further reason why arbitration outcomes should be published, subject to the safeguards noted by some delegations.

77. As to the extent of disclosure of information on awards, it was felt that the privacy of parties could be safeguarded by keeping their names and other identifying information and private data out of the published case results. There was a general consensus that some disclosure of arbitration outcomes was useful so long as necessary safeguards relating to personal data and the parties wishes with respect to confidentiality were put in place.

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<sup>22</sup> ICDR International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), Rules Amended and Effective June 1, 2009, Fee Schedule Amended and Effective June 1, 2010.

78. As to conciliation, there was general agreement that conciliation discussions and outcomes would remain private, recognizing that the conciliation process was based on agreement between the parties. Such privacy could act as an incentive to parties to choose conciliation.

79. A question arose as to the point at which the duty of confidentiality attaches, and whether a provider could disclose statistics to show that a vendor had been taken to an ODR process many times. The latter could be useful public information, but it was queried whether such disclosure violated the principle of provider neutrality.

80. Other matters raised included: possible development of categorization criteria to be used by ODR providers and a standardized format for summarizing cases to enable searching of precedents; a question as to how, in a cross-border negotiation or conciliation, parties could be required to keep confidential the information that they received.

81. The tension between confidentiality and transparency, and the need to strike a balance between them, was regarded as an important issue. With regard to formulating a standard on confidentiality, reference was made to the International Law Association report on “Confidentiality in International Commercial Arbitration”. It was noted that these standards were however developed in the context of high-value commercial arbitration.

82. It was agreed that standards of security of data exchange for ODR providers should be high to prevent unauthorized accessing of data, whether for commercial purposes or otherwise. Reference in this regard was made to ISO 27001 and 27002 as possible standards.

**9. Communication between the conciliators or members of the arbitral tribunal and the parties (A/CN.9/WG.III/WP.105, paras. 51-58)**

83. Some delegations expressed the view that it was not necessary to consider the matters raised in this section of the paper for the purposes of an ODR standard. It was said that each provider would have its own rules and the integrity of the process would not be adversely affected thereby. In particular, technical rules regarding dispatch and receipt of electronic communication would likely not be needed in an ODR context, as the ODR online platform<sup>23</sup> would convey all relevant information to parties in a timely manner. It was recalled that the MLEC and Model Law on Electronic Signature (MLES) principles cited applied unless the parties agreed otherwise, and thus party autonomy should be respected.

84. Another view was that cross-border ODR would be a significant user of information and communications technology and that a common protocol on technology issues would be helpful. It was noted that it might be desirable to have a single gateway to the ODR online platform for consumers and vendors, in order to avoid any confusion caused by different interfaces.

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<sup>23</sup> “ODR online platform” refers to a forum provided by the ODR provider. An ODR online platform may be a platform accessible to the public such as websites on the Internet (an open platform) or a platform with limited or restricted access such as Intranet or internal electronic file management system (a closed platform). See A/CN.9/WG.III/WP.105, paragraph 23).

85. After discussion, it was agreed that the issues raised in this Section were more technical than legal and need not occupy significant time of the Working Group. It was felt that the underlying principles of UNCITRAL texts in electronic commerce should be respected, and that any further consideration of communication issues could be taken up at a later stage once deliberations had progressed further.

**10. Hearings (A/CN.9/WG.III/WP.105, paras. 59-62)**

86. Several observations were made: that records in ODR need only be kept in electronic form; that any rules which may be drafted should remain open and flexible on the subject of hearings; and that in successful ODR models, such as ICANN UDRP, hearings were not provided for except in a small category of exceptional cases.

**11. Representation of the parties and assistance (A/CN.9/WG.III/WP.105, para. 36)**

87. Overall, it was agreed that parties should have a right to be represented or assisted by third parties in the ODR process. It was noted that consumers might seek help in accessing an ODR online platform and presenting their case, perhaps from domestic consumer organizations — whose personnel may or may not be lawyers — or from an ODR provider in their own country, including assisting them to overcome any language difficulties in accessing an ODR online platform. With regard to help from an ODR provider, it was questioned whether this might run contrary to the need for ODR providers to remain neutral.

88. One suggestion was to make it obligatory that a consumer disclose when he/she was assisted informally by a third party. It was questioned how ODR would deal with situations where a party's representative was found to have a conflict of interest. It was recalled that an ODR online platform should be as user-friendly as possible, thus minimizing the need for parties to retain counsel, since the costs of representation would in most cases be out of proportion to the value of the dispute.

**12. Place of arbitration (A/CN.9/WG.III/WP.105, paras. 64-65)**

89. While it was broadly agreed that the place of arbitration was a crucial consideration for the reasons stated in paragraph 65 of A/CN.9/WG.III/WP.105, a variety of views were offered on what that place might be. The basic rule was understood to be that it was the choice of the parties. In addition, it was said that no State had laws preventing the parties from voluntarily entering into an agreement concerning the place of arbitration. Some delegations expressed caution, however, that, in cases involving consumers and large companies, there was an inequality of bargaining power and a consumer could not be said in those circumstances to be giving true consent. On the issue of party agreement, it was suggested that if any rules set for ODR specified a place of arbitration, and if parties chose to use an ODR online platform, then they would have accepted that place voluntarily by "opting in" to the online platform.

90. Failing agreement by the parties, some delegations favoured the place of arbitration being the jurisdiction of the consumer, since it would offer the protection of his/her national consumer protection law and the ability to have any award certified in the consumer's home courts. Another view was that the vendor's jurisdiction was to be preferred, since this would remove the need for a consumer to

apply in a foreign jurisdiction for enforcement of an award made in his own jurisdiction; instead, the consumer could simply seek enforcement of the award in the courts of the country where it was made and where the vendor and its assets were located.

91. One delegation suggested, that if the arbitrator were to decide the place of arbitration, this being the default rule in the absence of agreement by the parties, then the selection might simply be the place where the arbitrator was most familiar with the law, which might not be the most suitable choice for the parties.

92. Another suggestion was to provide for a single place of arbitration for all cases globally, thus eliminating disputes over jurisdiction and ensuring a consistency in the application and development of the law on ODR. In this regard, it was pointed out that a jurisdiction where the arbitration laws, legal framework and court system were favourable to efficient handling of such matters would be the most suitable choice. An example of such an approach was given: the Court of Arbitration for Sports in Lausanne, Switzerland.

93. It was recalled that, according to Article 6 of the Electronic Communication Convention, the location of equipment and technology supporting an information system did not by itself establish the location of a contract, and by analogy the place of arbitration could not be ascertained from the location of the ODR provider or its equipment, which could indeed be located in a variety of jurisdictions simultaneously. A view was also expressed that place of arbitration could be where the contract was executed.

94. Some delegations suggested that a focus on the location of the vendor or the consumer was unhelpful and that new thinking was needed on the subject of place of arbitration, given the proposed global nature of ODR, the multiplicity of jurisdictions and the need to have a simple and speedy process which was commensurate with the low-value transactions at stake. Any new rules drafted should reflect this approach. One suggestion would be to remove the concept of place of arbitration from any national jurisdiction, following the approach used in International Centre for Settlement of Investment Disputes (ICSID) arbitrations.

95. The question was raised as to the applicability of the New York Convention in this regard, discussion of which was deferred until the Working Group considered the enforcement issue.

96. Overall, there was agreement on the need to make rules in this regard simple and consumer-friendly, and to keep an open mind on the issue for future consideration.

### **13. Settlement agreement and termination of the proceedings (A/CN.9/WG.III/WP.105, paras. 66-67)**

97. It was noted that national approaches to enforcing compliance with settlement agreements varied, including enforcing such agreements as contracts or using them as a basis to proceed to an arbitration award which could then be enforced. The view was expressed that the Working Group should consider ways in which compliance with settlement agreements could best be enforced, with the proviso that any solution be focused on expediting the process.

**14. Enforcement issues (A/CN.9/WG.III/WP.105, paras. 68-75)**

98. It was said that enforcement was less of an issue in cases dealt with through conciliation, which was in fact the majority of high-volume, low-value transaction cases, and so the discussion focused on arbitral awards. There was a general consensus that it could be assumed the New York Convention would be applicable to enforcement of arbitral awards under ODR cases in B2B and B2C cross-border disputes, but that reliance on that mechanism alone was insufficient. Discussion then centred on other options that might be used to enforce awards in a more practicable and expedited fashion. One option was to emphasize the use of trustmarks and reliance on merchants to comply with their obligations thereunder. Another was to require certification of merchants, who would undertake to comply with ODR decisions rendered against them. In that regard, it was said to be helpful to gather statistics to show the extent of compliance with awards. Finally, it was stressed that an effective and timely ODR process would contribute to compliance by the parties.

99. It was generally agreed that ODR arbitral decisions should be final and binding, with no appeals on the substance of the dispute, and carried out within a short time period after being rendered, and that further consideration of enforcement issues should be deferred until after issues of substantive and procedural rules had been addressed.

100. The Secretariat noted that, should any ODR standard be developed under which a party with an arbitral award would be provided with a specific enforcement mechanism, then Article VII (1) of the New York Convention might permit resort to such an enforcement mechanism and thus problems with enforcement through other provisions of the New York Convention might be avoided.

**15. Applicable law (A/CN.9/WG.III/WP.105, paras. 76-81)**

101. Many delegations supported the approach of using equitable principles, codes of conduct, uniform generic rules or sets of substantive provisions — bearing in mind the need for a high consumer protection content — as the basis for deciding cases, thus avoiding complex problems that may arise in the interpretation of rules as to applicable law. Reference was made in this regard to the GDBe-Consumers International Agreement. It was said that in any event most of the cases dealt with in ODR could be decided on the basis of the terms of the contract, with little need for resort to complex legal principles, and that any rules devised for ODR should be simple, expeditious and flexible. Some delegations characterized the need as being for a body of general legal principles applicable to a limited fact-based system, which would avoid having to deal with issues of applicable law and jurisdiction.

102. Reference was made to the joint proposal put forward by Brazil, Argentina and Paraguay to the OAS Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII). It was suggested that the principles set out therein, which referred to applicable law being that most favourable to the consumer, should be considered.

103. It was suggested that the Secretariat could present options on the issue of applicable law — taking into account the suggestions that had been made during the discussion — to the Working Group at a future meeting, and also that consideration

be given as to what interim measures might apply in the period before work on substantive provisions was completed.

**16. Language of proceeding (A/CN.9/WG.III/WP.105, paras. 82-87)**

104. There was broad agreement that the language of proceeding was an important issue in ODR and one that was closely linked to consumer protection. It was emphasized that the language of the proceeding needed to be understood by consumers, as the level of understanding required for conclusion of contracts through electronic transactions on the one hand, and for the process of ODR on the other hand, differed.

105. One option suggested was that the language of contract in an electronic transaction be presumed to be the language of the ODR proceeding. Another option was to leave the selection of language of proceeding up to the parties. It was also suggested that in cases where the parties failed to reach an agreement on the language of proceeding, it could be left to the discretion of the neutral to decide.

106. In cases where the language of proceeding was not the language of the consumer, it was noted that the ODR process should provide a simple and easy way for the consumer to understand the process. Additionally, it was noted that the language of the proceeding should be made known in advance to consumers.

107. Another matter raised was the assistance from technological solutions by which automatic translations were provided. The ECRI (see para. 22 above) was introduced as a developing solution. In that regard, a concern was raised that while these technologies might facilitate translation for grammatical and linguistic purposes, they would not provide quality translation with reference to legal terms and the legal nature of the document. In that regard, it was suggested that a legal glossary translated into various languages may be useful for facilitating the process.

**17. Costs and speed of proceedings (A/CN.9/WG.III/WP.105, paras. 88-90)**

108. There was broad agreement that an overall aim should be to keep costs low so that ODR was affordable to users. It was stressed that simple expedited procedures and rules would be important factors in that regard. Aspects such as allowing non-lawyers to act as neutrals, or not requiring decisions to be accompanied by reasons, were also said to be significant in cost-saving.

109. A reference was made to the need to ensure inexpensive enforcement of awards, since an award was useless without the capacity to realize on it; a question was raised as to whether the ODR provider might be able to assist in enforcement.

110. Suggestions were made on the issue of user fees, and there was substantial support for a proposal that users would pay a reasonable application fee that would serve to deter the filing of abusive claims yet not be so high as to exclude consumers. A number of delegations supported the notion that the fees could be a percentage of the value of the claim, with possibly a minimum fee and a cap or limit on the highest level of fee. One proposal was that a consumer be refunded or awarded his access fee in the event he succeeded in his claim. The need to transparently disclose to users all costs of proceeding up front was emphasized.

111. Another view was that ODR providers might compete for business, in which case market forces could work to keep costs low for users. Trustmark processes



could, it was suggested, refer to the fact that merchants participated in ODR, thereby attracting consumers.

112. The issue was raised of the independence of ODR providers and neutrals, especially where providers kept lists of neutrals who they may call upon. It was said that how money flowed between providers and neutrals should be transparent, with the goal that it be in no one's financial interest to decide cases in a certain way.

113. Other suggestions as to funding were: government establishment and financial support for an ODR online platform; and funding of an ODR online platform by consumer organizations.

114. One delegation urged that the ODR system be self-sufficient and receive no external funding, and that at the same time it be efficient in order to ensure it would operate at minimum cost.

## V. Future work

115. The Working Group requested that the Secretariat, subject to availability of resources, prepare the following for a future meeting:

(a) Draft generic procedural rules for ODR, including taking into account: the types of claims with which ODR would deal (B2B and B2C cross-border low-value, high-volume transactions); initiation of the online procedure; alerting parties to any agreement with regard to dispute settlement that might be entered into at the time of contracting; stages in the dispute settlement process — including negotiation, conciliation and arbitration; describing substantive legal principles, including equitable principles, for deciding cases and making awards; addressing procedural matters such as representation and language of proceedings; the application of the New York Convention, as discussed; reference to rules of other ODR systems; setting out options, where appropriate;

(b) Draft document setting out principles and issues involved in the design of an ODR system. All documents or other references to ODR known to the Secretariat would be listed by the Secretariat with references to websites or other sources where they may be found.

116. The Secretariat advised that States might send proposals to the Secretariat for consideration in the preparation of these documents. Such proposals should be brief and could be summarized in a document which would be provided to delegates in all official languages of the United Nations. It was suggested that the Secretariat would consult with relevant NGOs and experts in the preparation of any documentation, including to the extent possible taking into account the outcomes of the 10th annual meeting of the Online Dispute Resolution Conference to be held in Chennai, India on 7-9 February 2011.<sup>24</sup>

117. The Working Group noted that its twenty-third session was scheduled to take place in New York from 23 to 27 May 2011.

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<sup>24</sup> [www.odr2011.org/index.php](http://www.odr2011.org/index.php).

**B. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions, submitted to the Working Group on Online Dispute Resolution at its twenty-second session**

**A/CN.9/WG.III/WP.105 and Corr.1**

**[Original: English]**

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## I. Introduction

1. At its forty-third session (New York, 21 June to 9 July 2010), the Commission considered a note by the Secretariat on the issue of online dispute resolution (A/CN.9/706). The note, in particular, summarized the discussion at the colloquium organized jointly by the Secretariat, the Pace Institute of International Commercial Law and the Penn State University Dickinson School of Law, under the title “A fresh look at online dispute resolution (ODR) and global e-commerce: towards a practical and fair redress system for the 21st century trader (consumer and merchant)” (Vienna, 29 and 30 March 2010).<sup>1</sup> The Commission also had before it a note by the Secretariat (A/CN.9/710) transmitting information provided by the Institute of International Commercial Law in support of possible future work by UNCITRAL in the field of online dispute resolution. The Commission was generally of the view that topics identified at the colloquium required attention and that work by the Commission in the field of online dispute resolution would be timely.<sup>2</sup>

2. After discussion, the Commission established a working group to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions. At that session, the Commission also agreed that the form of the legal standards to be prepared should be decided after further discussion of the topic.<sup>3</sup> As to the scope of work, the Commission agreed that, although it would be feasible to develop a generic set of rules applicable to both B2B and B2C transactions, the Working Group should have the discretion to suggest different approaches, if necessary.<sup>4</sup>

3. ODR is a means of dispute settlement which may or may not involve a binding decision being made by a third party, implying the use of online technologies to facilitate the resolution of disputes between parties. Online dispute resolution has similarities with offline conciliation<sup>5</sup> and arbitration, although the information

<sup>1</sup> Information about the colloquium is available at the date of this report from [www.uncitral.org/pdf/english/news/IICL\\_Bro\\_2010\\_v8.pdf](http://www.uncitral.org/pdf/english/news/IICL_Bro_2010_v8.pdf).

<sup>2</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 251-256.

<sup>3</sup> *Ibid.*, para. 257.

<sup>4</sup> *Ibid.*, para. 256.

<sup>5</sup> The term “conciliation” is used in this note with the same meaning as in article 1(3) of the UNCITRAL Model Law on International Commercial Conciliation, expressing a broad notion of a voluntary dispute resolution mechanism controlled by the parties and conducted with the assistance of a neutral third person or persons. The broad nature of the definition indicates that there is no intention to distinguish among procedural styles or approaches that might fall within the scope of article 1(3), which reads: “For the purposes of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose

management and communication tools which may be used during all or part of the proceedings can have an impact on the methods by which disputes are resolved. ODR may be applied to a range of disputes affecting B2B and B2C transactions. It could be logical to apply ODR for the resolution of disputes relating to transactions involving the use of Internet. Online arbitration raises specific legal issues stemming from the formal requirements contained in national and international arbitration laws and conventions.

4. The concept of ODR is particularly relevant in addressing disputes arising out of low value, high volume transactions that require an efficient and affordable dispute resolution process. This suggests the need for specific legal standards for ODR, being more than a simple adaptation of existing arbitration and electronic communication rules. The purpose of this note is to provide background information on ODR, and to suggest matters that may need to be addressed in the formulation of legal standards on ODR.

## II. Examples of online dispute resolution models and systems

### A. General remarks

5. This section introduces existing models of online conciliation and arbitration together with the technologies used, and highlights issues which may need special consideration. It does not deal with complaint handling mechanisms or trustmarks, which lie outside the formal dispute resolution context. Complaint handling is a process that facilitates negotiation of consumer grievances without the intervention of third parties.<sup>6</sup> A trustmark in the context of electronic commerce generally refers to an image, logo or seal found on a website that purports to indicate the reliability of the online merchant. The trustmark is offered as a proof that the online merchant is a member of a professional organization or a network, and that the online merchant has a redress mechanism in place.<sup>7</sup> In addition, this note does not cover

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upon the parties a solution to the dispute.” The Model Law does not distinguish between conciliation or mediation processes.

<sup>6</sup> Some examples of existing complaint handling models are eConsumer.gov, European Consumer Centres Network (ECC-Net) and International Consumers Advisory Network (ICA-Net). As an initiative of the International Consumer Protection and Enforcement Network (ICPEN), eConsumer.gov provides a web portal to allow individuals to file complaints about online and related transactions with foreign companies. The ECC-Net helps consumers make a complaint and reach an amicable solution with the trader and also helps consumers reach a solution through the appropriate mechanism (a third party). A trial of ICA-Net is ongoing since January 2009 and its functions are as follows: to receive cross-border complaints from domestic consumers; to offer them relevant information or advice; to inform the other Consumer Advisory Liaison Office (CALO) in a different country where a business in dispute is located regarding the complaint; and to urge the business to solve the dispute through the other CALO.

<sup>7</sup> An example of trustmark in the context of online dispute resolution is the Better Business Bureau (BBB) OnLine. Approved merchants put a BBBOnLine logo on their websites that links to the BBB site so consumers can determine in advance which companies participate in the program and learn about redress mechanisms for when complaints are not resolved internally. Another example is Euro-Label, a cooperation of national suppliers of Internet trustmarks with national websites in Germany, Austria, Poland, Italy, France and Spain. Organizations such as

certain highly specialised ODR systems such as the Internet Corporation for Assignment Names and Numbers (ICANN) Uniform Domain Name Dispute Resolution Policy and the World Intellectual Property Organization (WIPO) Domain Name Dispute Resolution, as they raise a different set of issues.<sup>8</sup> These systems already have in place the relevant mandatory rules regarding applicable law, jurisdiction and enforcement.

## B. Online conciliation

6. There is a limited number of existing online conciliation models available. One example is MédiateurDuNet.fr, a joint system of the Forum des droits sur l'Internet in France and the French courts, in which interested parties are directed by the courts of first instance to the Forum to conduct free mediation either before or during the court proceedings.<sup>9</sup> Another example in the area of dispute resolution is an initiative of eBay, an online mediation experiment which started in 1999.<sup>10</sup>

7. A third example involving online conciliation is the Electronic Consumer Dispute Resolution Rules (ECODIR), a pilot project based on a university initiative undertaken with the support of the European Commission and Ireland's Department of Enterprise, Trade and Employment.<sup>11</sup> ECODIR is the only project to date to provide a multi-step ODR procedure with a complete set of rules. Under these rules, complaints could be submitted to an ODR online platform if the dispute arose out of an online transaction and if at least one of the parties to the disputed transaction was a consumer. The system offered an ODR online platform providing a two-step process of negotiation and mediation in accordance with the ECODIR rules.<sup>12</sup>

8. In online conciliation, proceedings are carried out using electronic communications such as e-mail<sup>13</sup> or an ODR online platform through which the parties can communicate, or both.<sup>14</sup> Some proceedings are carried out by mobile phones.<sup>15</sup> In online conciliation, two channels of communication may be provided

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the Global Trustmark Alliance (GTA) and the Asia-Pacific Trustmark Alliance (ATA) exist to further promote and strengthen the global trustmark system.

<sup>8</sup> The ICANN (Internet Corporation for Assignment Names and Numbers) has accredited resolution to settle domain name disputes online. These domain name disputes are resolved in accordance with the ICANN Uniform Domain Name Dispute Resolution Policy ("UDRP"). The purpose of UDRP is to provide effective resolution of domain name disputes regarding ownership of the domain name, and designate certain dispute resolution providers to conduct arbitrations.

<sup>9</sup> A/CN.9/706, para. 26. Currently, 7 courts participate in the initiative. [www.foruminternet.org/particuliers/mediation/](http://www.foruminternet.org/particuliers/mediation/).

<sup>10</sup> A total of 225 complaints were filed, three quarters by buyers and one quarter by sellers, involving mostly non-delivery, non-payment, inability to reach the other party and damage to reputation. Mediation was attempted in 144 cases. Approximately 46 per cent of the complaints were successfully resolved, in 25 per cent of the cases the respondents refused to participate, and in 54 per cent of the cases an impasse was reached.

<sup>11</sup> The project operated from October 2001 to June 2003.

<sup>12</sup> [www.ecodir.org/index.htm](http://www.ecodir.org/index.htm); [www.ecodir.org/odrp/rules.htm](http://www.ecodir.org/odrp/rules.htm).

<sup>13</sup> This was the case in the eBay online mediation experiment.

<sup>14</sup> MédiateurDuNet involves communication via an ODR online platform and by e-mail.

<sup>15</sup> The dispute resolution mechanism provided by the Commission on Conflict Mediation (CCM) of Afghanistan — the m-Jirga (Mobile Phone Jirga) — encourages the use of mobile phones and

by technical means, one for a private dialogue between one party and the conciliator, and the other for open dialogue with all participants, including the conciliator.

### C. Online arbitration

9. An example of online arbitration is the joint project of the International Centre for Dispute Resolution (ICDR) and General Electric for the online resolution of disputes between manufacturers and suppliers.<sup>16</sup> Online arbitration is conducted under the American Arbitration Association (AAA) Commercial Arbitration Rules and no rules specific to online arbitration apply. Another model is that of the China Council for the Promotion of International Trade and the China Chamber of International Commerce, which adopted the China International Economic and Trade Arbitration Commission Online Arbitration Rules (“the CIETAC Rules”) in 2009.<sup>17</sup> The CIETAC Rules apply mostly to larger volume business to business electronic commerce disputes.

10. In an online arbitration, electronic file management can be used. Electronic file management is a closed system whose access is limited to the parties and arbitrators (i.e. website) or is only used by the arbitration institution (i.e. Intranet). Examples of electronic file management include AAA WebFile organized by AAA,<sup>18</sup> and NetCase housed at the ICC International Court of Arbitration.<sup>19</sup> Both systems provide an ODR online platform for filing complaints; uploading, downloading and transferring documents; and communicating with other participants in the dispute.<sup>20</sup>

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other devices in the dispute resolution process. Parties can call a special number on their mobile phone to begin the process and disputants will be able record their cases. Panels of elders will then convene by phone to hear each case and the elders will then be able to weigh in with their decision.

<sup>16</sup> A/CN.9/706, para. 29.

<sup>17</sup> A/CN.9/706, para. 25.

<sup>18</sup> AAA WebFile is an ODR online platform to file complaints, to upload and download documents, to review progress of the case and to communicate with ICDR via a message centre. In addition to filing claims online, clients can make payments, perform online case management, access rules and procedures, electronically transfer documents, select Neutrals, use a case-customized message board and check the status of their case. <https://apps.adr.org/webfile/>.

<sup>19</sup> The NetCase system allows arbitrators and parties to communicate online and facilitates the management of their arbitration case in a secure online environment. NetCase enables all participants in an arbitration to communicate electronically through a secure online website to conduct arbitrations, store and organize documents on ICC’s secure ODR online platform, and access information about their arbitration at any time. NetCase also provides forums where certain participants, authorized to access the respective forum, can communicate with each other. [www.iccwbo.org/id19772/index.html](http://www.iccwbo.org/id19772/index.html).

<sup>20</sup> Further information would need to be gathered on the actual use of the system as information was not readily available.

### III. Standards on online dispute resolution

#### A. Existing standards

11. Currently, there are few legal standards on ODR. Many standards in related areas may apply directly or indirectly, such as legal texts on conciliation, arbitration, electronic commerce and electronic communications,<sup>21</sup> and regulations on consumer protection.<sup>22</sup> This section will focus on existing standards that specifically deal with ODR at the international level. In most cases, these standards take the form of guidelines set up by international non-governmental organizations. None of these guidelines actually provide for the setting up of a fully-fledged online dispute resolution system.

#### International Chamber of Commerce

12. The International Chamber of Commerce (ICC) Guidelines on Using Information Technology in Arbitration (“the ICC Guidelines”) examine issues relating to, and provide operational standards for, the use of information technology (IT) in international arbitration settings. The ICC Guidelines include a section on how to use the Operating Standards for Using IT in International Arbitration (“the ICC Standards”), which describes standard procedures allowing parties and arbitrators to exchange information regarding their capabilities to use IT solutions in arbitration proceedings. The parties may agree to apply the ICC Standards, and if so they need to specify the means of communication — such as e-mail or otherwise on the Internet through a website — by submitting a form annexed to the ICC Guidelines to the other party and the sole arbitrator or arbitral tribunal.<sup>23</sup>

13. The ICC Standards establish the parties’ duty to properly manage their e-mails, for example, to regularly check their inboxes and confirm receipt of each e-mail manually, or promptly notify the sender if certain data is missing or it is incomprehensible. These standards provide that parties should agree on a protocol in case they wish to apply additional security measures or to communicate via a website operated by a neutral third party. Additionally, the ICC Standards determine the technicalities regarding electronic submission of complaints, documents and evidence (including the method of converting hard copies into electronic files, file format compatibility, full searchability, file sharing and particulars of the file system to be used during the entire arbitration). For instance, electronic files must be

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<sup>21</sup> For instance, the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (the Electronic Communications Convention); the UNCITRAL Model Law on Electronic Commerce, 1996, with additional article 5 bis as adopted in 1998; and the UNCITRAL Model Law on Electronic Signatures, 2001.

<sup>22</sup> For instance, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure, that applies since 2009 in cross-border litigation to civil and commercial matters where the claim does not exceed 2000 euros.

<sup>23</sup> The party must complete a “Standards Initiation Form” and submit it to the other party and the sole arbitrator or arbitral tribunal within 10 business days, and the recipient party must respond and also complete the Standards Initiation Form. The Standards Initiation Form includes the details of the entities concerned, the scope of implementation, file formats proposed to be used and information to check interoperability and compatibility. Once they are successfully exchanged, the Standards Initiation Forms from both parties are consolidated into a “Consolidation Form”, which is agreed by the arbitrator or the arbitral tribunal.

electronic photocopies of the original and in any case, unless the parties agree otherwise or the arbitrator/arbitral tribunal instructs differently, hard copy submissions must be accompanied by a CD or DVD containing the electronic files. Additionally, each party must make sure throughout the arbitration that files are kept in order and they are not corrupted, and that file names reflect the content of the file.

### **Organization for Economic Cooperation and Development**

14. The Organization for Economic Cooperation and Development (OECD) addressed the issues of consumer disputes through the development of E-commerce Guidelines for Consumer Protection in the Context of Electronic Commerce (1999) and the OECD Recommendation on Consumer Dispute Resolution and Redress (2007).<sup>24</sup>

### **The Global Business Dialogue on e-Society**

15. The Global Business Dialogue on e-Society (GBDe) is a private sector initiative, established in January 1999 to assist the development of a global policy framework for the emerging online economy.<sup>25</sup> In November 2003, GBDe reached an agreement with an international non-governmental organization, Consumers International, on guidelines for the provision of dispute resolution services for e-commerce (“the GBDe Agreement”). This agreement outlines principles relevant to the creation of an ADR system geared toward merchants, providers of services in the field of dispute settlement and governments. The principles refer to the need to adjust the requirements of alternative dispute settlement mechanisms to the online context, but there are no further guidelines relating to ODR per se.<sup>26</sup>

### **European Committee of Standardization**

16. The CEN (European Committee of Standardization) Workshop Agreement on Standardisation of Online Dispute Resolution Tools (2007) contains guidelines (“the CEN Guidelines”) that give general directions for users to access ADR resources using electronic tools, focusing on ODR.<sup>27</sup> According to the CEN Guidelines, ODR mechanisms can be classified as follows: assisted negotiation, automated negotiation, mediation and arbitration. Furthermore, the CEN Guidelines also refer to technical aspects of ODR such as electronic communication considerations, confidentiality and security.

## **B. Standards under consideration**

### **The Organization of American States (OAS)**

17. Several initiatives are currently being considered by the OAS through the Inter-American Specialized Conference on Private International Law. These initiatives

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<sup>24</sup> A/CN.9/706, para. 14.

<sup>25</sup> Ibid., para. 27-28.

<sup>26</sup> [www.gbd-e.org/pubs/ADR\\_Guideline.pdf](http://www.gbd-e.org/pubs/ADR_Guideline.pdf).

<sup>27</sup> The CEN Workshop Agreement on Standardisation of Online Dispute Resolution, available at: [ftp://cenftp1.cenorm.be/PUBLIC/CWAs/STAND-ODR/CWA16026\\_STANDODR.pdf](ftp://cenftp1.cenorm.be/PUBLIC/CWAs/STAND-ODR/CWA16026_STANDODR.pdf)



include a proposal for a State-sponsored initiative to resolve cross-border electronic commerce consumer contract disputes for the sale of goods and services.<sup>28</sup>

#### **Optional Instrument (Blue Button)**

18. Another ODR proposal has been developed by academics within the European Union centred under the form of an Optional Instrument for resolution of B2C transactions, also referred to as “Blue Button”.<sup>29</sup> This type of arrangement would permit businesses to offer consumers and other businesses dispute settlement pursuant to the terms of an Optional Instrument, which would in effect be a European Union-wide contract and sales law. This Optional Instrument would provide a high level of consumer protection (as required by existing EU Directives) plus general rules of contract and sales law. The Optional Instrument would only be applicable to the sale of goods and would contain at minimum rules on pre-contractual obligations, conclusion of contract, content and interpretation of contract, validity, withdrawal, unfair terms, performance, conformity and remedies for non-performance. If the client chooses the “Blue Button”, the optional European contract and sales law would apply in place of the law which would otherwise be applicable according to conflict of laws rules.

### **IV. Issues for possible consideration**

#### **A. Definitions**

19. This section includes definitions of certain terms. The Working Group may wish to consider these definitions and whether there are other terms which should also be defined.

#### **ODR**

20. A definition of ODR has been included in the introduction (see para. 3 above). The Working Group may wish to consider whether it is sufficient or whether it should be expanded to also cover informal private negotiation, automated or assisted negotiation (using negotiation software or an online service).<sup>30</sup> In the latter case, the Working Group may wish to consider text along the following lines: “Online dispute resolution (ODR) usually refers to alternative dispute settlement methods using information and communication technology (ICT) and, in particular, electronic forms of interaction on the Internet. ODR can be conducted in whole or in part online. ODR is a means of settling disputes that incorporates the use of the

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<sup>28</sup> For a description of this proposal see A/CN.9/706, para. 18.

<sup>29</sup> Ibid., para. 16.

<sup>30</sup> In automated negotiation, the parties negotiate through a dispute resolution provider that facilitates the administration of the negotiation, for example, by contacting the other party and providing a software or application for negotiation and/or blind bidding. A typical negotiation assistance software allows the users to analyse their bargaining positions by evaluating and prioritising their negotiation objectives and by calculating the outcome most efficient for all parties. Blind-bidding process is an automated algorithm that evaluates bids from the parties and settles the case if the offers are within a prescribed range. In assisted negotiation, the parties negotiate with the help of an ODR online platform that facilitates the process by providing efficient technology and a designated place for the negotiation to take place.

e-mail communications, streaming media, ODR online platforms such as websites and other information technology as part of the dispute resolution process.”

#### **ODR provider**

21. “ODR provider” means an intermediary that administers the process and provides an ODR online platform for the parties to resolve their dispute by their chosen resolution method.

22. Online conciliation and online arbitration generally involve an ODR provider. However, in some States, resolution of the dispute takes place informally, without the assistance of an intermediary, in particular in the case of informal negotiations.

#### **ODR online platform**

23. “ODR online platform” refers to a forum provided by the ODR provider. An ODR online platform may be a platform accessible to the public such as websites on the Internet (an open platform) or a platform with limited or restricted access such as Intranet or internal electronic file management system (a closed platform).

### **B. Scope of work**

24. As already mentioned (see para. 1 above), the Commission requested the Working Group to undertake work in the field of ODR relating to cross-border electronic commerce transactions, including B2B and B2C transactions.

25. The Commission took note of the commonly shared view expressed during the colloquium that traditional judicial mechanisms for legal recourse did not offer an adequate solution for cross-border electronic commerce disputes, and that the solution (providing a quick resolution and enforcement of disputes across borders) might reside in a global ODR system for small value, high volume B2B and B2C disputes.<sup>31</sup> This paper was not drafted with specific attention to consumer law issues; however, the Working Group may wish to bear in mind that matter when discussing the issues identified below. In particular, the Working Group may wish to consider how any ODR standard could be made compatible with consumer law.

26. The Commission also took note of the concerns expressed with regard to the difficulty of harmonizing consumer protection law and agreed that, while work should be carefully designed not to affect the rights of consumers, it would be feasible to develop a generic set of rules applicable to both B2B and B2C transactions.

27. Given the above considerations and decisions of the Commission, the Working Group may wish to consider the exact scope and form of its work. For example, if work is to focus on small value disputes, flexible standards might need to be considered, since what is regarded as small value may not be the same in every State.

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<sup>31</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 254.

### C. Identification and authentication

28. Proper mechanisms of identification and authentication will be required at different stages of the ODR proceedings. A party's identity in an electronic setting can be verified through the use of a variety of technologies associated with electronic signature or identity management. The terms "electronic authentication" and "electronic signature" refer to various techniques for the purpose of replicating, in an electronic environment, some or all of the functions identified as characteristic of handwritten signatures or other traditional authentication methods.<sup>32</sup> Identity management refers to the currently prevailing business model that requires service providers and other businesses to identify and authenticate users seeking access to services or databases.<sup>33</sup> Given that in ODR trust is an important factor, the Working Group may wish to consider whether the legal standards dealing with it should incorporate any existing standard on electronic signatures.

29. The Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures 2001<sup>34</sup> states the following functions of an electronic signature: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; and to associate that person with the content of a document. A signature can perform a variety of additional functions, depending on the nature of the document that was signed. In the context of ODR, a signature might attest to the intent of a party to be bound by an arbitration agreement or to commence arbitration.

30. The principle of technological neutrality has gained wide acceptance in legislative and regulatory frameworks globally.<sup>35</sup> Most modern laws on electronic commerce (many of which are based on or draw guidance from the UNCITRAL Model Law on Electronic Commerce 1996)<sup>36</sup> espouse technological neutrality and are able to facilitate the recognition of new technologies used in electronic authentication. The electronic authentication methods currently available and in use are: "digital signatures" based on public-key cryptography (PKI); biometric devices; techniques involving the use of personal identification numbers (PINs); digitized versions of handwritten signatures; and other methods such as a click-wrap agreement (that is, clicking an "OK-box").<sup>37</sup>

31. With respect to electronic signatures in the context of ODR, the Working Group may wish to consider whether any legal standard should specify that an electronic signature, in whatever form, or any other identification method, is not discriminated

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<sup>32</sup> Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods, United Nations publication, Sales No. E.09.V.4, paras. 15-23.

<sup>33</sup> See A/CN.9/692, paras. 48-66.

<sup>34</sup> United Nations publication, Sales No. E.02.V.8.

<sup>35</sup> Technological neutrality refers to the notion that legislation should be neutral rules providing coverage of all situations where information is generated, stored or transmitted in the form of electronic communications, irrespective of the technology or medium used treating all existing technologies equally and further facilitating the application to new technologies. The principle of technological neutrality is important in view of the speed of technological innovation and development and ensures that the law is able to accommodate future developments and does not quickly become obsolete.

<sup>36</sup> United Nations publication, Sales No. E.99.V.4.

<sup>37</sup> Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures 2001, para. 33.

against vis-à-vis a paper-based signature in accordance with the principle of functional equivalence.<sup>38</sup> An additional consideration is whether the legal standard should adhere to the principle of technological neutrality and not discriminate against different types of technologies that may be used. Further, the question of whether discrimination between electronic signatures used domestically and those used in the context of international trade transactions should be discouraged, is a matter for the Working Group as this could result in a duality of regimes governing the use of electronic signatures, creating a serious obstacle to the use of such techniques.

#### **D. Commencement of proceedings**

32. A prerequisite for resorting to online conciliation or arbitration is that participants must have access to the relevant technology required by the respective ODR provider. An issue the Working Group may wish to consider is the extent to which such requirements must be specified in the terms and conditions of the ODR provider, to which the parties must consent. In the case of conciliation, consent occurs when a party submits an invitation to conciliation or agrees to participate therein; in arbitration, consent is normally contained in the arbitration agreement.<sup>39</sup>

33. In electronic commerce, the parties have the freedom to agree on appropriate identification and authentication methods for their purposes, subject only to overriding public policy concerns in line with the principle of party autonomy. This consent to use electronic communication need not be expressly indicated or be given in a particular form; such a requirement would itself be an unreasonable barrier to electronic commerce. However, in the field of ODR, absolute certainty can be achieved by obtaining the explicit consent of the parties to use electronic forms of communication before commencing any proceedings.

34. Online conciliation is commenced when one party sends an (online) invitation to the other party, or submits a request to the ODR provider that the other party be contacted. Such a request may be made with or without first submitting a complaint to the ODR provider. The necessary elements of an invitation to conciliate are usually determined and included in an electronic form which the party must fill out and submit to the ODR provider. Online conciliation starts when the invited party informs the inviting party of its consent to conciliate.

35. In online arbitration, the arbitration agreement serves as the basis of the arbitration. An option that online merchants may choose, in practice, is to include an

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<sup>38</sup> As set forth in the UNCITRAL Model law on Electronic Commerce, the principle of functional equivalence establishes that, provided certain criteria are met, electronic communication should enjoy the same level of legal recognition as that of the paper documents performing the same function. The functional equivalent approach is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques.

<sup>39</sup> For example, in order to use the ICC NetCase system, all parties and arbitrators in an arbitration case are required to agree to and sign the "Statement of Acceptance of the Conditions of Access and Use of NetCase". This Statement deals with confidentiality, security and intellectual property matters, as well as other technicalities and terms of use. The Statement also includes a provision stating that in case of posting documents on NetCase, time limits start to run on the day following the day of posting.

arbitration agreement in the contract concluded between the parties or in a separate document, such as the general terms and conditions applicable to the transaction, that is, clicking on the corresponding button or ticking a box certifying that it consents to the terms and conditions. Regarding the conclusion of arbitration agreements in an online environment, the Working Group may consider the relevance of consumer law in this regard.

36. Where an arbitration agreement is concluded entirely online, for instance, by the online acceptance of general terms and conditions, a question may arise as to whether its form satisfies the written form requirement under Article II(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>40</sup> In that context it may be noted that UNCITRAL has adopted a Recommendation to promote flexible interpretation of Article II(2) of the New York Convention (see para. 73 below).

## **E. Submission of complaint, statements and evidence**

### **1. Complaint and statements of claim and of defence**

37. In ODR, the complaint and statements of claim and defence can be expected to be submitted electronically through the ODR online platform of the ODR provider. In addition, documents are accessible to the parties, as well as the conciliator or arbitral tribunal, on the ODR online platform throughout the process. Access to certain documents may be restricted to certain participants.

38. In some systems the statement of claim may be submitted in an electronic form on the ODR online platform (see para. 23 above), and a party might wish to attach documents thereto. Electronic document submission systems, such as NetCase at the ICC or the AAA's WebFile, already exist (see paras. 9-10 above). The question of confidentiality and security of the notice of arbitration and other documents submitted electronically, as well as the amendment of electronically submitted documents, need to be considered also through the application of appropriate technology.

39. Upon receipt of the statement of claim, the ODR provider's administrative staff or an automated process needs to ensure that it is properly recorded and forwarded electronically to the other party.

40. Amendments to a statement of claim or defence could be provided for at any time during the online arbitration, unless the tribunal considered it inappropriate under the circumstances. Technology used by the ODR provider could be expected to be capable of processing such amendments, and of forwarding the related communications.

### **2. Submission of evidence**

41. In arbitration, the submission of evidence is governed by the relevant laws and the applicable procedural rules. Due to the use of technology in online arbitration, submission of evidence in an online arbitration needs to be aligned with the relevant technical requirements of the ODR provider such as the types, sizes and formats of

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<sup>40</sup> United Nations, *Treaty Series*, vol. 330. No. 4735.

documents. The Working Group might wish to consider that these matters may be included in the general rules or regulations, or the terms and conditions of the ODR provider.

42. A fundamental requirement of arbitration is due process, and with respect to electronic communication, the production of evidence and statements should be carefully considered. The UNCITRAL Model Law on Electronic Commerce provides, in Article 9, an appropriate standard on the admissibility of an electronic communication in evidence, namely, that admissibility should not be denied on the sole ground that it is an electronic communication or, if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

#### **F. Number and appointment of conciliators or members of the arbitral tribunal**

43. Conciliators or arbitrators may be appointed by the parties, or by the ODR provider drawing from a list that the ODR provider maintains. The value of the claim may be a matter of consideration when deciding on the number of conciliators or arbitrators. The issue of ensuring impartiality and independence of conciliators or arbitrators is addressed below (see paras. 48-50).

44. On an ODR online platform, the parties may use a variety of technologies to appoint their conciliators. In conciliation, existing models allow parties to nominate a certain number of persons from a list supplied by the ODR provider, submitting names in their order of preference. The sole conciliator is then appointed when the same name appears on the lists of both parties. Another approach allows the ODR provider to appoint a conciliator from its own list, which may speed up the process, although this entails the risk that the conciliator so appointed might not be acceptable to a party for certain reasons.

45. In arbitration, the matter is of particular importance. The ability of the parties to choose their arbitrators should be preserved, and if a party does not do so, a mechanism for assisting in the appointment procedure should be provided for.

#### **G. Impartiality and independence of conciliators or members of the arbitral tribunal**

46. In ODR, procedural principles applying to conciliation and arbitration, such as transparency, impartiality, independence and good faith are important because the parties do not meet face to face. Doubts as to independence and impartiality might be addressed by setting out appropriate guidelines and/or a code of conduct, according to which neutrals must act in ODR. The Working Group may wish to consider this issue, as well as whether an appropriate electronic communication method should be in place in order to preserve these principles, by ensuring that all participants are given simultaneously all relevant information and that the parties are informed of all procedural acts performed throughout the process.

47. In an arbitration proceeding, arbitrators are generally under a continuing duty to disclose any circumstances that might raise a doubt as to their impartiality or

independence in a case, a standard which could be considered for ODR as well. Such disclosure could be made to the parties, other arbitrators and the ODR provider, who could undertake any steps necessary to rectify the situation. Again, given the speed and efficiency of electronic communications, deadlines for submitting a challenge or response in this regard could be shorter than in traditional arbitration.

## **H. Confidentiality and issues related to security of communications**

48. The issue of confidentiality in an arbitration can be divided into the following three aspects: privacy during the proceedings; confidentiality prior to the award; and confidentiality after the award. The arbitration proceedings, the existence of pending arbitrations and outcome of the award are confidential.

49. In ODR, the confidentiality requirement is closely connected with the requirement of security within the online environment where resolution of the dispute takes place. In addition to technical measures providing security of electronic data and communications, the issue arises of making certain that participants are subject to conditions ensuring that electronic data and communications are not disclosed to unauthorized parties. Such mandatory provisions on confidentiality may already be contained in the policies of the ODR provider, to which the parties would become subject when entering the process.

50. Security issues arise with respect to both transmission and retention of electronic communications.<sup>41</sup> The purpose of confidentiality, i.e. the requirement not to make accessible certain information to persons not entitled to it and not to allow intermediaries to share information with others, is intended to protect sensitive data and information involved in the dispute.

## **I. Communication between the conciliators or members of the arbitral tribunal and the parties**

51. One function of the ODR provider is to ensure effective communication between the parties and the conciliator or arbitrator throughout the proceedings. In conciliation, the parties may communicate with the conciliator either jointly or separately. The technology used by the ODR provider must be suitable for either joint or separate communications, and confidential sessions should not be accessible to the other party. In arbitration, the technology used by the ODR provider must be suitable for smooth communications between the parties, and for conducting online arbitration hearings complying with the rules applicable to hearings. The Working

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<sup>41</sup> The process is exposed to the following risks: unauthorized third parties may access the information (confidentiality); the data transmitted may be modified without proper authorization (integrity); collection and dissemination of information is not secured and the information does not remain private but may be viewed by the public (privacy); the process of verifying the right user may be compromised (authentication); permission of access data is given to unauthorized persons (authority); data may only be available to the person who is authorized to view it (availability); and a party may deny association with a certain electronic transmission or evidence submitted (non-repudiation).

Group may wish to consider the necessity of specifying rules of conduct, and the enabling technology, in this regard.

52. Given that ODR aims to provide efficient and timely dispute resolution, it may be considered whether any legal standard should specifically regulate issues of acknowledgement of receipt of electronic communications. As ODR relies on electronic means of communication, its rules as to dispatch and receipt of communications — which may differ from those in traditional dispute resolution — will need to be precisely defined. The United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (Electronic Communications Convention)<sup>42</sup> and the UNCITRAL Model Law on Electronic Commerce are instruments which provide useful guidance in this regard.

### **1. Time of dispatch**

53. The time of dispatch of an electronic communication can be categorized according to the control of the relevant information system. Under article 10(1) of the Electronic Communications Convention, the dispatch occurs when the communication leaves an information system under the control of the originator. When the electronic communication has not left an information system under the control of the originator or of the party who sent it on the originator's behalf, namely, when both parties are using the same information system, the time of dispatch is when the communication is received.

### **2. Time of receipt**

54. The time of receipt of an electronic communication differs depending on whether it has been received at the designated electronic address for exchange of electronic communication or some other address. In the case of its receipt at the designated electronic address, the time of receipt is deemed to be when it becomes capable of being retrieved by the addressee at the designated address (Article 10 of the Electronic Communications Convention). In the case of receipt at a non-designated electronic address, the time of receipt is when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that it has been sent to that address (Article 10(2) of the Electronic Communications Convention). A general presumption is that an electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address. These rules are consistent with those prevailing in the paper world and limit the ability of an addressee to deliberately delay or impede delivery of a communication by not accessing it. These rules also take into account the fact that the information system of the addressee may not be reachable for reasons outside the control of the originator (for instance, the use of anti-spam filters for e-mails). Given their status as UNCITRAL standards, the Working Group may wish to consider their inclusion in any future legal standard, as appropriate.

### **3. Acknowledgment of receipt**

55. In situations where the parties have not agreed that the acknowledgement be given in a particular form or by a particular method, acknowledgement may be by

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<sup>42</sup> United Nations publication, Sales No. E.07.V.02.



any communication by the addressee, automated or otherwise, or any conduct of the addressee (Article 14(2) of the UNCITRAL Model Law on Electronic Commerce).

56. Where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgment is received (Article 14(3) of the UNCITRAL Model Law on Electronic Commerce).

57. The above rules are subject to consent by the parties. However, in the context of ODR, the Working Group may wish to consider whether a legal standard on the acknowledgment of receipt of electronic communications requires a prescriptive approach.

#### **4. Error**

58. With the increasing use of automated systems, errors in electronic submissions can frequently occur. In electronic commerce, automated systems normally provide an opportunity for a natural person to correct an error. Where that opportunity is not provided for, the person has the right to withdraw that portion of the communication containing the input error. This withdrawal is under the condition that the person notifies the other party of the error as soon as possible after having learned of the error, and that the person so notifying has not received any material benefit or value from the electronic transaction (Article 14 of the Electronic Communications Convention).

### **J. Hearings**

59. Hearings of witnesses or independent experts could be needed in online arbitration. Such hearings could take place by video or telephone conference, services which could be integrated into the ODR online platform. Keeping a record of such hearings, whether electronically or in paper form, may be required for various reasons and would need to be taken into account in the establishment of an ODR system.

60. Hearings could take place on the ODR online platform in writing (where the parties and the conciliator or arbitrator communicate with each other in dialogue boxes), or orally. Oral hearings could occur through video or telephone conference or similar methods, which could be integrated services on the ODR online platform. Again, keeping a record of such hearings is an important matter.

61. With respect to record of electronic data, the UNCITRAL Model Law on Electronic Commerce article 10 states that requirements for retaining data messages are met if certain conditions are satisfied: the information contained is accessible to be usable for subsequent reference; the data message is retained in the format in which it was generated, sent or received; and information retained enables the identification of the origin and destination of a data message and the date and time when it was communicated.

62. In ODR, the closure of proceedings could be indicated accordingly on the ODR online platform, e.g. by restricting the parties' further access to the relevant areas of the platform.

## **K. Representation of the parties and assistance**

63. In conciliation, the parties may be assisted or represented by other persons provided that their names are submitted to the conciliator. Such assistance could also be allowed in online conciliation, in which case the conditions of participation by representatives would need to be determined. It might be practicable to require the parties to submit the names of such representatives and the capacities in which they act via the ODR online platform. It may also be advisable to determine the party bearing the consequences and risks associated with involving representatives (such as sharing passwords and login information, making decisions or agreements on the party's behalf etc.). Parties to an arbitration may similarly be assisted or represented by persons of their choice. The conditions of the involvement of representatives in online arbitration would need to be determined, including informing the arbitral tribunal of their identity and the quality in which they act. Such information could be submitted via the ODR online platform. Again, as with conciliation, the bearing of the consequences and risks associated such involvement would need to be addressed.

## **L. Place of arbitration**

64. The place of arbitration has a legal impact on a number of matters, such as the applicable domestic procedural law, procedures for setting aside, determining the court having jurisdiction to grant interim measures or assist and supervise the arbitral tribunal in certain matters, and the recognition and enforcement of the arbitral award.

65. In online arbitration, determining the place of arbitration may be problematic. For instance, parties and arbitrators may be in different geographical locations, or the actual location of a party may differ from the address that it has submitted. In order to avoid controversies during the arbitration process and, subsequently, with recognition and enforcement of arbitral awards, it may be useful to ascertain the place of arbitration, rather than leaving it to the agreement of the parties. The place of arbitration may also affect the application of mandatory laws and public policy considerations on online arbitration.

## **M. Settlement agreement and termination of the proceedings**

66. In conciliation and arbitration, the parties may terminate the proceedings by a settlement agreement. In conciliation, a settlement agreement can be prepared by the parties or, upon request of the parties, by the conciliator; whereas in arbitration, the arbitral tribunal may record the settlement in the form of an award if requested by the parties and agreed by the arbitral tribunal. In both cases, the question arises as to the concluding and signing of a settlement in order to make it enforceable as a contract between the parties. Appropriate methods of electronic signature may be considered for that purpose.

67. The ODR provider should ensure that any communications relating to the termination of the proceedings are forwarded in a timely manner to all participants, in a form that allows proof thereof, including via e-mail or other written

communication via the ODR online platform. The ODR online platform needs to be specialized and suitable for the sending and retention of such communication and relevant electronic data (see para. 61).

## N. Enforcement issues

68. The attractiveness of online conciliation and online arbitration would presumably be increased if any settlements reached were to enjoy a regime of expedited enforcement, and this is a matter the Working Group may wish to consider.

69. In traditional conciliation, methods for enforcing a settlement agreement can vary greatly between legal systems and are dependent upon the technicalities of domestic procedural law. Some jurisdictions impose certain requirements, such as for a signature or a written form of agreement, whereas in other jurisdictions no special provisions apply, with the result that settlement agreements are enforceable as would be any contract between the parties. In the national legislation of some countries, parties who have settled a dispute through conciliation are empowered to appoint an arbitrator specifically to issue an award based on the settlement agreement of the parties. In some jurisdictions, the status of an agreement reached following conciliation depends on whether or not the conciliation took place within the court system and legal proceedings in relation to the dispute are on foot. Some legal systems provide for enforcement in a summary fashion if the parties and their counsel signed the settlement agreement and it contained a statement that the parties may seek summary enforcement of it. Settlement agreements may also be the subject of expedited enforcement if, for example, they have been notarized or formalized by a judge.

70. Article 14 of the UNCITRAL Model Law on International Commercial Conciliation<sup>43</sup> leaves the matter of enforcement to the applicable domestic law, allowing the States to implement a procedure for enforcement of settlement agreements. In line with this provision, the Working Group might wish to consider whether to address the matter of enforcing settlement agreements in conciliation, and if so, whether to discuss it in the form of rules, regulations, in a commentary or otherwise.<sup>44</sup>

71. In international commercial arbitration, foreign arbitral awards are recognized and enforced under the New York Convention. The New York Convention does not refer to the admissibility of electronic communications with regard to aspects of arbitration that are important regarding recognition and enforcement (e.g. the requirement that an arbitration agreement be in writing, and the formal requirements for the award to be submitted for recognition and enforcement).<sup>45</sup> Article II of the New York Convention provides that each Contracting State must recognize an agreement in writing under which the parties undertake to submit to arbitration a

<sup>43</sup> United Nations publication, Sales No. E.05.V.4.

<sup>44</sup> See also *Guide to Enactment of the UNCITRAL Model Law on International Commercial Conciliation*, paras. 87 to 92.

<sup>45</sup> This matter was addressed in the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (see para 74 below).

dispute. Article IV provides that a duly authenticated original or a duly certified copy of this agreement must be submitted when seeking recognition and enforcement of the arbitral award.

72. It should be noted that the Electronic Communications Convention includes in its article 20 a provision intended to clarify that electronic communications may also be used in connection with the formation or performance of contracts that are subject to certain Conventions, including the New York Convention. The Electronic Communications Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States (article 1). The reference to the New York Convention has been added in the list under article 20 of the Electronic Communications Convention in the interests of achieving some progress towards the objective of uniform interpretation of the written form requirement contained in article II(2) of the New York Convention. The inclusion of a reference to the New York Convention under article 20 of the Electronic Communications Convention is intended to provide a uniform definition of “writing”, a definition that is more consistent with developing technological practices in international commercial arbitration. It also seeks to provide a solution to the requirement under article IV, paragraph 1(b) of the New York Convention that an original agreement be supplied. However, that interpretation would prevail only in instances where the Electronic Communications Convention applies.

73. Further, it should be noted that the Commission also adopted, at its thirty-ninth session in 2006, a “Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958”.<sup>46</sup> The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II(2) of the New York Convention “recognizing that the circumstances described therein are not exhaustive”. In addition, the Recommendation encourages States to adopt the revised article 7 of the UNCITRAL Model Law on International Commercial Arbitration<sup>47</sup> (see below, para. 80). Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the “more favourable law provision” contained in article VII(1) of the New York Convention, the Recommendation clarifies that “any interested party” should be allowed “to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement”.

74. Article V(1)(a) of the New York Convention provides that recognition and enforcement of a foreign arbitral award may be refused if the arbitration agreement is not valid under the law of the country where the award was made (provided that the parties did not subject the arbitration agreement to any other law). Under

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<sup>46</sup> A/61/17, Annex 2

<sup>47</sup> United Nations publication, Sales No. E.08.V.4.

Article V(1)(d) of the New York Convention, recognition and enforcement may be refused if the composition of the arbitral authority or the arbitral procedure was not in accordance with the law of the country where the arbitration took place. The meaning of “the country where the award was made” and “the country where the arbitration took place” may be ambiguous in the case of online arbitration for the reasons discussed above in relation to the determination of the place of arbitration (see paras. 64-65 above).

75. Practical questions that may be raised in connection with the enforcement of awards include: whether the award is or should be issued in hard copy, duly signed and sealed by the arbitrators and/or the ODR provider, and sent to the parties; whether an electronic or scanned format of a hard copy bearing the necessary signatures and seals could be considered as duly authenticated; or whether any special rules should apply to the definition of due authentication of online arbitral awards. It also remains to be determined what a “copy” of an online arbitral award is and under what circumstances it is acceptable for recognition and enforcement. The Working Group may wish to consider whether the application of the enforcement mechanisms provided by the New York Convention should be regarded as an optimal solution for small value claims in the context of ODR. The Working Group may wish to further consider whether a specific system would need to be set up either to ensure enforcement of such claims or to avoid the need for enforcement altogether.

## **O. Applicable law**

76. Arbitrations are conducted under the applicable substantive and procedural laws that may be agreed upon by the parties or designated otherwise. An effective instrument on international ODR might address the issue of certainty as to the applicable law.

77. The parties may agree upon the applicable law in the contract at the time of the transaction. Such agreement is often embedded in the seller’s general terms and conditions applicable to the transaction. (In online sales transactions, in particular, buyers may be unaware of such clause despite accepting the applicable sales terms by clicking the corresponding button.) Conversely, the parties could agree upon the applicable law after the dispute arose. Consideration should also be given to whether and how mandatory laws and public policy considerations, for instance, regarding consumers, may apply in online arbitrations.

78. Absent the parties’ agreement, the applicable substantive law is generally designated by the private international law of the forum. In online arbitration, this may be problematic because the place of arbitration might be uncertain.<sup>48</sup> On the other hand, if the rules of arbitration or the parties’ agreement allows, the arbitrator may be granted a wide discretion to decide upon the applicable substantive law.

79. The parties may agree upon the applicable procedural rules in their contract at the time of the transaction in which case this set of rules applies. The parties may also defer such agreement until after the dispute arises, however, in online arbitrations in particular, there may be a risk that the parties would not be able to

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<sup>48</sup> See paragraph L. above on the place of arbitration.

communicate effectively given the existence of a dispute and the distance between the parties.

80. The arbitration law of the forum serves as background law for a number of procedural matters not governed by the rules agreed upon by the parties or designated by the arbitrator.

81. The Working Group may also wish to note that certain legislation on arbitration would be more favourable to the development of ODR. Concerning the UNCITRAL Model Law on International Commercial Arbitration, the original 1985 version of the provision on the definition and form of arbitration agreement (article 7) closely followed article II(2) of the New York Convention, which requires that an arbitration agreement be in writing. It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text. It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing”. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the UNCITRAL Model Law on Electronic Commerce and the Electronic Communications Convention. The second approach defines the arbitration agreement in a manner that omits any form requirement. Countries having adopted legislation reflecting the content of the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 would create an environment more favourable to the development of ODR.

## **P. Language of proceedings**

82. Determining the language of proceedings in ODR is crucial to success, since all variations of the ODR process are based on clear and efficient communication among the parties and the neutral. The language of the proceedings in B2B transactions may be determined by the parties but, for example, in B2C transactions, there may be mandatory laws which determine the language.

83. The language to be used may depend on several factors, such as the identity of the parties, the language of the disputed transaction, the language of the website where the transaction took place, or the language of the website administering ODR.

84. Parties may agree on the language before or after the dispute arises. In some online arbitrations, an arbitration agreement is included in the contract subject to the dispute. In online sales transactions, the general terms and conditions may contain such a clause.

85. Absent the parties' agreement, the language of the ODR may be determined through other means, including by reference to the terms and conditions of the underlying sales transaction, or the conditions laid down by the ODR provider. However, given the nature of ODR, party autonomy in this regard may be limited by the range of languages made available on the relevant ODR online platform.

86. The determination of the parties' location has an effect on the language of the proceeding. For instance, a party located in a country using English may get access to an ODR online platform in that language, while the language of the ODR online platform may differ for another party located in a country with a different language.

87. Article 6(4) of the Electronic Communications Convention, dealing with the location of the parties, specifies that the location of the equipment and of the supporting technology, or the place from which the information system is accessed, are not necessarily relevant for the determination of the party's place of business. Article 6(5) of that Convention introduces a similar rule with respect to the use of country-specific domain names or e-mail addresses. Such rules are particularly useful as mobility has made access to electronic communications ubiquitous, such that location of equipment may not be meaningful for the determination of the party's place of business.

## **Q. Costs and speed of proceedings**

88. The services of ODR providers may be offered either free of charge or for a fee. The issue of the cost of the process to parties may have an impact on their willingness to make use of it.

89. For complex cases in which the proceedings may involve online hearings in addition to written submissions, the parties may decide to use technologies other than, or in addition to, those provided by the ODR provider. Allocation of these related costs is another important factor to be considered by parties choosing ODR.

90. Research and experimentation with ODR indicate that the availability of dispute resolution which is faster than regular litigation or ADR may motivate parties to use ODR. If offered the opportunity to resolve their disputes without the need to travel and with the help of rapid electronic communications, parties may become more willing to embrace ODR. Since the speed of proceedings is a key motivating factor, it seems reasonable to consider tailoring the legal framework for ODR to promote this aspect.

## **V. Conclusion**

91. In order to remove paper-based obstacles in electronic transactions and to enhance legal certainty and commercial predictability where electronic communications are used, the regulating legal standard should give legal recognition to the fundamental principles of non-discrimination, functional equivalence, technological neutrality, party autonomy and geographical non-discrimination. These principles of electronic commerce incorporated in legislation for electronic transactions were developed for B2B transactions. It

should be noted by the Working Group that B2C transactions may require a special set of rules.

92. Development of a legal standard for online dispute resolution raises various issues for consideration, a number of which have been referred to in the foregoing paper. The Working Group may wish to consider the following matters in relation to its deliberations:

(a) Whether to recommend a set of generic rules of procedure for ODR, which rules might encompass the following aspects: consent to conciliate or arbitrate (see paras. 32-33 above); requirements for an arbitration agreement (see paras. 35-36 above); qualifications of conciliators and arbitrators; how conciliators and arbitrators are appointed (by the parties or otherwise) (see paras. 43-45 above); guidelines or a code of conduct for conciliators and arbitrators (see paras. 46-47 above); standardized phases of the ODR process including negotiation, conciliation and arbitration (see para. 20 above); submission of documents (see paras. 37-42 above); language of the proceedings (see paras. 82-87 above); making settlement agreements (see paras. 66-67 above); and expedited time limits for filing of documents and other matters related to costs and speed (see paras. 88-90 above);

(b) Whether there should be access to courts for review, and if so, to which courts and on what grounds (see paras. 68-75 above);

(c) How is the “place of arbitration” determined and what relevance does it have (see paras. 64-65 above);

(d) Ensuring security and confidentiality of communications and data, including preventing improper disclosure to parties outside the process (see paras. 48-49 above);

(e) Whether the legal standards dealing with ODR should incorporate existing standards on electronic signatures (see paras. 28-31 above);

(f) Principles applicable to the exchange of information electronically in the ODR process, including technological neutrality, non-discrimination and functional equivalence, as found in existing UN standards (see paras. 51-58 above);

(g) What form of hearing, if any, would be appropriate for ODR (see paras. 59-62 above);

(h) Recognition and enforcement of awards, in particular under the New York Convention, including: defining place of arbitration; requirement for the arbitration agreement to be in writing; written form and authentication of awards (see paras. 68-75 above); and

(i) Whether the applicable law should be the law of the vendor’s State, the purchaser’s, or some other law (see paras. 76-81 above).



## C. Report of the Working Group on Online Dispute Resolution on the work of its twenty-third session (New York, 23-27 May 2011)

(A/CN.9/721)

[Original: English]

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## I. Introduction

1. At its thirty-third session (New York, 12 June-7 July 2000), the Commission held a preliminary exchange of views on proposals to include online dispute resolution in its future work programme.<sup>1</sup> At its thirty-fourth<sup>2</sup> (Vienna, 25 June-13 July 2001) and thirty-fifth<sup>3</sup> (New York, 17-28 June 2002) sessions, the Commission decided that future work on electronic commerce would include further research and studies on the question of online dispute resolution and that Working Group II (Arbitration and Conciliation) would cooperate with Working Group IV (Electronic Commerce) with respect to possible future work in that area. At its thirty-ninth (New York, 19 June-7 July 2006) to forty-first (New York,

<sup>1</sup> *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 385.

<sup>2</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, paras. 287 and 311.

<sup>3</sup> *Ibid.*, *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, paras. 180 and 205.

16 June-3 July 2008) sessions, the Commission took note of suggestions that the issue of online dispute resolution should be maintained as an item for future work.<sup>4</sup>

2. At its forty-second session (Vienna, 29 June-17 July 2009), the Commission had heard a recommendation that a study should be prepared on possible future work on the subject of online dispute resolution in cross-border electronic commerce transactions, with a view to addressing the types of electronic commerce disputes that might be solved by online dispute resolution systems, the appropriateness of drafting procedural rules for online dispute resolution, the possibility or desirability to maintain a single database of certified online dispute resolution providers, and the issue of enforcement of awards made through the online dispute resolution process under the relevant international conventions.<sup>5</sup>

3. At its forty-third session (New York, 21 June-9 July 2010), the Commission had before it a note by the Secretariat on the issue of online dispute resolution which summarized the discussion at a colloquium organized jointly by the Secretariat, the Pace Institute of International Commercial Law and the Penn State Dickinson School of Law (A/CN.9/706).<sup>6</sup> The Commission also had before it a note from the Institute of International Commercial Law in support of possible future work by UNCITRAL in the field of online dispute resolution reproduced in document A/CN.9/710.

4. At that session, after discussion, the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions.<sup>7</sup> It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.

5. At its twenty-second session (Vienna, 13-17 December 2010), the Working Group commenced its work on the preparation of legal standards on online dispute resolution for cross-border electronic commerce transactions. The report of the Working Group on its twenty-second session can be found in document A/CN.9/716.

6. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.III/WP.106, paragraphs 5-13.

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<sup>4</sup> Ibid., *Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 183 and 186-187; *Sixty-second Session, Supplement No. 17 (A/62/17 (Part I))*, para. 177; and *Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 316.

<sup>5</sup> Ibid., *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 338, and A/CN.9/681/Add.2, para. 4.

<sup>6</sup> The Colloquium, entitled "A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant)" was held in Vienna, on 29 and 30 March 2010. Information about the colloquium is available at the date of this report at [www.uncitral.org/pdf/english/news/IICL\\_Bro\\_2010\\_v8.pdf](http://www.uncitral.org/pdf/english/news/IICL_Bro_2010_v8.pdf).

<sup>7</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

## II. Organization of the session

7. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-third session in New York, from 23 to 27 May 2011. The session was attended by representatives of the following States members of the Working Group: Benin, Brazil, Cameroon, Canada, Chile, Czech Republic, Egypt, France, Germany, Greece, Honduras, Iran (Islamic Republic of), Israel, Japan, Kenya, Malaysia, Mexico, Nigeria, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America, and Venezuela (Bolivarian Republic of).

8. The session was also attended by observers from the following States: Croatia, Ecuador, Indonesia, Iraq, Kuwait, Lebanon, Madagascar, Myanmar, Netherlands, Panama, and Peru.

9. The session was attended by observers from the following organizations of the United Nations System: United Nations Economic Commission for Africa (UNECA); and World Intellectual Property Organization (WIPO).

10. The session was attended by an observer from the following international intergovernmental organizations invited by the Commission: European Union.

11. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Bar Association (ABA), Asian-African Legal Consultative Organization (AALCO), Association for the Promotion of Arbitration in Africa (APAA), Association of the Bar of the City of New York (NYCBA), Center for International Legal Education (CILE), *Centre de Recherche en Droit Public* (CRDP), Chartered Institute of Arbitrators (CIARB), Construction Industry Arbitration Council (CIAC), Council of Bars and Law Societies of Europe (CCBE), Electronic Consumer Dispute Resolution (ECODIR), Forum for International Commercial Arbitration C.I.C (FICACIC), Institute of International Commercial Law (Penn State Dickinson School of Law), Inter-American Commercial Arbitration Commission (IACAC), Internet Bar Organization (IBO), International Institute for Conflict Prevention and Resolution (CPR), International Technology Law Association (ITECHLAW), Latin American E-Commerce Institute (ILCE), Madrid Court of Arbitration, National Center for Technology and Dispute Resolution (NCTDR), and Pace Institute of International Commercial Law.

12. The Working Group elected the following officers:

*Chairman:* Mr. Soo-geun OH (Republic of Korea)

*Rapporteur:* Ms. Roselyn AMADI (Kenya)

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.106); and

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.107).

14. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.
3. Adoption of the agenda.
4. Consideration of online dispute resolution for cross-border electronic commerce transactions: draft procedural rules.
5. Other business.
6. Adoption of the report.

### **III. Deliberations and decisions**

15. The Working Group continued its discussion on online dispute resolution (“ODR”) for cross-border electronic commerce transactions and considered draft procedural rules (“procedural rules”) on the basis of document A/CN.9/WG.III/WP.107. The deliberations and decisions of the Working Group on that topic are reflected in Chapter IV below.

### **IV. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules**

16. At the outset, it was recalled that the Working Group’s focus was on low-value, high-volume cross-border electronic commerce transactions and that ODR constituted a means of resolving disputes which differed from previous UNCITRAL standards on arbitration. It was further recalled that the work undertaken by the Working Group needed to be practical and realistic in order for it to be easily implemented in practice.

17. It was pointed out that the task of the Working Group was not to draft a new set of arbitration rules but to design a process that would satisfy the need for a rapid and inexpensive means of resolving disputes in an online environment. In that regard, it was said that the Working Group would have to consider how a new ODR system would differ from traditional dispute resolution mechanisms.

#### **A. General remarks (A/CN.9/WG.III/WP.107, paragraphs 5-8)**

18. The Working Group first engaged in a discussion of the appropriateness and applicability of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (“New York Convention”) to ODR cases leading to an arbitral award. It was recalled that the assumption had been made at the twenty-second session of the Working Group that the New York Convention would be applicable to enforcement of arbitral awards under ODR cases. One view was that ODR awards should be enforceable under the New York Convention but that consideration of the issue should be deferred until after the procedural rules had been dealt with. It was noted that any discussion of the involvement of the New York Convention must take account of the advice and deliberations of Working Group II (Arbitration and Conciliation).

19. The view was expressed that the issues of enforcement and the applicability of the New York Convention should be addressed before proceeding to discussion of the scope of application of the procedural rules. It was stated that which law would determine the legal validity of the agreement to settle disputes through the ODR process should be addressed as otherwise any decision resulting from that process might not be enforceable.
20. There were differing views as to whether the term “low-value” needed to be defined either now or at a later stage.
21. It was observed that the question of the “digital divide” should be addressed as some developing countries did not have extensive access to the Internet and might not be able to partake fully in an ODR system. It was also observed that electronic communication included mobile phones, which were widely used in a number of developing countries, particularly in Africa.
22. It was suggested that emerging technology might make videoconference hearings fast and inexpensive, even when compared to procedures that relied only on filing of documents, and the possibility for conducting hearings therefore might be contemplated by the procedural rules on an exceptional basis, although it was pointed out that the cost implications of holding hearings would have to be explored. For that reason and others, support was expressed for the view that the procedural rules should be forward-looking, and be able to accommodate any changes in technology and practice that might arise in the long-term future.
23. Another suggestion was to not force parties to go through all three stages contemplated in the procedural rules if they wanted, for example, to proceed speedily and go straight to final and binding decision by a neutral person.
24. It was suggested that the term “arbitrator” should be used instead of “neutral” and “award” instead of “decision” in the procedural rules, in order to accord with the terminology used in the New York Convention. A different view was that consideration of that terminology, since it was related to enforcement issues, should be deferred until enforcement was dealt with by the Working Group.
25. A question was raised as to the final form of the instrument to be produced by the Working Group, and at what stage that should be addressed. The Working Group agreed that that matter should remain open for discussion at a future session once deliberations had progressed sufficiently.
26. After discussion, the Working Group concluded that the form of the instruments to be developed by the Working Group could not be decided at that point. The possibility of developing a protocol to the New York Convention for the enforcement of ODR decisions was raised but it was considered premature to express opinion on the feasibility or the need of such instrument.

## **B. Notes on draft procedural rules (A/CN.9/WG.III/WP.107, paragraphs 5-63)**

### **1. Introductory rules (A/CN.9/WG.III/WP.107, draft articles 1-3)**

#### **Draft article 1 (Scope of application)**

##### *Paragraph (1)*

27. The Working Group first considered whether there needed to be a definition of the term “cross-border”, as it could be interpreted as referring to the location of a business or equipment and technology supporting an information system. In that regard, one suggestion was to use the approach of the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) (“Electronic Communications Convention”) Article 1 of which provided that the Electronic Communications Convention applied to “the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States”. Another suggestion was to reference the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Article 2 of which characterized a cross-border dispute as “one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party”.

28. The view was expressed that the term “cross-border” should be deleted, so that the procedural rules would be applicable to domestic transactions as well. In that regard, the point was made that it was often difficult for a consumer to discern whether he was entering into a transaction which was cross-border.

29. Another view was that the term “cross-border” should be retained as it was part of the mandate given to the Working Group by the Commission, it would be a necessary element in order to engage the New York Convention, and it emphasized the non face-to-face nature of the transactions which called for greater protection of the buyer. The view was also expressed that extending the application of ODR to domestic disputes would go beyond the mandate given by the Commission and, in any event, the scope could always be extended by users if they wished.

30. After discussion, it was decided to place the term “cross-border” in square brackets.

31. The Working Group next considered whether the scope of the procedural rules should be limited to transactions “conducted by the use of electronic means of communication”. It was suggested that that phrase was unclear, as for example when a transaction was initiated by telephone and a response was given in writing on paper; also that the present formulation made an unjustifiable difference between two types of purchase, as when the same product could be purchased in a shop or by downloading it from a website. In that context, attention was drawn to the definition of “electronic communication” provided in the procedural rules which drew from the definition contained in the Electronic Communications Convention. Under that definition, electronic communication had a broad meaning and included communication by fax, and conceivably by Voice over Internet Protocol (VoIP).

32. It was further suggested that it should be clarified that the phrase “conducted by the use of electronic means of communication” was referring to transactions and not to the means of dispute resolution.

33. The Working Group was reminded that its mandate from the Commission was to focus on “online dispute resolution relating to cross-border e-commerce transactions including business-to-business and business-to-consumer transactions”, and that the terms “cross-border” and “e-commerce transactions” therefore had a place in the deliberations of the Working Group.<sup>8</sup>

34. A proposal was made to add a paragraph after draft article 1, paragraph (1) along the following lines:

*“The parties may agree to enlarge the scope of application of the Rules to domestic disputes and to transactions conducted off-line, such as by way of paper-based documents.”*

35. A proposal was made that the existing wording of paragraph (1) should be kept, since it made no mention of business-to-business (“B2B”), business-to-consumer (“B2C”) or consumer-to-consumer (“C2C”) nor of “consumer” and “business”, and was thus open and flexible and did not raise problems relating to definition of the parties.

36. Another proposal was that reference to low-value, high-volume transactions be added to the paragraph. It was also proposed that a definition of “low-value” be provided.

37. There was broad agreement that C2C transactions should fall within the scope of the Working Group’s work and of the procedural rules. Reasons for that included: it was often difficult to distinguish a consumer from a business or to define what a “business” was; the large and growing volume of C2C transactions that gave rise to disputes; and the fact that C2C transactions generally conformed to the definition of low-value, high-volume transactions.

#### *Paragraph (2)*

38. It was suggested that the paragraph be reworded as follows:

*“The Rules apply where parties to an online transaction have agreed to submit to dispute resolution under these Rules all or any differences involving the sale of goods or provision of services provided that it meets other requirements under these Rules.”*

39. The question was raised whether a case that had been brought to ODR could subsequently be re-litigated in a court as a claim, particularly since the court might view the processes under ODR as being less thorough than those available in the court.

40. Another issue was raised as to whether the paragraph should clarify which phases of dispute settlement were being agreed to by the parties when they agreed to application of the procedural rules.

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<sup>8</sup> Ibid., *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

41. With respect to the bracketed text at the end of the paragraph i.e. “[*subject to the right of the buyer to pursue other forms of redress*]”, it was suggested that that text be deleted since, inter alia, it called into question both the buyer’s decision to accept arbitration and the applicability of the New York Convention which, it was said, provided that agreements to arbitrate were binding. In response, the view was expressed that the language of New York Convention Article II (1) left open the question of whether in some States disputes relating to consumers were capable of settlement by arbitration, and thus whether the New York Convention would apply.

42. It was pointed out that a study was to be produced by the Secretariat at a future session on the question of enforceability of awards under the New York Convention to disputes involving consumers.

43. Another view was that the bracketed text should be retained, as it referred to situations where pre-dispute binding agreements to arbitrate might not be binding upon consumers and thus where one party might be bound by the agreement on dispute resolution and the other not. Yet another view was that the bracketed text be retained because most consumers would choose to proceed by way of ODR rather than the costly and less attractive route of litigation in the courts.

44. Yet another view was that the bracketed text be replaced with language emphasizing the buyer’s right to receive adequate notice of the dispute resolution process he was entering into, on the assumption that the process the Working Group was being asked to devise would be one that was fair to all parties.

45. It was said that, if the bracketed text remained it would give a buyer the right to object to the jurisdiction of the neutral, contradicting draft article 8, paragraph (4) of the procedural rules, which provided that the neutral might rule on his own jurisdiction.

46. One suggestion was to replace the bracketed text in draft article 1, paragraph (2) with the following:

*“The Rules apply without prejudice to the rules of international treaties and of national applicable law which could not be derogated from by agreement of the parties, inter alia those rules that are aimed at protection of consumers.”*

47. The consensus was that in order to achieve a balance in the provision, “*buyer*” should be replaced with “*parties*” in the bracketed text.

48. There was support for a suggestion to replace the bracketed text with language indicating a time limit, for example six months, within which claims must be initiated by way of ODR. A contrary view was that time limits of that sort should be left to be dealt with by national law. It was also observed that such a time limit could unduly prolong resolution of disputes by giving a buyer an option to resort to the courts after the expiry of the time limit.

49. After discussion, it was decided that in the absence of consensus on modifying draft article 1, paragraph (2) the text should remain as is for now, with the various suggested changes being noted for future consideration.



*Paragraph (3)*

50. With respect to draft article 1, paragraph (3), the following proposals were made:

(a) Several delegations expressed the view that paragraph (3) should be deleted, on the grounds that it was not practicable to devise a fully exhaustive list of matters to be excluded from ODR and that, in any event, the parties should be free to choose whether to apply the procedural rules to their particular dispute. In that regard it was suggested to amend paragraph (1) to be more specific as to the nature of the claims to be covered, referring to the mandate from the Commission and including reference to low-value, high-volume transactions.

(b) A contrary view was that certain matters needed to be excluded from the operation of the procedural rules so that they retained their focus of dealing with low-value, high-volume cross-border electronic commerce transactions, and to exclude from the system complex cases that might have lengthy or difficult procedural issues: examples were given of claims against financial institutions, intellectual property cases or those dealing with personal injury.

(c) Another approach was suggested, which was to define what types of claims fell within the scope of the procedural rules rather than those that fell outside them.

51. It was concluded that paragraph (3) should be deleted while at the same time paragraph (1) should be amended to provide greater detail as to claims to be covered by the procedural rules. The Working Group requested the Secretariat to reformulate the text taking into account the suggestions made, for consideration at a future session.

*Paragraph (4)*

52. There was broad support for a proposal to replace the current wording of paragraph (4) with the following:

*“The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents which are attached to these Rules as Annexes and form part of these Rules:”*

*“(a) Substantive legal principles for deciding cases;”*

*“(b) Guidelines for ODR providers and arbitrators;”*

*“(c) Minimum requirements for ODR providers and arbitrators, including common communication standards and formats and also including accreditation and quality control; and”*

*“(d) Cross-border enforcement mechanism.”*

53. A question was however raised as to whether it was appropriate to refer to such matters in the text of the procedural rules themselves, or whether these provisions should appear elsewhere including in the ODR arbitration clause in the contract. The point was made that any additional provisions must be brought clearly to the attention of consumers.

54. In response to a question as to the words “the Rules are only one element in a framework to be designed for an ODR system to be effective” (A/CN.9/WG.III/WP.107, para. 13), it was explained by reference, inter alia, to paragraphs 21 and 115(a) of the Report of the Working Group III on the work of its twenty-second session (A/CN.9/716) that the documents to be prepared for the Working Group’s consideration included procedural rules; standards for ODR providers; substantive legal principles, including equitable principles, for resolving disputes; and a cross-border enforcement mechanism.

55. It was further suggested that a paragraph be added, which would provide that any supplemental rules for ODR providers should be in conformity with the procedural rules, as follows: “*Any supplemental rules must conform to these Rules*”. There was broad support for that suggestion and it was concluded that such a paragraph should be placed in square brackets pending agreement on its final wording and its location in the procedural rules.

56. There was broad support for a proposal to add two new paragraphs to draft article 1, the first of which would read as follows:

*“Where the parties have agreed to submit to dispute resolution under these Rules as one of the terms of the online transaction or before the dispute arises, the Rules apply only if the buyer was given clear and adequate notice of the agreement to arbitrate.”*

57. It was suggested that the proposed new paragraph be placed in square brackets and that the concept of clear and adequate notice to the buyer required more precise definition.

58. The second proposed new paragraph would read as follows:

*“As a condition to using the Rules the seller must list its contact information.”*

59. It was suggested that the proposed new paragraph become draft article 3, paragraph (2) and that buyers should also be required to give their contact information.

60. As to both proposed new paragraphs, it was suggested that they be moved to a separate article, possibly draft article 1 bis, as they were not properly part of the scope of application. It was questioned whether use of the terms “buyer” and “seller” was appropriate in the context of the procedural rules.

61. It was concluded that the suggested new paragraphs be placed in square brackets in draft article 1, pending discussion at a future session on where they should be located, and that consideration of the appropriateness of the terms “buyer” and “seller” be deferred for further discussion at a later time.

## **Draft article 2 (Definitions)**

### *Paragraph (3)*

62. There was a suggestion to delete “telegram” and “telex” from the list of means of communication, and to add other communication methods such as Short Message Service (SMS).

*Paragraph (4)*

63. Reference was made to a working assumption that ODR was a process in three phases and that draft article 7 did not involve the appointment of an arbitrator but rather was a phase akin to conciliation, and therefore, the neutral acting under draft article 7 could not be the same person as the one acting under draft article 8. It was also observed that a neutral acting under draft article 8 might need to have legal expertise to fulfil that role.

64. It was suggested that the objectivity of the neutral could be challenged during his conduct of ODR proceedings on the basis of his having been involved at the point of facilitated settlement.

65. Another view was that there was no conflict where the neutral dealing with facilitated settlement under draft article 7 was the same individual conducting ODR proceedings pursuant to draft article 8.

66. There was support for the notion that an arbitrator in appropriate circumstances could explore with the parties possibilities for settlement as envisaged in draft article 7, and that with the agreement of the parties, such a combined procedure could be possible. However, a concern was raised as to whether the same person could oversee facilitated settlement and subsequently be an arbitrator, in light of the fact that he might have received confidential information from the parties which might compromise his impartiality.

67. On the question of possible mingling of the roles of arbitrator and conciliator, reference was made to paragraph 47 of the UNCITRAL Notes on Organizing Arbitral Proceedings and article 12 of the UNCITRAL Model Law on International Commercial Conciliation (2002). It was noted that in general the position of UNCITRAL had been to provide a default rule separating the role of conciliator and arbitrator and recognizing the discretion of the parties otherwise to agree. While there was no prohibition on, or an attempt to discourage, an arbitrator exploring the possibilities for conciliation, the key was that parties needed to know that the roles of arbitrator and conciliator differed and to express their consent on the dispute settlement method to be applied. The matter was therefore open for discussion by the Working Group, bearing in mind the need to be clear on the intent of the parties.

68. There were suggestions that, given the cost associated with an arbitration stage, it might be necessary to impose an extra fee on users in the event they would proceed to that stage.

69. The point was made that ODR procedural rules might be different from arbitration rules and further that it was important to emphasise the consensual aspects of the ODR process since most cases were resolved at that stage.

*Paragraph (7)*

70. The question was posed as to the function of an ODR platform and whether it was essentially a communication channel or a mail box. In response, it was said that an ODR platform was more than just an e-mail inbox, but rather was an interconnected software application operating under common protocol.

71. A proposal was made to amend the definition of ODR platform as follows:

*“ODR platform means an online dispute resolution system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications in order to manage and resolve cases.”*

72. Another proposal was made to indicate that ODR provider might be defined as “one or more entities”.

*Paragraph (8)*

73. A proposal was made to amend the definition of ODR provider as follows:

*“‘ODR provider’ means an entity that operates within or under the overall ODR platform and administers ODR processes in accordance with these Rules.”*

74. It was pointed out that further discussion of the concepts of ODR platform and ODR provider would assist the Working Group in understanding the definitions.

*Paragraph (9)*

75. A question was raised as to whether “cherry-picking” by ODR providers and by users of the system (meaning choosing to offer services in respect of, or to make use of, particular phases of the process) should be permitted.

76. One view was that “cherry-picking” by users of the system should be discouraged as it would render the process less effective.

77. Another view was that dealing with the procedural rules as a single integrated package was seen as fulfilling the goal of simplicity.

78. Several issues were noted relating to the definition of ODR:

(a) That there were broadly two parts to ODR, consensual and mandatory, and the procedural rules should make it clear when there was a transition from one to the other; it should be clear to all parties when they were in the mandatory part;

(b) In that regard, there might need to be a different rule on commencement referable to each phase of the ODR process;

(c) Whether information from the facilitated settlement stage should be made known to the neutral at the arbitration stage;

(d) That a more detailed arbitration procedure might be needed in order to ensure enforceability.

79. There was support for the view that it was important to have arbitration as an end stage as that would motivate sellers to resolve disputes early in the process.

80. Several delegations indicated that ODR was emerging as a two-stage process, first a consensual stage followed, where necessary, by arbitration. The Working Group would need to consider the appropriate way to design a system that incorporated these phases, bearing in mind that arbitration within the ODR process was a quite distinct phase.

81. After discussion, it was agreed to proceed with consideration of the procedural rules as a single package applying to all phases, bearing in mind that particular variations might be needed as the Working Group examined each particular phase.

82. With respect to draft article 2, it was agreed that the Working Group would continue its consideration of the definitions therein at a future session.

### **Draft article 3 (Communications)**

#### *Paragraph (1)*

83. After discussion, the Working Group approved draft article 3, paragraph (1) in substance, without any change.

#### *Paragraph (2)*

84. It was suggested that the current paragraph be divided into two separate paragraphs, as follows:

*“The designated electronic addresses of the respondent for the purpose of all communications arising under the Rules shall be those which the respondent notified to the ODR provider or ODR platform when accepting these Rules or any changes notified during the ODR proceeding.”*

*“The designated electronic addresses of the claimant for the purpose of all communications arising under the Rules shall be those set out in the notice of ODR (“the notice”), unless the claimant notifies the ODR provider or ODR platform otherwise.”*

85. There was broad support for the division of draft article 3, paragraph (2) into two paragraphs and the rewording as proposed, though a view was expressed that the original wording should remain. A suggestion was made to reverse the order of the paragraphs from that proposal.

86. The issue was raised of the requirement in some States that consumers showed they had made a non-judicial attempt to resolve their case before they might approach the national courts. It was suggested that where the respondent did not respond to the notice, the ODR provider could certify that the claimant had indeed attempted to deal with the case by way of ODR, and that such certification would assist the consumer to satisfy such a requirement.

#### *Paragraph (3) and paragraph (4)*

87. There was support for a suggestion to combine draft article 3, paragraphs (3) and (4) into a single paragraph. The Working Group requested the Secretariat to reformulate the text, taking into account the suggestions made, for consideration at a future session.

88. One delegation raised the issue of the need for a rule requiring proof of service of the claim in cases where a default judgment was sought and the buyer was the respondent.

89. There was support for a proposal to make the following further addition to draft article 3:

*“The ODR provider shall communicate acknowledgements of receipt of electronic communications from any party to all other parties at their designated electronic addresses.”*

## **2. Commencement (A/CN.9/WG.III/WP.107, draft article 4)**

### **Draft article 4 (Commencement)**

90. A question arose as to whether a claimant might choose to enter the ODR process at a phase of his choosing and, if so, at what point did he make that choice. It was also asked whether an ODR provider could offer services in respect of only some of the phases of the ODR process.

91. It was proposed that in drafting of the procedural rules, regard should be had to inequality of bargaining power between parties and the risk of the stronger party imposing a dispute resolution system on the weaker party.

92. It was suggested that the following four principles were important in designing the ODR system:

(a) Arbitral decisions must be binding on the parties, to ensure effective enforcement;

(b) When being offered a choice to accept the procedural rules, whether pre- or post-dispute, buyers must be given a separate, clear and adequate notice about ODR;

(c) Online sellers should be obliged to implement the decisions, and should have the right to bring claims against non-paying buyers;

(d) Rules or guidelines should set out best practices for providing online notices to the parties, and adequate measures should be devised to ensure that claims would be brought to responding parties' attention.

93. Emphasis was also placed on the importance of ensuring that the procedural rules were relevant to the situation in developing countries, where small and medium enterprises lacking financial literacy might be claimants, and where in the absence of effective judicial remedies, ODR might be the only option available to such claimants.

94. One means identified to encourage sellers to honour their obligations to implement ODR outcomes was publication of their failure to do so.

### *Paragraph (1)*

95. Support was voiced for addition to the procedural rules of a paragraph as follows and to place it at the end of paragraph (1) of draft article 3:

*“The ODR provider shall communicate acknowledgment of receipt of communications from the parties [and the neutral] to their designated electronic addresses.”*

96. It was suggested that the ODR provider also acknowledged the date and time of the receipt of communications.

97. A clarification was made that notification to the parties of the availability of the content of communications by the parties or the neutral did not mean that the contents of such communications were being disclosed.

98. It was further suggested that any material accompanying the procedural rules should include reference to the obligation of the parties to regularly check the ODR platform regarding the status of their case in the ODR proceedings.

99. Following a discussion of the necessity of referring in that draft article to a specified standard time, such as Greenwich Mean Time, it was decided to provide in any material accompanying the procedural rules that time should be construed liberally in the procedural rules to ensure fairness to both parties, and that ODR providers might make their own procedural rules with regard to time so long as they would not be inconsistent with the generic rules.

100. It was suggested that matters of calculation of time and acknowledgment of receipt of electronic communications could be handled at the ODR platform by the use of technical means.

101. The importance of language in the submission of documents was widely recognized and acknowledged, particularly with regard to submission of evidence and claims by buyers. In response, it was suggested that language might not pose a problem in practice in that regard since evidence and the claim would usually be in the language of the original contract, and in any event ODR platforms would have technology to assist in resolving language issues by using codes which allowed simultaneous access in various languages.

102. A suggestion was made that there might need to be a limit placed on the number of documents that could be submitted by a party, in order to avoid overloading the ODR platform.

#### *Paragraph (2)*

103. In response to a concern that the term “*promptly*” required further definition, it was pointed out that that was already a defined term in several UNCITRAL instruments. There was wide support for keeping that expression.

104. There was general agreement to a proposal to amend the wording of the paragraph by inserting the words “*by the ODR platform*” after the word “*communicated*”.

#### *Paragraph (3)*

105. There was general agreement to a proposal to amend the wording of the paragraph by inserting the words “*to the ODR platform*” after the word “*communicate*” in the first line of the paragraph.

106. Concern was expressed that the proposed five day deadline for filing a response might be too short.

#### *Paragraph (4)*

107. A question was raised as to the appropriateness of that formulation for time of commencement, namely how it could be said that ODR proceedings had

commenced before both parties had signified their agreement to participate in ODR proceedings.

*Annex A (b)*

108. It was said that careful consideration should be given to any data protection or privacy issues and online security in the context of communicating information relating to the parties in the course of ODR proceedings.

*Annex A (c) and Annex A (d)*

109. The Working Group was reminded of the importance of giving consideration to simplifying the grounds for claims, and the remedies available, in order to ensure that ODR was quick and efficient.

*Annex A (e)*

110. A proposal was made to improve the text by indicating that the signatures of the parties could be by way of any form of electronic authentication. One suggestion was that there was no need for a signature of the claimant.

*Annex A (f)*

111. Several delegations questioned the necessity for the parties to acknowledge their agreement to participate in ODR (for example, by click-wrap agreement) where the parties had a pre-existing agreement to proceed by way of ODR. In response, it was noted that there might be no pre-existing agreement, or that clicking to agree meant that the parties were agreeing to the use of a specific ODR provider.

112. It was noted that there might be multiple ODR providers and that such an agreement could signify agreement to use a particular provider.

113. It was pointed out that if the ODR process was to be binding and thus engage the application of the New York Convention, then there would have to be clear notice to the respondent that proceedings had been initiated.

114. It was decided that the question of the parties agreeing to participate in ODR proceedings upon the filing of a notice or response required further deliberation, taking into account the various scenarios, including where there was already in place a pre-dispute agreement between the parties to use ODR, and where there was no such pre-dispute agreement. The situation where a respondent refused to agree to ODR, and the situation where the response of the respondent to the claim constituted an agreement to ODR, were also said to require further deliberation.

115. There was a proposal to modify the language of annex A (f) as follows, and to place in square brackets the proposed language, pending the deliberations of the Working Group on the issue of pre-dispute binding agreements to participate in ODR:

*“[(f) statement that the claimant agrees or, where applicable has agreed (for example in a pre-dispute arbitration agreement) to participate in ODR proceedings]”*



*Annex B (d)*

116. There was a proposal to modify the language of annex B (d) as follows, and to place in square brackets the proposed language, pending the deliberations of the Working Group on the issue of pre-dispute binding agreements to participate in ODR:

*“[(d) statement that the respondent agrees, or where applicable has agreed (for example in a pre-dispute arbitration agreement) to participate in ODR proceedings]”*

*Annex B (e)*

117. Several delegations stated that in addition to the electronic signature, any other form of electronic authentication should also be permitted.

118. A new paragraph (5) for draft article 5 was proposed, dealing with the issue of counterclaims as follows:

*[“If a party initiates its claim in response to a claim initiated by the other party (“counter-claim”), such a claim must be initiated with the same ODR provider regarding the same disputed transaction as the first claim not later than [5] days after the notice of the first claim is sent to such party. The counter-claim shall be decided by the arbitrator appointed to decide the first claim.”]*

119. Another proposal was made to include the following:

*“[If the respondent has a counter-claim, he must specifically state thereafter what he hopes to obtain.]”*

120. It was proposed to add a new annex (annex C) dealing with counterclaims and comprising the matters set out in paragraphs (c) (d) and (h) of annex A.

121. The following issues were raised regarding counterclaims:

(a) whether claims and counterclaims would be handled by the same provider and the same neutral;

(b) who decided whether a response constituted a counterclaim;

(c) what measures were needed to ensure that counterclaims were dealt with in the same proceeding and not as claims in separate proceedings.

122. In order to prevent multiplicity of proceedings relating to the same dispute, it was suggested that annex A (g) together with a companion provision in annex B could assist in that regard.

### **3. Negotiation (A/CN.9/WG.III/WP.107, draft article 5)**

#### **Draft article 5 (Negotiation)**

123. One view was that draft article 5 should address the consequences of various possible scenarios of negotiation between the parties. In response, it was noted that the current language of draft article 5 addressed those matters in a simple and satisfactory manner.

124. Several questions were raised with regard to draft article 5:

- (a) if one party refused take part in negotiation, at what point could the other party force a move to the facilitated settlement stage?
- (b) how in practice was a negotiated agreement to be carried out?
- (c) how was the move from negotiation to the facilitated settlement phase triggered?

125. An issue was raised as to whether the procedural rules were intended to be mandatory or to be used at the option of the parties; if mandatory, then it was urged that the procedural rules be kept at an abstract level and flexible, in order to facilitate ease of participation by a range of ODR providers who might employ various technologies.

*Paragraph (1)*

126. It was illustrated that automated software was an important factor in the speedy handling of large volumes of cases. The observation was made that negotiation was an automated ODR stage where the “fourth party” was technology, and that systems using such technology had proven highly successful in resolving a large percentage of the cases submitted to them.

127. Several proposals were made regarding paragraph (1):

- (a) to replace “*If the respondent responds to the notice and accepts one of the solutions proposed by the claimant,*” with “*If settlement is reached*”;
- (b) to add “*automatically*”, so that the phrase read “*the ODR proceeding is automatically terminated*”;
- (c) to add “*This solution shall be binding on the parties*”;
- (d) to replace paragraph 1 with “*If the parties reach an agreement, they shall communicate it to the ODR provider, in which case the ODR platform will automatically generate an agreement form recording the settlement*”.

128. It was noted that in some States a case was only regarded as concluded when the agreement or decision had been implemented. It was suggested that one option for a claimant whose agreement had not been implemented was to resubmit his claim and proceed to request a decision by a neutral.

129. The importance of maintaining simple language, accessible to non-lawyers, was stressed.

130. After discussion, it was concluded that draft article 5, paragraph (1) would be modified to take into account that negotiation was terminated when the settlement had been implemented.

*Paragraph (2)*

131. Several proposals were made regarding paragraph (2):

- (a) that draft article 5, paragraph (2) should be replaced by: “*[If the parties have not settled their dispute by negotiation within 10 days of the response, then either party may request ...]*”;

(b) that “*if none of the solutions proposed by the party are accepted by the other party*” be replaced by “[*If the parties have not reached an agreement*]”;

(c) that the following be added after paragraph (2): “*Either party could object, within [3] days from receiving the notice of appointment of the arbitrator, to providing the arbitrator with information generated during the negotiation stage*”;

(d) to change “*If none of the solutions proposed by the party are accepted by the other party*” to “*If no settlement is reached*”.

*Paragraph (3)*

132. It was suggested that the term “five (5) days” should be put into square brackets and considered at a later stage. It was further suggested that it might be appropriate to leave such time limits to the discretion of individual ODR providers. Concern was expressed that paragraph (3) as currently drafted could result in consumers, when they were respondents, being forced into facilitated settlement or arbitration.

133. It was further suggested to insert the words “and arbitration” between the words “settlement” and “stage” in draft article 5, paragraph (3).

**4. Facilitated settlement and arbitration (A/CN.9/WG.III/WP.107, draft articles 6-12)**

134. It was suggested to put square brackets around the words “Facilitated settlement and arbitration” which appeared before draft article 6.

**a. Appointment of neutral (A/CN.9/WG.III/WP.107, draft article 6)**

**Draft article 6 (Appointment of neutral)**

*Paragraph (1)*

135. Discussion on paragraph (1) included:

- (a) It was agreed to delete the word random;
- (b) That the process for appointment of the neutral should be set out in detail;
- (c) That common minimum criteria for appointment of neutrals by ODR providers should be set out in a separate document.

*Paragraph (2)*

136. Comments on paragraph (2) included:

- (a) That the neutral should be required to positively declare his independence;
- (b) That the meaning of impartiality of the neutral be set out in a separate document.

*Paragraph (4)*

137. Comments on paragraph (4) included:

(a) That the ODR provider should be required to give reasons for disregarding a party's objection to a neutral;

(b) To simplify the objection process, by providing for automatic disqualification of a neutral when a party objects, with a possible limit to prevent repeated objections made in bad faith.

138. After discussion, it was generally agreed that any objection regarding the appointment of the neutral should be dealt with in a straightforward manner and should not open the possibility of providing comments or reasons for objecting.

## **V. Future work**

139. It was noted that while some draft articles had been considered in the current Working Group session, the document as a whole would be further considered at the subsequent session and that its current structure should be maintained pending the outcome of those considerations.

140. The Working Group requested the Secretariat, subject to availability of resources, to prepare documentation for its next session addressing the following issues:

- (a) Guidelines for neutrals;
- (b) Minimum standards for ODR providers;
- (c) Substantive legal principles for resolving disputes; and
- (d) A cross-border enforcement mechanism.

141. The Working Group requested the Secretariat to prepare a new draft of the procedural rules taking into account the views expressed by the Working Group at the current session.

142. The Working Group noted that its twenty-fourth session was scheduled to take place in Vienna from 14 to 18 November 2011.

**D. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, submitted to the Working Group on Online Dispute Resolution at its twenty-third session**

**(A/CN.9/WG.III/WP.107)**

**[Original: English]**

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## **I. Introduction**

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions. It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.<sup>1</sup>

2. At its twenty-second session (Vienna, 13-17 December 2010), the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat, subject to availability of resources, prepare draft generic procedural rules for ODR, including taking into account that the types of claims with which ODR would deal should be B2B and B2C cross-border low-value, high-volume transactions (A/CN.9/716, para. 115).

<sup>1</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), para. 257.*

3. At that session, the Working Group also requested the Secretariat to list available information regarding ODR known to the Secretariat with references to websites or other sources where they may be found (A/CN.9/716, para. 115). The Working Group may wish to note that that list is now available on the UNCITRAL website.<sup>2</sup>

4. This note contains an annotated draft of procedural rules, based on the deliberations of the Working Group at its twenty-second session.

## **II. Online dispute resolution for cross-border electronic transactions: draft procedural rules**

### **A. General remarks**

5. At the twenty-second session of the Working Group, the view was generally shared that there was an absence of an agreed international standard on ODR, and that a need existed to address in a practical way disputes arising from the many low-value transactions, both B2B and B2C, which were occurring in very high-volumes worldwide and required a dispute resolution response that was rapid, effective and inexpensive. The view was also expressed that enforcement of awards cross-border was difficult if not impossible in light of the lack of treaties providing expressly for cross-border enforcement of awards in B2C transactions (A/CN.9/716, para. 16). Issues raised included: how a global ODR system would be funded (and indeed whether States would be willing to fund it); and, in the context of enforcement and the validity of the arbitration agreement, whether the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was appropriate and applicable to those ODR cases leading to an arbitral award, as they dealt with disputes involving consumers. Reference was made to treaty obligations under the New York Convention (A/CN.9/716, para. 23).

6. The present note contains draft fast-track procedural rules that could be used as a model by ODR providers, and does not address the question of enforcement of decisions made in the context of ODR. The Working Group may wish to note that the draft procedural rules have been drafted in a generic manner, so as to apply to B2B and B2C transactions, provided that those transactions have the common feature of being low-value. This is in line with the mandate of the Commission that work on that topic should focus on ODR relating to cross-border e-commerce transactions, including B2B and B2C transactions (see above, para. 1).<sup>3</sup>

7. Taking into account the decision of the Working Group at its twenty-second session to formulate simple, user-friendly generic rules that reflect the low-value of claims involved, the need for a speedy procedure, and that emphasize conciliation since the majority of cases are resolved at that stage (A/CN.9/716, para. 55), the draft procedural rules have the following characteristics:

(a) They include a negotiation phase, followed by a phase of facilitated settlement and, if that second phase is inconclusive, by a final and binding decision

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<sup>2</sup> [www.uncitral.org/uncitral/en/publications/online\\_resources\\_ODR.html](http://www.uncitral.org/uncitral/en/publications/online_resources_ODR.html).

<sup>3</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

by a neutral person. To take account of the need for a speedy procedure, the neutral appointed by the ODR provider handles both phases of facilitated settlement and arbitration; the term “neutral” has been chosen to encompass both possible functions;

(b) It is proposed that, unless otherwise decided by the parties, disputes are handled by a sole neutral, who is selected by the ODR provider and not the parties, although the parties can challenge the choice of the neutral through a simplified procedure; and

(c) There would not be any hearing, as the procedure is based on documents filed online.

8. Subjects for further consideration by the Working Group include the general legal framework in which those rules should come into operation (see below, paras. 13-14), as well as the question of arbitrability (see below, para. 12).

## B. Notes on draft procedural rules

### 1. Introductory rules

#### 9. Draft article 1 (Scope of application)

*“1. UNCITRAL online dispute resolution rules for cross-border electronic transactions (“the Rules”) shall be used for the settlement of disputes arising from any cross-border transactions, conducted by the use of electronic means of communication.*

*“2. The Rules apply where parties to an online transaction have agreed that disputes in relation to that transaction shall be referred for settlement under the Rules[, subject to the right of the buyer to pursue other forms of redress].*

*“3. The Rules do not apply to transactions relating to any of the following:*

*(a) [...];*

*(b) [...];*

*(c) [...];*

*...*

*“4. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of [...].”*

*Remarks*

*Paragraph (2)*

10. The Working Group may wish to consider whether there ought to be a limitation period within which claims must be brought, or whether that matter should be left to relevant applicable laws. In some proposed ODR rules, the claimant is required to initiate ODR proceedings within six months of paying for the purchase (Article 4 of Annex A to Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers submitted by the United States of America for Organization of American States (OAS) Seventh

Inter-American Specialized Conference on Private International Law (“OAS/ODR Proposal”).

11. The Working Group may wish to consider how the agreement to arbitrate would materialize. In that regard, it could be suggested to provide instructions for the ODR provider to include in its ODR platform an “OK-box” (click-wrap agreement) or other electronic means whereby the parties agree to the application of the Rules to their dispute.

*Paragraph (3)*

12. The Working Group may wish to consider whether the Rules should define the types of claims to which they apply (i.e. sale of goods) or whether they should contain a limitation of their scope (A/CN.9/716, para. 47). Some existing ODR rules and proposals have adopted the approach that certain types of disputes will be so excluded. Generally, these refer to disputes which raise issues of bodily injury, family law, taxation or intellectual property (Article 1(2) of Electronic Consumer Dispute Resolution (ECODIR) Rules), and disputes related to privacy violations, intellectual property, other claims arising in tort, or claims for indirect and consequential loss (Article 2 of OAS/ODR Proposal).

*Paragraph (4)*

13. Paragraph (4) seeks to clarify that the Rules are only one element in a framework to be designed for an ODR system to be effective. At its twenty-second session, the Working Group requested the Secretariat to provide for a future meeting a document setting out principles and issues involved in the design of an ODR system (A/CN.9/716, para. 115(b)).

14. The Working Group may wish to note that the Internet Corporation for Assigned Names and Numbers (ICANN) Uniform Domain Name Dispute Resolution Policy (UDRP) system allows for providers to adopt “Supplemental Rules”, consistent with UDRP Rules, covering such matters as fees, guidelines on word and page limits of submissions, file size and other format modalities, the means of communicating with the provider and the neutral (UDRP Article 1) or for any other matters not already covered by the UDRP Rules. In this regard, the Working Group may wish to consider whether such separate and additional rule or guideline may be useful to and complement the current work. In the event the Working Group finds it useful, it may also wish to consider the nature of such a document. For the purposes of this Note, reference will be made to guidelines for ODR providers (“Guidelines for ODR providers”) where clarification of the procedural rules in view of technical and design aspects of the ODR platform are needed and where it would complement these rules.

**15. Draft article 2 (Definitions)**

*“For purposes of these Rules:*

*“1. “claimant” means any party initiating ODR proceedings under the Rules by issuing a notice;*

*“2. “communication” means any statement, declaration, demand, notice, response, submission, notification or request that the parties are required to make in connection with ODR;*



“3. “electronic communication” means any communication that the parties make by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex, or telecopy;

“4. “neutral” means an individual that assists the parties in settling the dispute and/or renders a [decision][award] regarding the dispute in accordance with the Rules;

“5. “respondent” means the party to whom the notice is directed;

“6. “ODR” means online dispute resolution which is a system for resolving [cross-border] disputes where the [procedural aspects of the dispute resolution mechanisms are][procedure for dispute resolution is] conducted and facilitated through the use of electronic communications and other information and communication technology;

“7. “ODR platform” means an online dispute resolution platform which is a system for generating, sending, receiving, storing or otherwise processing electronic communications used in ODR;

“8. “ODR provider” means an online dispute resolution provide which is an entity that administers ODR proceeding and provides an ODR platform for the parties to resolve their disputes in accordance with these Rules;

“9. “ODR proceedings” means an online dispute resolution proceedings which are ...;

“[...]

#### Remarks

##### Paragraph (2)

16. The definition of “communication” is derived from an equivalent in article 4(a) of United Nations Convention on the Use of Electronic Communications in International Contracts adopted in 2005 (Electronic Communications Convention), where it is confined to use of electronic communications in connection with the formation or performance of a contract between parties.

##### Paragraph (3)

17. The definition of “electronic communication” is derived from articles 4(b) and 4(c) of the Electronic Communications Convention and article 2(a) of the UNCITRAL Model Law on Electronic Commerce (MLEC) adopted in 1996 (with additional article 5 bis adopted in 1998). That definition refers to “electronic mail, telegram, telex, or telecopy”. Since the adoption of the MLEC, other technological innovations have emerged, and therefore the Working Group may wish to consider whether the provision should be amended to include short message services (SMS), Web-conferences, online chats, Internet forums, microblogging, and other information and communication technologies as examples of electronic communications. The Working Group may also wish to consider whether a more abstract and technology-neutral concept, such as “digitized communications” might be used instead of “electronic communications”.

*Paragraph (6)*

18. At its twenty-second session, the Working Group agreed that consideration of a definition of ODR could usefully be deferred to a later point in the discussion, when the components of the concept had been more fully elaborated (A/CN.9/716, para. 40). It was also suggested that the definition of ODR be limited to instances where procedural aspects of a case are conducted online (A/CN.9/716, para. 35). The Working Group may wish to decide whether ODR could be conducted in whole or in part online and if so, define what “in part” means (A/CN.9/716, para. 37).

*Paragraph (7)*

19. The definition of ODR platform should be construed so as to accommodate development of future technologies. The ODR platform might include an e-mail server where the parties and the ODR provider communicate, a Web-based portal, a customized solution or internal enterprise resource planning system or any other type of format.

20. The Working Group may wish to consider the appropriateness of including in the Guidelines for ODR providers directions as to the design of an ODR platform including adherence to principles of technological neutrality, and accommodating interoperability and scalability of technologies.

21. The Working Group may wish to consider whether the Guidelines for ODR providers should include instructions on design of an ODR platform to accommodate the following circumstances and to provide an efficient and timely procedure:

(a) The platform should be designed in such a way that parties are required to submit all necessary information in order to proceed to the next stage of the ODR process. This would avoid the ODR provider having to request additional information for clarification;

(b) In situations where the design of the ODR platform cannot prevent defects in a notice, the ODR provider may request the claimant to remedy any defects or to provide such further information as may be necessary to proceed with the claim. Additionally, where the claimant has wrongly identified the respondent, the claimant could be permitted to amend the notice and transmit it through the ODR provider to a newly designated respondent. This may be important as in the current infrastructure of online transactions, it is often difficult for consumers to distinguish the actual merchant from outsourced vendors who are partially responsible for the transaction such as maintenance of website, delivery and other matters. The Working Group may wish to consider whether the amendment process for this and other circumstances should be formulated in the procedural rules or in Guidelines for ODR providers;

(c) In the event the claimant has more than one claim against the same respondent, the neutral may decide to consolidate several claims into one. The Working Group may wish to decide whether the procedural rules should provide the opportunity for a claimant to consolidate such cases where appropriate. Alternatively, the Working Group may wish to direct ODR providers to design the ODR platform so as to accommodate this. The Working Group may wish to consider

this in the Guidelines for ODR providers. It may also wish to contemplate the stage of ODR proceedings (negotiation or arbitration) at which this issue may arise; and

(d) The Working Group may wish to foresee circumstances where claims of a number of claimants are joined and submitted to a respondent.

*Paragraph (8)*

22. The Working Group may wish to decide whether details of the role and responsibility of the ODR provider should be defined and whether they should be included in the procedural rules or in the Guidelines for ODR providers.

23. The Working Group may wish to note that there might be a need for a definition, in domestic legislation or otherwise, of how ODR providers would be approved and licensed, and the method by which they would receive or be assigned cases.

24. Further, there might also be a need for a determination of the means by which ODR providers would be selected. This is relevant to issues of forum shopping and accreditation of ODR providers. In this regard, the Working Group may wish to note that European Consumer Centres' Network (ECC-Net) selects its ODR providers in accordance with European Union law and eConsumer.gov does so in accordance with Alternative Dispute Resolution Guidelines Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce ("GDBe-Consumers International Agreement") whereas under the OAS/ODR proposal, the selection of provider is from a list of ODR providers maintained by a central clearing house (Article 5 of OAS/ODR proposal).

*Paragraph (9)*

25. The Working Group may wish to consider whether "ODR proceedings" should be defined and if so, what the definition should contain.

**26. Draft article 3 (Communications)**

*"1. All communications between parties and the neutral in the course of ODR proceedings shall be transmitted by electronic means to the ODR provider and shall be addressed through the ODR platform.*

*"2. The designated electronic addresses of the parties for the purpose of all communications arising under the Rules shall be those set out in the notice of ODR ("the notice"), unless either party notifies the ODR provider otherwise.*

*"3. The time of receipt of an electronic communication from the parties or the neutral to the ODR provider is the time when it becomes capable of being retrieved by the ODR provider at the ODR platform.*

*"4. The time of receipt of an electronic communication from the ODR provider to the parties or the neutral is the time when it becomes capable of being retrieved by them at the ODR platform."*

*Remarks*

27. It is important to define the flow of communications between parties and the neutral as this relates to technical and design aspects of the ODR platform. The

Working Group may wish to identify aspects that should be addressed in the Rules and in Guidelines for ODR providers.

*Paragraph (2)*

28. The Working Group may wish to consider who has the burden of identifying the electronic address of the respondent — whether it falls solely to the claimant or whether the ODR provider should intervene (and bearing in mind whether tasking the ODR provider with such a function is in keeping with the requirement for a speedy process). In considering how an ODR provider would ascertain a respondent's electronic address, one option would be to use a trustmark system in which respondent merchants would opt in to ODR proceedings by virtue of their participation in the ODR system.<sup>4</sup>

*Paragraph (4)*

29. This paragraph which reflects article 10 of Electronic Communications Convention is relevant to the overall timeframe of the ODR process.<sup>5</sup> Given that the Rules are intended to promote simplicity, speed and efficiency, and that the dispute resolution is cross-border, uncertainties over time of receipt of communications could delay proceedings.

30. At the Working Group's twenty-second session, the need for rules regarding receipt of communications was questioned on the basis that providers would have their own rules (A/CN.9/716, para. 83). However, another view was that a common protocol on technology issues would be helpful (A/CN.9/716, para. 84). The Working Group agreed that consideration of communication issues could be taken up at a later stage once deliberations had progressed further (A/CN.9/716, para. 85).

31. In light of the previous deliberations, the Working Group may wish to decide whether these Rules should contain provision on receipt of electronic communications or whether those matters should be at the discretion of the ODR provider. If the former is the case, then such a rule could state: "5. The ODR provider shall communicate acknowledgment of receipt of communications from the parties [and the neutral] to their designated electronic addresses."

## 2. Commencement

### 32. Draft article 4 (Commencement)

*"1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in annex A. The notice should, as far as*

<sup>4</sup> Trustmark in the context of electronic commerce generally refers to an image, logo or seal found on a website that purports to indicate the reliability of the online merchant. The trustmark is offered as proof that the online merchant is a member of a professional organization or a network, and has a redress mechanism in place (A/CN.9/WG.III/WP.105, para. 5).

<sup>5</sup> Article 10 of Electronic Communications Convention updates article 15 of MLEC. The amendments made to article 10 of Electronic Communications Convention are consistent with those prevailing in the paper world and limit the ability of an addressee to deliberately delay or impede delivery of a communication by not accessing it. They also take into account the fact that the information system of the addressee may not be reachable for reasons outside the control of the originator (for instance, the use of anti-spam filters for e-mails).

*possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.*

*“2. The notice shall then be promptly communicated to the respondent.*

*“3. The respondent shall communicate a response to the notice in accordance with the form contained in annex B within five (5) [calendar] days of receipt of the notice. The response should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.*

*“4. ODR proceedings shall be deemed to commence on the date of receipt by the ODR provider at the ODR platform of the notice referred to in paragraph 1.”*

*“Annex A*

*The notice shall include:*

*“(a) the name and designated electronic address of the claimant and of the claimant’s representative (if any) authorized to act for the claimant in the ODR proceedings;*

*“(b) the name and electronic addresses of the respondent and of the respondent’s representative (if any) known to the claimant;*

*“(c) the grounds on which the claim is made;*

*“(d) any solutions proposed to resolve the dispute;*

*“(e) the signature of the claimant and/or the claimant’s representative in electronic form;*

*“(f) statement that the claimant agrees to participate in ODR proceedings;*

*“(g) statement that the claimant is not currently pursuing other remedies against the respondent with regard to the transaction in issue;*

*“(h) filing fee of [ ];*

*[...]”*

*“Annex B*

*The response shall include:*

*“(a) the name and designated electronic address of the respondent and the respondent’s representative (if any) authorized to act for the respondent in the ODR proceedings;*

*“(b) a response to the statement and allegations contained in the notice;*

*“(c) any solutions proposed to resolve the dispute;*

*“(d) a statement that the respondent agrees to participate in ODR proceedings;*

*“(e) the signature of the respondent and/or the respondent’s representative in electronic form;*

[...]"

*Remarks*

*Paragraph (3)*

33. The Working Group may wish to clarify the term “days”, and how the period of time under the Rules should be calculated. In this regard article 2 (6) of the UNCITRAL Arbitration Rules provides that “official holidays or non-business days occurring during the running of the period of time are included in calculating the period”.

*Paragraph (4)*

34. There are several options for fixing a date for commencement of dispute resolution proceedings. One can be when the ODR provider receives the notice from the claimant (Article 4 of World Intellectual Property Organization (WIPO) Mediation Rules). Alternatively, it could be when the response is submitted by the respondent including agreement to participate in the proceedings (article 2(3) of UNCITRAL Conciliation Rules). A further option would be when the ODR provider communicates the notice to the respondent (Articles 4(c) and 2(a) of ICANN UDRP).

*Annex A*

35. Annex A contains the items that should be included in the notice of arbitration. The Working Group may wish to consider whether annex A should enumerate the grounds on which claims can be made and the available remedies. Some suggested grounds for claims are: goods not ordered, not delivered/provided, not as described, remedies could include: discount, replacement, return for a full refund. In a global cross-border environment for low-value high-volume cases, it may be necessary to limit the types of cases to simple fact-based claims and basic remedies. Otherwise there is a substantial risk of flooding the system with complex cases, making it inefficient and expensive.

36. Additionally, the Working Group may wish to consider whether the Guidelines for ODR providers should include instructions on facilitating the agreement of parties by electronic means. The ODR provider might provide a one-time electronic method where the parties agree to the entire ODR proceedings or may provide a stage by stage option where the parties agree to each stage of the process. The ODR provider could provide electronic authentication methods such as a click-wrap agreement, among others, whereby the parties agree to the process by clicking an “OK-box”.

*Annex B*

37. Annex B deals with the response to the notice and mirrors the provisions of annex A.

### 3. Negotiation

#### 38. Draft article 5 (Negotiation)

*“1. If the respondent responds to the notice and accepts one of the solutions proposed by the claimant, the ODR provider shall communicate the acceptance to the claimant [and the ODR proceeding is terminated].*

*“2. If none of the solutions proposed by the party are accepted by the other party, one of the parties may request that the case be moved to the facilitated settlement stage, at which point the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 below.*

*“3. If the respondent does not respond to the notice within five (5) [calendar] days, he/she is presumed to have refused to negotiate and the case shall automatically move to the facilitated settlement stage, at which point the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 below.*

*“[4. The parties may agree to extend the deadline for the filing of the response however no such extension shall be for more than [--][calendar] days].”*

#### *Remarks*

##### *Paragraph (1)*

39. Paragraph (1) deals with the termination of negotiation and the ODR proceedings in the case where the parties have reached an agreement. The Working Group may wish to clarify how the date of termination of negotiation should be defined.

40. The Working Group may wish to consider providing in the Guidelines for ODR providers that the ODR platform should be designed so that once the respondent accepts a solution and the acceptance has been communicated, the ODR platform will automatically generate an agreement form formalizing the settlement.

##### *Paragraph (2)*

41. The Working Group may wish to decide whether the Rules should impose a time limit for the negotiation phase, in particular, the time within which the respondent must accept a solution or propose an alternative solution, and the time within which the claimant must notify acceptance or rejection of the respondent's solution. Another option is to set an overall time frame for negotiations, within which the parties are required to reach agreement. Putting such time pressure on the parties may act as an incentive for them to reach a settlement.

42. The Working Group may wish to consider whether the option to extend the negotiation phase should be that of the parties or whether such extension may be refused by the ODR provider.

*Paragraph (3)*

43. The Working Group may wish to consider for inclusion in the Guidelines for ODR providers the mechanism by which the provider can ascertain that a respondent has received the notice.

44. Where there is no response, the Working Group may consider whether the provision should allude the process to move directly to the arbitration stage without any possibility for facilitated settlement.

*Paragraph (4)*

45. Negotiation in the context of ODR may refer to assisted negotiation and/or facilitated negotiation. In the context of ODR, the parties negotiate through an ODR provider that facilitates the administration of the negotiation, for example, by contacting the other party and providing a software or application for negotiation and/or blind bidding. A typical negotiation assistance software allows the users to analyse their bargaining positions by evaluating and prioritizing their negotiation objectives and by calculating the outcome most efficient for all parties. Blind-bidding process is an automated algorithm that evaluates bids from the parties and settles the case if the offers are within a prescribed range. In assisted negotiation, the parties negotiate with the help of an ODR platform that facilitates the process by providing efficient technology and a designated place for the negotiation to take place. The Working Group may wish to consider whether these specific types of negotiation should be referred to in the Rules.

**4. Facilitated settlement and arbitration****a. Appointment of neutral****46. Draft article 6 (Appointment of neutral)**

*“1. The ODR provider shall appoint the neutral by [random] selection from a pool of qualified neutrals maintained by the ODR provider.*

*“2. The neutral shall disclose to the ODR provider any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The ODR provider shall communicate such information to the parties.*

*“3. Once the neutral is appointed, the ODR provider shall notify the parties of such appointment and shall provide the neutral all of the communications and documents regarding the dispute received from the parties.*

*“4. Either party may object to the neutral’s appointment within two (2) [calendar] days of the notice of appointment. In the event of an objection, the ODR provider will invite the non-objecting party to submit comments within two (2) [calendar] days and then either communicate the appointment of the neutral to the parties or appoint a new neutral.*

*“5. If the neutral has to be replaced during the course of the proceedings, the ODR provider will promptly appoint a neutral to replace him or her and will inform the parties. The proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.*



*“6. The neutral, by accepting appointment, shall be deemed to have undertaken to make available sufficient time to enable the dispute resolution to be conducted and completed expeditiously in accordance with the Rules.*

*“[7. The number of neutrals shall be one unless the parties otherwise agree.]”*

*Remarks*

*Paragraph (1)*

47. At its twenty-second session, the Working Group agreed that neutrals need not necessarily be lawyers but should be required to have relevant professional and dispute resolution experience and skills (A/CN.9/716, para. 63). The Working Group may wish to consider whether to include in the Guidelines for ODR providers the criteria to be met by the ODR provider in maintaining a pool of, and appointing, neutrals by the ODR provider.

*Paragraph (3)*

48. The Working Group may wish to clarify whether “all of the communications and documents regarding the dispute received from the parties” should include the communications exchanged at the negotiation stage, since the claimant, upon filing, is required to submit everything of relevance. For example, in the ECODIR model, the neutral has access to all information and documents from the negotiation stage in order to find a solution that is rapid and acceptable to the parties.

*Paragraph (4)*

49. At its twenty-second session, the Working Group agreed that providing an opportunity for parties to challenge the appointment of neutrals should be considered (A/CN.9/716, para. 70). The Working Group may wish to take into consideration the possibility of subsequent challenges to the neutral once the neutral has made disclosure pursuant to paragraph 2.

*Paragraph (7)*

50. At the twenty-second session of the Working Group, there was general agreement that, in the absence of agreement by the parties, there should be a sole neutral (A/CN.9/716, para. 62).

51. The Working Group may wish to consider whether the neutral for both the facilitated settlement and the arbitration could be the same person. In commercial cases, the mediator/conciliator is normally not the arbitrator, unless the parties decide otherwise. The approach could be different for ODR, given the need for speed and simplicity.

**b. Conduct of ODR proceedings**

**52. Draft article 7 (Facilitated Settlement)**

*“The neutral shall evaluate the dispute based on the information submitted and determine whether the dispute would benefit from a facilitated settlement.*

*If so, the neutral may communicate with the parties to attempt to reach an agreement. If the parties reach an agreement, the neutral shall render a [decision][award] on that basis.”*

**53. Draft article 8 (Conduct of ODR proceedings)**

*“1. Subject to the Rules, the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate, provided that the parties are treated equally. The neutral, in exercising his or her discretion, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall act fairly and shall remain at all times wholly independent and impartial.*

*“2. The neutral shall decide the dispute on the basis of documents filed by the parties and any communications made by them to the ODR provider, the relevance of which shall be determined by the neutral. The ODR proceedings shall be conducted on the basis of these materials only.*

*“3. The neutral shall have the power to allow any party, upon such terms (as to costs and otherwise) as the neutral shall determine, to amend any document submitted. Each party shall have the burden of proving the facts relied on to support its claim or defence. At any time during the proceedings the neutral may require the parties to provide additional information, produce documents, exhibits or other evidence within such a period of time as the neutral shall determine.*

*“4. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, a dispute settlement clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A [decision][award] by the neutral that the contract is null shall not automatically entail the invalidity of the dispute settlement clause.*

*“5. The place of the [arbitration] [dispute resolution] shall be as agreed by the parties, failing which it will be decided by the neutral.”*

*Remarks*

54. The Working Group may wish to consider whether instead of time limits for individual stages of the proceeding there should be overall time limit for proceeding.

**55. Draft article 9 ([Issuing of] [Communication of] [decision][award])**

*“1. The neutral shall render a [decision][award] promptly and in any event within seven (7) [calendar] days after the parties make their final submissions to the neutral. The ODR provider shall communicate the [decision][award] to the parties. Failure to adhere to this time limit shall not constitute a basis for challenging the [decision][award].*

*“2. The [decision][award] shall be final and binding on the parties. The parties shall carry out the [decision][award] without delay.*

*“3. Within five (5) [calendar] days after the receipt of the [decision][award], a party, with notice to the other party, may request the neutral to correct in the [decision][award] any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the neutral considers that the request is justified, he or she shall make the correction within two (2) [calendar] days of receipt of the request. Such corrections [shall be in writing and] shall form part of the [decision][award].”*

*“4. In all cases, the neutral shall decide in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances, and shall take into account any usage of trade applicable to the transaction.”*

*Remarks*

*Paragraph (1)*

56. Requests by the neutral for an extension of time in which to submit the decision are foreseeable. The Working Group may wish to consider whether to include provisions relating thereto.

**57. Draft article 10 (Language of proceedings)**

*“The ODR proceedings shall be conducted in the language used in connection with the transaction in dispute, unless another language is agreed upon by the parties. In the event the parties do not agree on the language of the transaction, the language of the ODR proceedings shall be determined by the neutral.”*

*Remarks*

58. Draft article 10 reflects the suggestion made by the Working Group that where the parties have failed to reach an agreement on the language of proceeding, this matter could be left to the discretion of the neutral (A/CN.9/716, para. 105).

**59. Draft article 11 (Representation)**

*“A party may be represented or assisted by a person or persons chosen by that party. The names and addresses of such persons [and the authority to act] must be communicated to the other party through the ODR provider.”*

**c. Exclusion of liability**

**60. Draft article 12 (Exclusion of liability)**

*“Save for intentional wrongdoing, the parties waive, any claim against the neutral, the ODR provider [and any other persons involved in the ODR proceedings] based on any act or omission in connection with the ODR proceedings.”*

*Remarks*

61. Draft article 12 deals with the question of exclusion of liability of the persons involved in the ODR proceedings. It mirrors article 16 of the UNCITRAL Arbitration Rules, with necessary adjustments.

62. **Draft article 13 (Costs)**

*“The neutral shall make no [decision][award] as to costs and each party shall bear its own costs.”*

*Remarks*

63. The Working Group may wish to consider, in the event the claimant is successful in an arbitration phase, whether his or her filing fee should be paid by the unsuccessful party.

## VI. FUTURE WORK

### A. Present and possible future work on electronic commerce

(A/CN.9/728 and Add.1)

[Original: English]

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### I. Introduction

1. At its fortieth session, in 2007, the Commission requested the Secretariat to continue to follow closely legal developments in the area of electronic commerce, with a view to making appropriate suggestions in due course.<sup>1</sup>

2. At its forty-first session, in 2008, the Commission requested the Secretariat to engage actively, in cooperation with the World Customs Organization (WCO) and the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), and with the involvement of experts, in the study of the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document on the legal aspects of creating and managing a single window, and to report to the Commission on the progress of that work.<sup>2</sup> That request was reiterated by the Commission at its forty-second session, in 2009,<sup>3</sup> and again at its forty-third session, in 2010.<sup>4</sup>

3. Furthermore, at its forty-second session, in 2009, the Commission requested the Secretariat to prepare studies on electronic transferable records also in light of the written proposals received at that session (documents A/CN.9/681 and Add.1 and A/CN.9/682), with a view to reconsidering those matters at a future session.<sup>5</sup>

4. In furtherance of that request, a document on current and possible future work on electronic commerce (A/CN.9/692) was submitted to the consideration of the

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<sup>1</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 195.

<sup>2</sup> *Ibid.*, *Sixty-third Session, Supplement No. 17 (A/63/17)*, paras. 333-338.

<sup>3</sup> *Ibid.*, *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 340.

<sup>4</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 244.

<sup>5</sup> *Ibid.*, *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 343.

Commission at its forty-third session, in 2010. At that session, the Commission requested the Secretariat to organize a colloquium on the topics discussed in document A/CN.9/692, namely electronic transferable records, identity management and electronic commerce conducted with mobile devices, and to prepare a note summarizing the discussions at that colloquium and possibly identifying a road map for future work by the Commission in the area of electronic commerce.<sup>6</sup> It was agreed that that note should provide sufficient information for the Commission to make an informed decision and to give a clearly defined mandate to a working group, if deemed appropriate.<sup>7</sup>

5. In line with that request, the present note reports on the colloquium on possible future work of UNCITRAL in the field of electronic commerce, held in New York on 14-16 February 2011.<sup>8</sup>

## **II. Report on the colloquium on present and possible future work on electronic commerce**

6. As an introduction to the colloquium, reference was made to past work of UNCITRAL in the field of electronic commerce. It was indicated that, while the Working Group on Electronic Commerce had not met since the finalization of its work on the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (the “Electronic Communications Convention”),<sup>9</sup> work in the field had continued regularly. That work included the preparation of the publication “Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods”,<sup>10</sup> coordination of work with other organizations, and the promotion of the adoption and uniform interpretation of UNCITRAL texts in the field.

7. It was added that several legislative provisions relating to the use of electronic communications had been discussed in recent years by UNCITRAL Working Groups dealing with arbitration, maritime transport and public procurement, *inter alia*.

8. It was said that over the years UNCITRAL had become a leading international body and main repository of international expertise on legal issues relating to electronic commerce. However, rapid technological progress and developments in business practice occurred in the last few years had given rise to new legal challenges that needed to be addressed. It was added that, while other bodies could take up those challenges with equal competence, the universal composition of UNCITRAL represented the best guarantee of a balanced and fair approach. It was also suggested that further delay in resuming the work of the Working Group on Electronic Commerce might lead to loss of institutional expertise and, eventually, of its prominence in the field.

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<sup>6</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 250.

<sup>7</sup> *Ibid.*

<sup>8</sup> The preparatory documents of the colloquium are available in the form they were submitted by the speakers from the UNCITRAL website: [www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010program.html](http://www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010program.html).

<sup>9</sup> United Nations publication, Sales No. E.07.V.2.

<sup>10</sup> United Nations publication, Sales No. E.09.V.4.

## A. Identity management (IdM)

9. The colloquium provided an opportunity to discuss recent technical, policy and legal developments relating to identity management, which continued to attract significant interest in several fora. Reference is made also to basic information on the structure and goals of identity management systems that has already been compiled (A/CN.9/692, paras. 48-66).

10. With respect to technical standards, reference was made to the work of Study Group 17 (SG 17) of the International Telecommunication Union Telecommunication Standardization Sector (ITU-T). It was explained that business, and especially financial institutions, had expressed a need to create a safe and secure electronic environment for their customers that could be accessed in a simple, seamless and convenient manner. In short, business requested better identity assurance of electronic entities. It was added that better identity assurance could assist in addressing a number of regulatory, operational and contractual risks with multiple legal aspects including privacy and data protection, fraud prevention and compliance with anti-money-laundering regulations.

11. In this context, the work of SG 17 pursued the standardization of four levels of assurance corresponding to varying degrees of confidence in the asserted identity, with a view to promoting trust, improving interoperability, and facilitating the portability of identity information across organizations and borders. The resulting standard, referred to as “X.eaa” (entity authentication assurance), could be used to define the requirements that an identity service provider had to meet in order to satisfy a given level of assurance. It was further explained that such approach could facilitate the acceptance of third parties as identity providers not only by commercial and non-commercial private entities but also by governmental agencies. It was specified that the standard would be applicable to identification of both human and non-human entities.

12. Potential benefits arising from the adoption of such a standard included the provision of a consistent basis for trust and the possibility to re-use credentials in different contexts. Moreover, this approach could promote efficiency, reduce costs and provide the foundation for the uniform treatment of liability and other legal aspects. It was further explained that the work of SG 17 built on previous and ongoing similar initiatives promoted by governments and the private sector.

13. In conclusion, it was stated that better identity assurance was of fundamental importance to establish trust in electronic transactions and to fight cybercrime. It was added that better understanding of policy and legal matters at the national and international levels was necessary in order to improve identity assurance. In this respect, future work of UNCITRAL aiming at identifying legal issues in the field, for instance, of parties’ liability, privacy and cross-border enforcement, would be particularly welcome.

14. From the policy perspective, it was recalled that the Organization for Economic Cooperation and Development (OECD) had prepared a first reference

document<sup>11</sup> highlighting the benefits associated with adopting an interoperable approach in identity management systems (see also A/CN.9/692, para. 59).

15. It was explained that, building on previous work, OECD had conducted in 2010 a survey of identity management strategies at the national level.<sup>12</sup> A report<sup>13</sup> as well as a document containing the policy messages gathered from data analysis and the lessons learned would be made available to the public later in the year 2011.

16. It was illustrated that three main trends could be identified at the top level of analysis of the results of the survey (defined as a “vision”): most governments set the establishment and development of e-government systems as overarching objectives of national identity management strategy; several governments added to that goal the desire to foster innovation in the broader Internet economy; other governments indicated as their priority the achievement of a higher level of cybersecurity. However, it was also said that, while the primary focus of each national strategy might vary, reference to each goal was present in all of them.

17. Another relevant difference among country strategies emerging from the survey was the adoption of an “universal approach” to credentials, i.e. an approach that allowed for the cross-use of credentials between private and public sector, as opposed to one that envisaged the extension to the private sector of credentials established for the public sector or, at least, of their framework.

18. Specific benefits for governments, citizens and businesses were expected from the adoption of identity management systems, and included the possibility of introducing new services, especially of higher value, due to enhanced security. Reduction of costs and enhancement in usability, including by reducing the number of credentials and pooling authentication systems (for instance, through single sign-on) were also foreseen, as well as a general increase in productivity and efficiency.

19. It was recalled that an obstacle to the development of more secure electronic environments was often identified in the insufficient number of users willing to pay for the development of such applications that made identity providers reluctant to investing in stronger identity assurance systems. In turn, secure applications using stronger identity assurance systems were not available in a number and at a cost sufficient to raise the interest of users. National identity management strategies aimed at overcoming this stalemate by providing a number of e-government applications sufficient to justify the development and deployment of a trusted national identity management system offering stronger identity assurance.

20. It was indicated that an analysis of existing policies and practices indicated a significant trend towards the migration into the electronic environment of existing off-line identity practices. Country-specific approaches would usually be maintained and influence the choice of strategy. This was, for instance, the case with national systems of registration and identification of persons, whose mandatory nature was

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<sup>11</sup> OECD Working Party on Information Security and Privacy, *The Role of Digital Identity Management in the Internet Economy: a Primer for Policy Makers*, DSTI/ICCP/REG(2008)10/FINAL (11 June 2009).

<sup>12</sup> The survey did not deal with cross-border aspects of identity management.

<sup>13</sup> OECD, *Report on National Strategies and Policies for Digital Identity Management in OECD Countries*, 2011.



reflected in the policy for adoption of credentials.<sup>14</sup> Moreover, it was said that, while varying degrees of centralization could be found, systems tended to be designed in a more “technology-neutral” manner under decentralized approaches, and to be more “technology-prescriptive” in centralized ones.

21. It was added that the retention of country-specific approaches did not favour addressing challenges related to cross-border identity management. On the contrary, it seemed that under that approach issues existing in the traditional world would remain and add to those arising from the adoption of electronic means. It was further mentioned that current experiments in the cross-border field seemed to focus on interoperability.<sup>15</sup>

22. In this respect, it was further indicated that, while migration of services online could offer the possibility to re-engineer and streamline existing processes, thus offering additional benefits, that stage had not been reached yet by any participant in the survey.

23. It was explained that challenges posed by identity management systems might be regrouped under three general categories: technological, economic and legal. The discussion on legal topics focused on identity management systems based on a three-party scheme, i.e. featuring a subject, an identity provider and a relying party (see A/CN.9/692, para. 54).<sup>16</sup>

24. The following topics were identified on a preliminary basis as relevant for further legal analysis: contractual performance at the identification and authentication stages; privacy; data protection; liability; enforceability; and regulatory compliance. It was noted that each of the parties involved in identity management systems had different rights and obligations in the various areas.

25. It was stated that the ultimate goal of an identity management system was to provide an identity assurance sufficiently reliable for the intended purpose. While technological measures could play an important role in achieving this goal, the ultimate protection against abuses had to be offered by the law. Thus, it was suggested that a “trust framework” would need to be established to address both the operational requirements, i.e. technical specifications, processes, standards, policies, rules and performance requirements necessary for the functioning of the identity system, and the legal rules necessary to define a trustworthy identity system.

26. It was clarified that the legal rules of the trust framework could have statutory or contractual nature. Contractual agreements could complement statutory rules but could also vary them, where so permitted. It was explained that legal rules were relevant for the trust framework in three ways. First, they made specifications, standards, and rules relating to the various components of the operational requirements legally binding on and enforceable against each party. Secondly, they defined legal rights and responsibilities of the parties, clarified the legal risks assumed by participating in the trust framework (e.g., warranties, liability for losses,

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<sup>14</sup> For a definition of credential, see UNCITRAL, *Promoting confidence in electronic commerce*, cit., p. 69, footnote 189.

<sup>15</sup> For instance, see the Secure idenTity acROss boRders linKed (STORK) project in the European Union: <https://www.eid-stork.eu>.

<sup>16</sup> In off-line and in simple online system, the subject may issue and verify credentials, thus discharging also the functions of identity provider.

risks to personal data) and provided remedies in the event of disputes among the parties, including dispute resolution and enforcement mechanisms, termination rights, and the amount of damages, penalties and other forms of liability. Finally, in some cases, legal rules could also regulate the content of the operational requirements.

27. The relation between identity systems and electronic signatures was also discussed. It was said that a number of services related to electronic signatures, such as timestamping and the guarantee of the integrity of the message, still lacked uniform legal treatment, and that those services were relevant also in the context of identity management. Moreover, fundamental matters, such as electronic signatures of juridical entities, were still under discussion in some jurisdictions. Thus, it was suggested that work on identity management could tackle and solve also those issues relating to electronic signatures.

28. In conclusion, wide consensus was expressed on the relevance of identity management to facilitate cross-border electronic transactions and on the importance that related legal issues would receive adequate treatment. It was noted that, while work was ongoing at the national level, very few initiatives, if any, dealt with transnational legal aspects of identity management. It was suggested that, due to its mandate, composition and expertise, UNCITRAL would be in an ideal position to work on those legal issues. It was added that such work would also clarify the scope of provisions on legal signatures contained in existing UNCITRAL texts, and would facilitate the treatment of identity management in the context of other topics potentially of interest for UNCITRAL and discussed at the colloquium, namely mobile commerce, electronic transferable records and electronic single windows facilities.

## **B. Use of mobile devices in electronic commerce**

29. The exponential growth of mobile subscription and the increased ubiquity of mobile devices, including mobile telephones, have transformed the information and communication technologies (ICT) landscape and how electronic transactions are conducted around the world. In a recent report,<sup>17</sup> the United Nations Conference on Trade and Development (UNCTAD) noted that the development of the use of mobile devices had emerged as the most important ICT contributing to sustainable development and to poverty reduction (see also A/CN.9/692, para. 67, and A/CN.9/706, paras. 9-11).<sup>18</sup> Thus, the widespread use of mobile devices is considered to be a central factor in achieving the Millennium Development Goals.<sup>19</sup>

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<sup>17</sup> UNCTAD, *Information Economy Report 2010: ICTs, Enterprises and Poverty Alleviation*, August 2010, United Nations publication, Sales No. E.10.II.D.17.

<sup>18</sup> At the end of 2009, global mobile subscription penetration was estimated at 68 per cent, up from 60 per cent the year before. Penetration in both developed and transition economies exceeded 100 per cent while in developing countries it stood at 58 per cent. In least developed countries, there were more than 25 mobile subscriptions per 100 inhabitants.

<sup>19</sup> See, in particular, Millennium Development Goals, Goal 8: Develop a Global Partnership for Development, Target 18: "In cooperation with the private sector, make available the benefits of new technologies, especially information and communications technologies".

30. At the colloquium, it was stressed that work aimed at facilitating the establishment of a uniform enabling legislative framework would enhance the likelihood of reaching those goals. The example of the lower cost of payments effected with mobile devices in developing countries as opposed to those carried out through the traditional banking system was mentioned. It was added that, in that example, the difference in cost was inversely proportional to the amount transferred, and therefore the introduction of mobile technologies was particularly beneficial for “low-income” customers.

31. On the one hand, it was suggested that electronic commerce and mobile commerce shared significant technical similarities (see also A/65/17, para. 249) and that therefore the existing legal framework for electronic communications and electronic commerce, including provisions of UNCITRAL texts, might suffice to address legal issues arising from mobile commerce. It was added that expected technological progress seemed to suggest that mobile commerce would simply become mobile electronic commerce without any further distinction.

32. On the other hand, it was indicated that mobile commerce presented, and was likely to retain for the foreseeable future, peculiar features due to the specificities of mobile devices (for more information on such specificities, see below, paras. 33-34, 36 and 40-44), and that those features might deserve dedicated legal treatment. It was added that some legal obstacles to the use of mobile devices could arise from legislation in other areas, such as informational requirements in financial and other transactions. Thus, while there was broad consensus that provisions on electronic transactions and electronic commerce should be applied to mobile commerce, support was also expressed for undertaking work on additional specific rules for mobile commerce with a view to fully enabling the use of mobile devices. It was reiterated that any additional legislative provision on mobile commerce should take into full consideration the many points of commonality between electronic and mobile commerce.

#### *Definition of “mobile commerce”*

33. It was recalled that mobile commerce had been defined as “commercial transactions and communication activities conducted through wireless communication services and networks by means of short message services (“SMS”), multimedia messaging service (“MMS”), or the Internet, using small, handheld mobile devices that typically had been used for telephonic communications.”<sup>20</sup> It was explained that that definition highlighted two fundamental aspects of mobile commerce, i.e., wireless communication and the use of mobile devices. However, it was commented that, while that definition could provide a useful starting point, it might adhere too strictly to the technological status quo and therefore might not fully accommodate progress. In this respect, it was illustrated that not only several dedicated technologies had already been developed to facilitate the use of mobile devices for exchanging electronic communications,<sup>21</sup> but also mobile devices

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<sup>20</sup> OECD, *Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce*, June 2008.

<sup>21</sup> Those technologies include SMS, MMS, Wireless Application Protocol (WAP) browser and Mobile Explorer (ME), Universal Subscriber Identity Module (USIM) Integrated Circuit (IC) Chip, Near Field Communication (NFC). Near Field Communication is used for “proximity

existed that provided wireless connection without using mobile telephone networks.<sup>22</sup>

34. It was suggested that the term “mobile” should not refer to mobile phones but rather to the mobility of devices, as restricting any definition of mobile commerce to mobile phones might exclude other mobile handheld devices that equally enable ubiquitous computing. It was added that any definition of mobile commerce should not distinguish among devices based on their ability to access mobile telephone networks, and that a broader and more “technology-neutral” definition of mobile commerce could be more appropriate.

35. In this line, the following definition of mobile commerce was suggested as a starting point for future discussions: “any commercial transaction and communication activity conducted through wireless communication services and networks using handheld mobile devices designed to be used in mobile or other wireless communications networks”. As a matter of illustration, it was indicated that parties involved in mobile commerce included mobile network operators (MNO), mobile vendors, mobile subscribers and trusted service managers (TSM).<sup>23</sup>

*Legal standards applicable to mobile commerce*

36. It was explained that the use of mobile devices for commercial transactions raised a number of concerns with respect to security of the transmission, secure identification of the parties, formation of contract, options for payment of the price of the goods or services purchased, privacy and data retention, and consumer protection. While those issues were not specific to mobile commerce, it was added, some specific features of mobile devices and their use might require additional consideration.

37. It was recalled that the adoption of UNCITRAL texts on electronic communications would facilitate establishing an enabling legislative framework for mobile commerce, thus helping to address many of the related concerns. Relevant UNCITRAL texts included the Electronic Communications Convention; the UNCITRAL Model Law on Electronic Signatures, 2001;<sup>24</sup> and the UNCITRAL Model Law on Electronic Commerce, 1996, with additional article 5 bis as adopted in 1998.<sup>25</sup>

38. In particular, it was explained that the definition of “data message” contained in UNCITRAL texts was sufficiently broad to encompass information transmitted

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transactions” since the device needs to be held close to a reader; other technologies may be used for “remote transactions”.

<sup>22</sup> Devices able to access wireless networks independently of their ability to connect to a mobile telephone network include Mobile Internet Devices (MID), Tablets and Smartphones, depending, among other criteria, on size and input method. Handheld devices that do not provide the telephonic communications functions include earlier Personal Digital Assistants (PDAs), Portable Media Players (PMPs), eBook readers and game-related devices.

<sup>23</sup> Mobile operators provide services to mobile subscribers; mobile vendors sell goods and services through mobile platforms, either directly, or through intermediaries, including website operators and mobile aggregators; mobile subscribers pay for a mobile phone subscription; trusted service managers guarantee the security and confidentiality of mobile transaction.

<sup>24</sup> United Nations publication, Sales No. E.02.V.8.

<sup>25</sup> United Nations publication, Sales No. E.99.V.4.

with mobile devices. It was added that the legal status of transactions carried out with mobile devices would be unclear without a general recognition of the legal validity of electronic transactions.

39. It was further explained that only a few laws dealt explicitly with mobile commerce and that their treatment of the matter was limited to certain aspects.<sup>26</sup> In other cases, the law provided that the modalities for the satisfaction of informational obligations in radio-telecommunications end devices (i.e. mobile phones) were to be detailed in a separate regulation.<sup>27</sup>

40. It was noted that one impediment to mobile commerce was the so-called “media discontinuity”<sup>28</sup> occurring when users were required to switch to other means to initiate or complete a procedure. For instance, in some instances users could conduct a transaction via mobile device except for initial registration to the service. It was remarked that such approach did not promote the broader use of mobile services.

41. With respect to issues specific to the use of mobile devices that might deserve additional legislative consideration, it was highlighted that differences in technical specifications of mobile devices, such as data storage capacity, could penalize users of “low-range” models, such as users in developing countries and “low-income” consumers. Furthermore, it was suggested that the possibility of input or other man-made error on mobile devices could be higher than on an ordinary computer due to the size of the device. The possibility of limiting the user’s liability for consequences of loss or theft of mobile devices to be used as part of an authentication method, e.g. for accessing mobile finance applications, was also mentioned.

42. One challenge in the use of mobile devices related to the possibility of accessing large documents as required by law. It was recalled that mobile devices, being of small dimensions, offered limited display size and screen resolution and might restricted also input methods. It was added that “low-range” mobile devices might offer as sole option scrolling through long texts, which was not user-friendly.

43. It was added that due to display limitations and the cost of transmitting data over mobile telephone networks originally designed for voice, a practice had developed of designing dedicated websites for mobile devices.<sup>29</sup> Due to their

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<sup>26</sup> See, e.g., article 58, on the elements of the contract to be displayed on a mobile device, and article 62, on the elements of the acknowledgment of receipt to be displayed on a mobile device, of the Loi n° 045-2009/AN de 10 novembre 2009 portant réglementation des services et des transactions électroniques au Burkina Faso. See also Commission of the European Communities, COM(2008) 614 final, *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights* (8 October 2008), article 11(3): “If the contract is concluded through a medium which allows limited space or time to display the information, the trader shall provide at least the information regarding the main characteristics of the product and the total price referred to in Articles 5(1)(a) and (c) on that particular medium prior to the conclusion of such a contract. The other information referred to in Articles 5 and 7 shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1.”

<sup>27</sup> Article 28 of the French Loi n°2004-575 du 21 juin 2004 pour la confiance dans l’économie numérique.

<sup>28</sup> Referred to as “Medienbruch” in the German language.

<sup>29</sup> The top-level domain name “.mobi” is an example of a mobile website which is used by mobile devices for accessing Internet resources.

intended goal, such dedicated mobile websites could offer less information, including legally relevant one, and could also be updated less frequently, than their conventional equivalents.

44. With respect to electronic signatures, it was noted that, while mobile devices could normally be used to identify the author of a communication, few of them could technically be able at the present time to meet a higher standard for “advanced”, “qualified” or “digital” signatures associated with legal presumptions. As an example, reference was made to the common use of a smart card and card reader combination to generate higher standard signatures, and to the fact that that combination could currently operate only with a limited number of “high-range” mobile devices. It was further noted that the quantity of information to be transmitted was proportional to the level of security of the signature, and that “larger-size” transmissions might be more difficult and more expensive in areas with reduced connectivity, thus discouraging users in those areas from using more secure signature technologies.

45. Moreover, it was explained that users of mobile devices would typically change device frequently and that those devices were prone to damages by both usage and non-usage. It was added that certain components of mobile devices could affect their life cycle, and that synchronization and backup processes could also pose difficulties. Therefore, it was concluded that mobile devices were not designed for long-term storage of a large quantity of data. These circumstances were likely to impact on the ability of those devices to meet legislative requirements for data retention and archiving of information. Possible alternatives could envisage forwarding the information to be stored to more adequate devices or to dedicated storage service providers.

46. It was suggested that the above challenges might find adequate solution by extending the functional equivalent approach to substantive requirements. According to that proposal, it would first be necessary to identify the purposes or functions of those protection rules whose fulfilment with mobile devices might be difficult. Then, it would be possible to prepare provisions containing simplified requirements compatible with the use of mobile devices and able to achieve those purposes previously identified. Whenever those special rules could be met, contractual parties would be considered in compliance with general provisions, too.

47. As an illustration of the above proposal, it was indicated that the purpose of information duties mandated before the conclusion of the contract was to ensure an informed consent, especially for contracts concluded remotely. In that case, the suggested equivalent mechanism might consist of limiting the information to be provided prior to the conclusion of the contract to core one, and to complement that information at a later stage, including by granting an additional right of withdrawal. Similarly, the purpose of information and conservation duties imposed after the conclusion of the contract was the provision of the information needed during the performance of the contract, including for evidence in case of dispute. In that case, an equivalent mechanism could foresee the provision of the information on a different medium available at a later stage, or the use of third-party providers of data archiving services.

*Mobile payments and mobile banking*

48. It was indicated that the use of mobile devices was of growing importance in the area of payments and banking. It was explained that applications in this field could be categorized as mobile payments, electronic mobile money and mobile banking.

49. It was explained that mobile payments referred to “any payment in which a mobile device was used for the purpose of initiation, activation or confirmation of the transaction”. Transfers of sums of money carried out using mobile devices could take place through direct mobile billing or mobile credit card schemes. Regulations applicable to payments, such as anti-money-laundering and “know your customer”, would apply to mobile payments, too. However, it was added, mobile payments services could be designed in a manner not to provide access to credit, so that mobile network operators offering payment services would not fall under the purview of rules on the supervision of financial institutions.

50. A trend to establish joint ventures between financial institutions and mobile network operators with a view to creating platforms parallel to the financial payment systems governed by central banks was reported. It was indicated that the goal of those platforms was to promote alternative means of payment enabling mobile commerce.

51. It was also explained that direct mobile billing allowed customers to purchase goods and services online by charging their price to mobile phone bills issued by a mobile network operator. In a typical scheme, a customer purchased goods or services from a merchant who was enabled to access the payment gateway. The payment gateway facilitated the exchange of electronic information on the transaction between the merchant and the mobile network operator. The mobile network operator paid the price of the good or service purchased to the seller and eventually charged the customer’s mobile phone bill.

52. Mobile credit card services allowed customers to make payments with a credit card contained in a subscriber identity module (SIM) card inserted in the mobile phone or with a credit card downloaded over the air on the mobile phone. Purchases were charged to the credit card and paid under the terms of the credit card agreement.

53. It was further explained that both bank-based and non-bank-based models were possible in mobile commerce. In the latter, the parties were not linked to the banking system and therefore did not fall under the scope of competent supervisory authorities, but rather under different types of control and supervision applicable to non-traditional payment service providers. The non-bank-based model could feature electronic and mobile money issuers, cash-in and cash-out agents in charge of converting cash into electronic mobile money and vice versa, and traditional merchants.

54. Electronic mobile money was described as a certificate of transferable monetary value issued and stored in electronic form and installed in mobile devices. It was explained that electronic mobile money was currently used mainly for micropayments such as public transportation, parking and tunnel fees and payment of small sums at convenience stores. It was further explained that stored-value products, defined as payment methods in which a prepaid balance of funds, or

“value”, was recorded on a device held by the consumer, and the balance was decreased when the device was presented for payment, might not coincide with electronic mobile money.

55. It was said that mobile banking referred to the possibility of accessing conventional bank accounts through mobile devices. The access could be limited to informational purposes, or enable some or all banking and financial transactions permitted under electronic banking. The high level of security required for such transactions often required the download on the mobile devices of dedicated software applications. It was recalled that that type of service would fall under the oversight and controls applicable to banking and financial institutions.

56. It was suggested that, due to the automated and remote nature of the transactions, it might be advisable to allocate on financial institutions, mobile financial business operators<sup>30</sup> and payment service providers the risk for unauthorized financial transactions, except in case of fraud or gross negligence attributable to the user. According to the same suggestion, mobile network operators might be held liable for transaction errors occurred during operations under their control, while a duty to indemnify any loss caused by their negligence might be imposed on trusted service managers. Finally, users would have a duty to notify immediately the loss of the mobile device and any other event that might facilitate unauthorized transactions and would bear consequences for not doing so.

57. From the regulatory perspective, it was mentioned that oversight and controls applicable to traditional financial institutions might not be adequate for mobile financial business operator and that therefore additional rules might need to be developed.

*Relation to UNCITRAL Model Law on International Credit Transfers*

58. It was suggested that UNCITRAL texts on international payments such as the UNCITRAL Model Law on International Credit Transfer, 1992,<sup>31</sup> which covered issues related to payment in the form of orders to a bank to transfer money from an existing account to a beneficiary, could assist in regulating electronic credit transfers used in mobile financial transactions.

59. However, it was also said that that Model Law did not provide for all potential legal issues arising from electronic or mobile financial transactions. In particular, it was noted that mobile payments and mobile banking could pose peculiar challenges related to the use of mobile devices that might deserve dedicated legislative treatment. An illustration of the allocation of liability for loss arising from fraudulent use or from errors in the transmission or processing of the electronic information was provided. Moreover, it was mentioned that further consideration of the legal status of the network service operator in mobile financial transactions might be desirable with a view to clarifying when that operator should be considered an agent of the sender, an agent of the payment system provider or the payment system provider itself.

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<sup>30</sup> Mobile financial business operators encompass providers of mobile electronic money and of direct mobile billing services.

<sup>31</sup> United Nations publication, Sales No. E.99.V.11.



60. Examples of specific legislation for electronic financial transactions, applicable also to mobile financial transactions, were provided.<sup>32</sup>

61. Furthermore, it was said that mobile payments featured instruction and payment flows different from other payment systems and thus it might be useful to develop dedicated rules. In this regard, on the one hand, the view was expressed that a revision of that Model Law to include aspects of mobile payments was not advisable and that new rules should be independent of that text.

62. On the other hand, the view was also expressed that a thorough revision of the UNCITRAL Model Law on International Credit Transfers would be desirable. It was indicated that while that Model Law offered a very good starting point for providing adequate legislative treatment to mobile and other electronic payments, technological and other developments required the preparation of a more modern instrument.

63. The following issues were mentioned as relevant for such revision: the introduction of separate rules for credit and debit transfers, in line with modern payment legislation; liability of mobile network operators, including by clarifying the notion of “commercial reasonableness” in this context; the transposition of rules on electronic communications, including those on electronic signatures and data storage, in the field of payments; and the interaction between general provisions on the allocation of liability and special payment systems agreements. It was also mentioned that a revised version of the UNCITRAL Model Law on International Credit Transfers might take into special account the needs of developing countries with a view to facilitating legislative enactments in those countries.

#### *International remittance transfers*

64. International remittance transfers were identified as a cross-border payment service deserving special consideration. It was explained that such remittances were relatively low in value and often performed by migrant workers. They consisted mostly of credit transfers initiated by an instruction sent by the transferor, including via a mobile device, to a remittance service provider. The typical scheme of an international remittance transfer foresaw the presence of two remittance service providers, one capturing the transfer order and the other disbursing the sum transferred to the beneficiary.

65. It was explained that low-value credit transfers fell under the scope of the UNCITRAL Model Law on International Credit Transfers but did not represent a primary concern for the drafters of that Model Law. It was also recalled that that Model Law did not deal with consumer protection issues and that its explanatory note clarified that dedicated consumer legislation might prevail over legislation based on the Model Law.

66. Taking the above into account, it was indicated that the UNCITRAL Model Law on International Credit Transfers provided sufficient basis to adequately address legal issues relating to international remittance transfers. In particular, reference was made to its article 5, paragraphs (2), (3) and (4), establishing rules on authentication systems in case of payment orders. However, it was added that

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<sup>32</sup> The Electronic Financial Transaction Act, 2008, of the Republic of Korea; see also Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, *Official Journal L* 319, 5 December 2007, pp. 1-36.

originators of the remittance transfer would benefit from a different loss allocation scheme for unauthorized credit transfers, which, under the Model Law, might be inadequate for consumers protection. Additional contractual disclosures, also meant to favour consumers, might also be considered.

*Other mobile device applications*

67. It was indicated that a number of mobile commerce services based on different technologies such as location-based services, voice-based services and SMS-based services were gaining popularity. It was illustrated that those services could be used in a number of commercial and non-commercial fields such as election monitoring, earthquake relief and mobile micro-insurance.<sup>33</sup> In this respect, a trend towards greater use of mobile devices for accessing e-government services was noted. It was said that that trend could become relevant also for commercial transactions, especially with respect to the use of mobile devices for authentication purposes.

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<sup>33</sup> See also UNCTAD, *Information Economy Report 2010*, cit., p. 19.

## A/CN.9/728 and Add.1 (Original: English)

**Present and possible future work on electronic commerce****ADDENDUM****CONTENTS**

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**II. Report on the colloquium on present and possible future work on electronic commerce (*continued*)****C. Electronic transferable records**

1. Possible work by UNCITRAL on the negotiability and transferability of rights in goods in an electronic environment was first mentioned at the Commission's twenty-seventh session, in 1994,<sup>1</sup> and subsequently discussed in various sessions of the Commission and of Working Group IV.<sup>2</sup> Two documents have dealt in depth with substantive aspects of the topic.

2. Document A/CN.9/WG.IV/WP.69 (of 31 January 1996) discussed both electronic and paper bills of lading and other maritime transport documents. It provided an overview of attempts to deal with bills of lading in the electronic environment and made suggestions for model legislative provisions that were eventually adopted as articles 16 and 17 of the UNCITRAL Model Law on Electronic Commerce.<sup>3</sup>

3. Furthermore, that document contained a preliminary analysis of the conditions for establishing the functional equivalence of electronic and paper bills of lading, highlighting as a key issue the possibility to identify with certainty the holder of the bill, which would be entitled to delivery of the goods. Such issue brought into focus the need to ensure the uniqueness of an electronic record incorporating the title to the goods.<sup>4</sup>

<sup>1</sup> *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*, para. 201.

<sup>2</sup> See A/CN.9/484, paras. 87-93; *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, paras. 291-293. For an historical record of previous sessions, see A/CN.9/WG.IV/WP.90, paras. 1-4.

<sup>3</sup> United Nations publication, Sales No. E.99.V.4.

<sup>4</sup> A/CN.9/WG.IV/WP.69, para. 92.

4. Document A/CN.9/WG.IV/WP.90 (of 20 December 2000) discussed general legal issues relating to transfer of rights in tangible goods and other rights. It offered a comparative description of the methods used for the transfer of property interests in tangible property and for the perfection of security interests, and of the challenges posed by the transposition of those methods in an electronic environment. It also provided an update on initiatives using electronic means for the transfer of rights in tangible goods.
5. With respect to documents of title and negotiable instruments, document A/CN.9/WG.IV/WP.90 stressed the desirability to ensure control over the electronic transferable record in a manner equivalent to physical possession, and suggested that a combination of a registry system and adequately secure technology could assist in ensuring the singularity and authenticity of an electronic record.<sup>5</sup>
6. The most recent update on the use of electronic communications for the transfer of rights in goods, including with respect to the use of registries for the creation and transfer of rights, was provided in document A/CN.9/692, paras. 12-47.
7. The discussion on electronic transferable records at the colloquium began with a general illustration of the effects of the transfer of documents of title on property and contract law. Reference was made to previous discussions on the topic and to the documents cited above.
8. It was explained that, since documents of title might affect third parties, paper-based systems referred to notions such as “possession” and “holdership” that presupposed the existence of a physical document. Therefore, the challenge consisted in transposing such notions in the electronic world by defining equivalents able to achieve the same results of paper documents.
9. In that line, it was added that paper had been chosen as a support for documents of title due to its features that allowed, for instance, easy record-keeping and circulation of the document. Therefore, the need to establish criteria for equivalence for each function fulfilled by paper documents was highlighted.
10. It was said that under a functional-equivalence approach it might be preferable to adopt a broad and flexible standard that could satisfy all the functions of the paper document in the electronic environment rather than separate standards aiming at fulfilling each function of the paper document. It was also said that, while drafting the requirements for functional equivalence of electronic transferable records, attention should be paid not only to commercial needs but also to regulatory requirements.
11. It was added that a thorough analysis should assess the actual market demand for electronic equivalents. As an example, it was explained that, while attempts to produce electronic cheques were made in the early times of dematerialization, a combination of wider use of other payment systems (such as credit cards and electronic wire transfers) and of regulations mandating identification of the parties made the use of electronic cheques unnecessary. At the same time, the use of paper cheques significantly decreased and was discontinued by law in some jurisdictions. Similar considerations might be made with respect to the use of traveller’s cheques.

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<sup>5</sup> A/CN.9/WG.IV/WP.90, paras. 35-37.

(For the evolution in trade practice with respect to electronic letters of credit, see below, paras. 67-76.)

12. It was further explained that, due to the effects on third parties, the creation and circulation of documents of title could be subject to compliance with statutory provisions. However, most jurisdictions had not yet adopted statutes allowing the use of electronic means in that field. Therefore, explicit rules needed to be adopted to enable the use of those means.

13. Moreover, it was recalled that the use of electronic transferable records in cross-border trade would greatly benefit from the adoption of uniform standards for functional equivalence in the various jurisdictions and from the uniform interpretation of those standards.

14. It was further recalled that technology neutrality should be assured to accommodate innovation, and that interaction with third parties' rights imposed a particularly high standard of legal clarity and predictability.

15. It was illustrated that existing legislative examples relating to electronic transferable records often referred to the notions of "singularity" or "uniqueness" and of "control". That was the case, for instance, of the Comité Maritime International (CMI) Rules for Electronic Bills of Lading, rule 4; of the UNCITRAL Model Law on Electronic Commerce,<sup>6</sup> article 17, paragraphs (3) and (4), and of United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"),<sup>7</sup> article 1, paragraphs (21) and (22), and articles 50 and 51.

16. It was added that a presumption of originality with respect to presentation of electronic records could be found in rule 4.15 (b) of the Rules on International Standby Practices (ISP98) and in article e8 and of the electronic supplement to the Uniform Customs and Practice for Documentary Credits (e-UCP 500).<sup>8</sup>

17. It was noted that, due to technical reasons, uniqueness in electronic records was not reflected in the existence of a single record but rather of a single claim to the rights incorporated in the electronic transferable document.

18. Furthermore, reference was made to existing contractual systems for the creation and transfer of negotiable documents of title such as the Bolero Title Registry and the ESS-Databridge™ eDocs Exchange. It was explained that such systems were closed in nature, i.e. access to those was subject to previous acceptance of contractual terms contained, respectively, in the Bolero Rulebook and the ESS-Databridge Services & Users Agreement. In both cases, English law was the law governing the contract. However, since English law did not contain any specific provision for electronic documents of title, contractual rights were

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<sup>6</sup> United Nations publication, Sales No. E.99.V.4.

<sup>7</sup> United Nations publication, Sales No. E.09.V.9.

<sup>8</sup> ISP98, rule 4.15 (b): "Presentation of an electronic record, where an electronic presentation is permitted or required, is deemed to be an 'original'". See also J. Byrne and D. Taylor, *ICC Guide to the eUCP — Understanding the electronic supplement to the UCP 500* (Paris, ICC, 2002), pp. 121-122.

transferred through novation while attornment<sup>9</sup> was used to transfer the title to property.

19. On the other hand, it was added that the law in the United States of America contained provisions on electronic documents of title. In particular, reference was made to the Uniform Commercial Code (UCC) articles 7-106 (Control of Electronic Document of Title), 7-501 (b) (Warehouse Receipts and Bills of Lading: Negotiation and Transfer) and 9-105 (Control of Electronic Chattel Paper), as well as section 16 (Transferable Records) of the Uniform Electronic Transactions Act (UETA), 1999, and section 201 of the Electronic Signatures in Global and National Commerce Act, 2000. That legislation made use of the notions of “single authoritative copy” and of “control” to establish the conditions for equivalence to the notions, respectively, of “holdership” and “possession”.

20. It was further explained that section 16 UETA set a general rule establishing that a party “ha[d] control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred”, and that that general rule was complemented by a description of specific conditions that, when met, would satisfy the general rule and therefore were associated with a presumption of control of a transferable record. It was noted that article 7-106 UCC had been amended in 2003 and article 9-105 UCC had been amended in 2010 to follow the approach adopted in section 16 UETA.

21. It was explained that the approach adopted in section 16 UETA had the advantage of being fully technology-neutral and therefore compatible with different technologies and models, including both open and closed systems. It was clarified that that approach could also accommodate systems based on registries. It was further explained that the amendment of article 9-105 UCC was enacted as a response to requests from the auto financing industry to foster wider use of electronic chattel papers. It was explained that a paramount consideration in the acceptance of electronic chattel papers in that business sector related to sufficient assurance to chattel paper financiers that superpriority would not be affected by the electronic nature of the record.

22. More generally, it was indicated that the possibility to act when an electronic transferable record was used as collateral was of key importance for business. In this line, the necessity to take into consideration the requirements related to the securitization of electronic transferable records was also expressed.

23. With respect to technical solutions, it was explained that systems for the management of electronic transferable records could be categorized under two models: the registry model and the transaction platform model.

24. It was illustrated that the registry model allowed for the creation, issuance and transfer of the record based on information transmitted to and recorded in a central registry. Access to the registry might be controlled and might be subject to acceptance of contractual provisions.

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<sup>9</sup> Attornment is “a constructive delivery involving the transfer of mediate possession while a third party has immediate possession”: *Black’s Law Dictionary*, third pocket edition (St. Paul (MN), Thomson-West, 2006), p. 54.

25. It was further illustrated that the transaction platform model used technology that was capable of ensuring the uniqueness of the electronic record and of enabling its transfer. As a result, the entity controlling the object could be identified as the holder of the electronic transferable record with all associated entitlements. It was suggested that technologies possibly relevant for transaction platform models included digital object identifiers (DOI) and digital rights of management (DRM).

26. It was explained that the concept of DOI referred to a unique set of numbers that could identify contents of an electronic document, including an electronic transferable record, by providing a persistent link to that document's location in the digital environment. Thus, DOI could ensure persistent identification of an electronic transferable record in case of changes, e.g., when the electronic transferable record was transferred from one information system to another. It was further indicated that the information contained in the electronic transferable record linked to the DOI might be updated after the issuance of that document to reflect variations in the real world, for instance in the location or condition of goods relevant for that electronic transferable record.

27. It was stressed that legislative provisions should strictly adhere to the principle of technology neutrality so as to accommodate all possible present and future models.

28. It was indicated that a critical element in the acceptance and diffusion of electronic transferable records related to their acceptance by third parties, which, in turn, depended on the level of trust. It was further said that existing models and legislative provisions assumed the existence of a provider of trust services whose liability needed special consideration. For instance, in the case of registry systems the registry operator could be made liable for certain issues relating to negligence in the operation and malfunctioning of the system; in the case of transaction platform models, those profiles of liability could be allocated to software providers.

29. It was indicated that, while electronic transferable records could offer more benefits than their paper equivalents, those benefits would be particularly significant in the framework of the progressive integration of electronic documents in the paperless cross-border trade chain. The notion of electronic single window facility could provide a practical example of infrastructure enabling paperless cross-border trade. Therefore, in addition to the preparation of legal provisions for electronic transferable records, the development of an adequate infrastructure was of great importance for the successful use of those records.

30. In conclusion, it was indicated that the cross-border use of electronic transferable records called for the discussion of various complex legal aspects of electronic transactions and that UNCITRAL was uniquely positioned in terms of expertise and composition to undertake such work.

#### **D. Electronic single window facilities**

31. Pursuant to the requests of the Commission, the Secretariat has engaged in a number of activities related to the legal aspects of the design and operation of national and cross-border single windows for customs operations ("electronic single windows"). Such activities have taken place mainly in the framework of the

meetings of the WCO-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window (the “Joint Legal Task Force”).<sup>10</sup> Additional relevant activities include cooperation with other bodies, such as the secretariat of the Eurasian Economic Community, and providing comments, at the request of the United Nations’ Centre for Trade Facilitation and Electronic Business (UN/CEFACT), on UN/CEFACT recommendation 35 “Establishing a legal framework for international trade Single Window”.<sup>11</sup>

32. Given the relevance of work in this field for possible future on electronic commerce, a session of the colloquium was devoted to issues relating to electronic single windows, also in connection with other topics discussed at the colloquium.

33. That session was opened by an illustration of the work of UN/CEFACT International Trade & Business Processes Group on International Trade Procedures (TBG 15). It was explained that the mandate of TBG 15 was to “analyze, simplify, harmonize, and align public and private sector practices, procedures and information flows relating to international trade transactions both in goods and related services”.<sup>12</sup> In this framework, TBG 15 was conducting work on single window facilities, in particular by preparing a Draft UN/CEFACT Recommendation 36 on Single Window Interoperability, and on e-Invoicing.

34. It was recalled that electronic single windows might greatly contribute to trade facilitation, defined as: “The simplification, standardization and harmonization of procedures and associated information flows required to move goods from seller to buyer and to make payment.” Indeed, electronic single windows might provide advantages for both customs administrations and other public offices interested in cross-border movement of goods and traders. Such advantages could include: reduced administrative burdens and input errors thanks to data sharing; faster information flows with increased predictability of trade-related timelines; enhanced risk management for control and enforcement purposes. It was added that a positive impact on revenue collection and the prevention of corruption was also possible, at least under certain circumstances. In any case, it was stressed that the successful design and implementation of a national single window facility required a careful assessment of the environment where it was meant to operate.

35. It was indicated that, while significant progress has already been made with respect to national single window facilities, significant work remained ahead for the establishment of an international system. In this regard, UN/CEFACT draft Recommendation 36 intended to provide guidance on the interconnectivity and interoperability of two or more national (or regional) single windows by addressing the needs associated to cross-border trade data transfer.

36. It was explained that the design of a cross-border single window facility required taking into account technical, security and legal and regulatory requirements. In the same line, it was said that interoperability was a multifaceted process and that the greatest challenges so far in achieving interoperability between single window facilities arose from the need to streamline existing procedures.

<sup>10</sup> Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 337; Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 242-243.

<sup>11</sup> A/CN.9/692, para. 10.

<sup>12</sup> For more information, see the home page of TBG 15 at [www1.unece.org/cefact/platform/display/TBG/TBG15](http://www1.unece.org/cefact/platform/display/TBG/TBG15).



37. It was added that information was currently provided by commercial operators along the lines of established procedures designed for existing facilities. As a result, a limited amount of customs information was shared between the exporting and the importing side. It might therefore be desirable to re-assess the manner in which information was captured, with a view to favouring its extraction in a structured manner and thus facilitating its subsequent reuse. In this regard, it was noted that an efficient cross-border single window model should facilitate coordination among different stakeholders whose objectives and procedures might differ significantly.

38. An additional layer of complexity in designing cross-border single window facilities related to the possible adoption of different architectures, including: a dedicated interconnection between national single window facilities; a network of interconnected national single window facilities; individual national single window facilities connected to a central secure hub; or a network of networks such as private sector Value Added Networks (VAN) or Local Area Networks (LAN). Each of these models might call for a different set of legal and operational requirements.

39. It was suggested that the progressive deployment of cross-border single windows could leverage on the involvement of authorized economic operators, a notion developed by customs administrations to identify certain professional operators whose greater capacity justified differentiated treatment. It was explained that their high level of compliance with procedures and willingness to invest in infrastructures could be rewarded with participation in a more integrated and more performing single window facility. This enhanced environment could encompass customs documents as well as transport and other commercial documents. An example of such approach could be provided by the implementation of the European Union Modernised Customs Code.

40. Reference was made to the WCO project on Globally Networked Customs that was described as an “inclusive, interconnected customs-to-customs information-sharing system to support and improve the functioning of the international trading system, national economic performance, and the protection of society and fiscal management”. It was said that, while the goals of Globally Networked Customs did not pertain only to the trade facilitation field, the deployment of Globally Networked Customs might have an impact on commercial operations.

41. It was recalled that UN/CEFACT Recommendation 33 “Recommendation and Guidelines on Establishing a Single Window to Enhance the Efficient Exchange of Information between Trade and Government” and UN/CEFACT Recommendation 35 “Establishing a Legal Framework for International Trade Single Window” contained specific guidance with respect to legal issues relating to the operation of electronic single windows. In particular, UN/CEFACT Recommendation 35, in its Annex II, featured “Checklist Guidelines” listing and discussing the following legal elements: legal basis for implementing a Single Window facility; single window facility structure and organization; data protection; authority to access and share data between government agencies; identification, authentication, and authorization; data quality; liability issues; arbitration and dispute resolution; electronic documents; electronic archiving; intellectual property rights and database ownership; and competition.

42. Moreover, it was recalled that the WCO-UNCITRAL Joint Legal Task Force had also identified a preliminary set of legal issues relating to electronic single

windows. Those issues included: enabling legislation; information sharing, data protection and confidentiality; organizational issues; liability of single window facility operators; competition law; use of electronic documents; intellectual property rights; data retention and limits on re-use of data, including for evidentiary purposes; mutual recognition of electronic and digital signatures (including through identity management systems); and electronic transfer of rights in goods.

43. It was said that some of the above-mentioned issues could be addressed, at least in part, with the adoption of UNCITRAL texts and, in particular, of the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (the “Electronic Communications Convention”),<sup>13</sup> of the UNCITRAL Model Law on Electronic Commerce, of the UNCITRAL Model Law on Electronic Signatures<sup>14</sup> and of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”).

44. It was indicated that the adoption of the Electronic Communications Convention was particularly relevant to establish a uniform legal framework for electronic communications in light of possible differences in the enactments of UNCITRAL model laws at the national level. It was also suggested that, in light of the fact that one effect of the Electronic Communications Convention was to enable the use of electronic communications in other international agreements, the study of the operation of the Electronic Communications Convention in conjunction with the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures, 1999 (the “revised Kyoto Convention”)<sup>15</sup> and with other relevant WCO instruments, including the Framework of Standards to Secure and Facilitate Global Trade (SAFE), deserved further attention.

45. It was added that other topics discussed at the colloquium, such as identity management and electronic transferable records, were directly relevant for the establishment of an adequate legal framework for electronic single windows facilities.

46. It was further noted that the international dimension might further complicate difficulties related to the single windows implementation. For instance, in case of investigation, the enforcement agency of an importing country was likely to need electronic evidence from the customs authority of an exporting country. In case of regional electronic single window facilities, where data could be processed and distributed selectively to multiple offices in various jurisdictions, difficulties could increase in proportion to the number of jurisdictions involved. Similar considerations could apply to the harmonization of provisions on data confidentiality and of sanctions for their breach.

#### *National electronic single window facilities*

47. The case of the national single window (the TradeNet® System) of Singapore was illustrated. It was said that the implementation of that single window had been

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<sup>13</sup> United Nations publication, Sales No. E.07.V.2.

<sup>14</sup> United Nations publication, Sales No. E.02.V.8.

<sup>15</sup> United Nations, *Treaty Series*, vol. 2370, p. 27.

particularly effective and that the TradeNet® System covered 100 per cent of trade declarations, for a total of 9 million declarations per year.

48. It was explained that the legal basis for the validity of the use of electronic documents in that jurisdiction was provided by the Electronic Transactions Act 2010 that represented an enactment of the Electronic Communications Convention as well as of earlier UNCITRAL texts on electronic commerce. In particular, section 25, paragraph (1) of the Electronic Transactions Act 2010 enabled any public agency to use electronic communications, including when issuing permits, licences or approvals. Moreover, the establishment and operation of the electronic single windows in that jurisdiction was explicitly permitted by section 86 of the Customs Act that enabled the use of electronic means with respect to any communication foreseen in that Act.

49. It was further explained that two aspects were particularly relevant in the experience of Singapore's single window facility. First, customs agencies expressed a paramount need to carry out enforcement functions effectively also in a single window environment. Specific rules on electronic evidence (contained in sections 35 and 36 of the Evidence Act) were adopted to ensure that goal. Secondly, merchants needed to be reassured that the confidentiality of the information submitted would be preserved. In this respect, it was noted that the submission and retention of information in electronic form might increase the risks of misuse. In the legal system of Singapore, section 6 of the Goods and Services Tax Act set the standards for official secrecy also with respect to customs operations and was applicable also to electronic communications.

50. Another illustration of advanced electronic single windows facility regarded "uTradeHub", the system for paperless trade implemented in the Republic of Korea. It was explained that uTradeHub offered electronic services related to cross-border trade in four main areas: trade financing, licensing/certification, customs clearance and logistics. The uTradeHub system connected customs offices, other governmental agencies, financial institutions and private sector operators such as shipping lines and logistics companies. Electronic documents exchanged on uTradeHub included letters of credit, certificates of origin, import and export clearances and import and export declarations.

51. The factors contributing to the success of uTradeHub were identified in clear policy guidance from the government, the establishment of a legal framework adequate for paperless trade, active collaboration with the private sector and highly developed information technology infrastructure.

52. It was indicated that the uTradeHub system had provided significant benefits in terms of time savings, increased security of documents and increased transparency in documents' handling. In particular, the ability to obtain real time reports contributed to preventing forgery and fraud. It was added that financial savings were also considerable and arose from reduction of costs in four areas: labour; issuance and circulation of documents; warehousing and inventory management; and avoidance of redundant investments in information technology.

53. From the legislative standpoint, it was explained that the following acts were relevant for the operations of uTradeHub: e-Trade Facilitation Act (2006); Framework Act on Electronic Commerce (1999); Digital Signature Act (1999); Act on Promotion of Information and Communications Network Utilization and

Information Protection (2001); and the provisions on electronic bills of lading inserted in the commercial law in 2008.<sup>16</sup>

*Regional electronic single window facilities*

54. Reference was made to initiatives aimed at building cross-border single window facilities in the Association of Southeast Asian Nations (ASEAN), in the European Union and in the East African Community, among others. Lessons learned from such initiatives pointed at the difficulty of reviewing and streamlining existing business processes. This prevented the choice of a model that represented in turn a condition for the preparation of adequate legislation. As a result, the implementation of those initiatives was delayed or was taking place on a smaller scale or at a slower pace than originally envisaged.

55. The legal aspects of the ASEAN Single Window were illustrated in detail as a prominent example of cross-border single window facility. In particular, it was explained that the study of legal and regulatory issues arising from the implementation of cross-border single windows might influence the technical architecture of the cross-border single window network. In fact, a careful choice of technical design could address or prevent certain legal or regulatory issues.

56. It was recalled that two technical models had been considered for adoption in the ASEAN Single Window. The first model featured a centralized facility through which all information transmitted by national single windows would transit and be distributed to the national single window of destination. The second model adopted a bilateral scheme in which national single windows would exchange information under common protocols and data models.

57. It was explained that, while both models aimed at enabling the electronic submission of trade-related documents to more than one country, they raised different legal and regulatory issues. In particular, the centralized model would require addressing matters such as ownership and confidentiality of data stored in the centralized database, and therefore outside the control of the country of origin of the data. Moreover, it was noted that over-concentration of data in a single database might hinder data retrieval during investigations and other enforcement-related activities.

58. In addition, it was said that the operator of a centralized facility might face liability towards users from all States using that facility and therefore its potential risk could be particularly high. Moreover, centralizing and aggregating data processing and storage in a single centralized location could expose to catastrophic consequences in case of successful cyberattack. The fundamental issue of the attribution of the power of control and oversight over the operations of the centralized facility would also need to be clarified.

59. It was finally recalled that in response, at least in part, to those concerns, it had been decided that the ASEAN Single Window pilot project technical model would be based on a model featuring a technical infrastructure with transmission functions but without any data retention or storage capability.

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<sup>16</sup> On the legislation of the Republic of Korea on electronic bills of lading, see A/CN.9/692, paras. 26-47.

60. The case of the Pan-Asian E-Commerce Alliance (PAA), an alliance of commercial operators whose goal was to facilitate cross-border transactions through the exchange of electronic communications over a secure infrastructure, was also mentioned. PAA offered mutual recognition of Public Key Infrastructure (PKI) certificates through a dedicated certificate policy authority. Business might have access to PAA's services through national PAA members.

61. Further efforts to create a regional electronic single window facility in Asia and Pacific were ongoing thanks to the work of a number of organizations and bodies including the United Nations Network of Experts for Paperless Trade in Asia and the Pacific (UNNExT) and the Asian-Pacific Economic Cooperation (APEC).

62. It was added that, while several jurisdictions in the region had similar legislative provisions on electronic communications and electronic signatures having adopted texts based on UNCITRAL models, rules on privacy and cross-border data flow might vary significantly.

63. It was reiterated that a condition for the establishment of a regional electronic single window facility was the removal of formal and procedural barriers to legal interoperability. In order to achieve that goal, it was suggested that the adoption of international standards and best practices at the national level should continue, based on the implementation of fundamental principles such as non-discrimination of electronic communications, technology neutrality and functional equivalence between electronic and other documents. Mutual recognition of electronic signatures should also be encouraged. Existing provisions on data collection, sharing, access, archiving and submission to governmental agencies, on cross-border data flow, intellectual property protection and market competition, on privacy and confidentiality and on intellectual property rights should be reviewed in light of the needs of trade facilitation.

64. The view was expressed that an agreement on the electronic exchange of trade data and documents might be beneficial for regional trade facilitation and help the establishment of an electronic single window facility in East Asia. It was further suggested that, in light of the diversity of the region and complexity of the relevant issues, a gradual approach could be advisable. In particular, it was said that the full deployment of a national single window facility should not be a condition for participation in cross-border initiatives, since all countries were entitled to build experience from an early stage also at the international level.

65. As a general recommendation, it was stated that, given the number of organizations working on various aspects of electronic single windows, including legal ones, it was particularly desirable that UNCITRAL would continue its work in this field as well as maintain a coordinating role with a view to avoiding the emergence of multiple inconsistent legal standards.

66. It was added that the legal expertise already existing in Working Group IV on Electronic Commerce made it particularly qualified to discharge successfully that task. It was further indicated that possible future work of UNCITRAL in other areas of electronic commerce should take into due consideration also the desirability of supporting seamless electronic interaction between business and governments, including in the framework of electronic single window facilities.

## E. Other topics

### *Electronic letters of credit*

67. The principles and evolution of the use of electronic means in connection with letters of credits were illustrated. It was explained that, while electronic communications had been used in letters of credit for decades and at least since the introduction of the telegraph, differences in that use could be found with respect to the various phases of the life of a letter of credit. In particular, while the issuance and the payment of a letter of credit could easily be performed electronically, its presentation in electronic form could pose a number of challenges.

68. It was further explained that resistance to the use of electronic communications was due to expectations by business that a document would be presented in paper form, although the paper medium did not always offer higher levels of authenticity and integrity than its electronic equivalent. Letters of credit transmitted via trusted closed networks such as that managed by the Society for Worldwide Interbank Financial Telecommunication (SWIFT) constituted a notable exception to that business attitude.

69. Moreover, it was highlighted that a significant difference existed between commercial letters of credit, on the one hand, and standby letters of credit, independent guarantees and reimbursement undertakings, on the other hand. In the first case, the letters needed to be presented with accompanying documents in original. Those accompanying documents, such as bills of lading and warehouse receipts, typically related to a transaction in goods and might lack an electronic authentic equivalent. Therefore, their electronic presentation could result impossible. On the contrary, such documents were usually not required in connection with the presentation of the second group of letters of credit.

70. It was indicated that the current status was the result of the interaction of different factors, i.e. legislation, other standards such as uniform rules and practice, and acceptance by market operators.

71. It was explained that legislative provisions, where existing, had promptly recognized the media flexibility established by practice. An early example of such legislative text was offered by Section 5-106 (2) of the Uniform Commercial Code's 1952 version, enabling the signature of a letter of credit by telegram.

72. However, it was added, the law did not mandate the use of electronic letters of credit by establishing a right of the beneficiary to make electronic presentations. This approach was commented favourably as in line with practice and market expectations.

73. Moreover, it was explained that in the field of letters of credit significant importance was attributed to default rules of practice that often replaced legislative provisions. It was also said that repeated attempts had been made to further expand the use of electronic communications through those rules. However, it seemed that technical standards, rather than rules of practice had been particularly relevant in promoting the use of electronic means.

74. As already mentioned, the acceptance by business of electronic letters of credit, especially at the presentation stage, was limited to exchanges in specific

environments. In this respect, it was noted that the full-fledged introduction of electronic means in this field might transform the nature of the letter of credit and required a reconsideration of its legal foundations.

75. Practical examples of possible innovation related by the use of electronic means in letters of credit were given. Thus, it was suggested that certain information readily available in electronic form from reliable sources and necessary to complete the letter of credit could be linked to an electronic document. This was the case with reference to the determination of the price of oil in letters of credit containing an oil fluctuation clause. Another example referred to the possibility of verifying electronically if certain conditions stated in the letter of credit, such as the presence of certain goods on a given vessel or the location of that vessel, were actually true.

76. In conclusion, it was suggested that further increase in the use of electronic letters of credit was expected and that that increase was likely to impact significantly on business practice. Thus, for instance, further technical standardization of electronic letters of credit could bring a higher degree of uniformity of their content. Moreover, the use of electronic means could simplify the letters of credit workflow by eliminating certain intermediaries such as correspondents.

#### *Cloud computing*

77. At the colloquium several speakers made reference to cloud computing. It was explained that cloud computing envisaged the use of computing hardware and software infrastructure and of applications that were remotely hosted and managed. It was further explained that the user of cloud computing did not know the physical location or the configuration of the system.

78. In particular, it was indicated that under the “software-as-a-service” (SaaS) model of cloud computing customers paid a fee for the use of the ICT solution but did not need to invest in the infrastructure nor to manage, upgrade or maintain it. Additional business benefits related to technical features typical of shared ICT solutions such as scalability.

79. It was explained that cloud computing could be categorized as private, highly managed and public.<sup>17</sup> It was further indicated that cloud computing could pose operational, reputation and legal challenges. Some operational challenges could deserve a dedicated legislative treatment, for instance, in case of changes in the legal status of the concerned entities due to events such as mergers and acquisitions or insolvency.

80. A preliminary list of legal challenges associated to cloud computing referred to intellectual property rights, liability with respect to data and network security,

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<sup>17</sup> Under this classification, a private cloud indicates a dedicated or single-tenant cloud environment where the user exerts control over information to the extent it controls information on its own internal network. The private cloud is typically located on the user’s own premises or at another designated venue under the user’s control, regardless of actual ownership of computer resources.

A highly-managed cloud refers to IT services upon which the customer had a high degree of management, but that are controlled and managed by a provider.

Public clouds are provided and owned by service providers. These cloud computing resources are usually shared by multiple users.

jurisdictional issues including multi-jurisdictional compliance, electronic discovery, and loss or compromise of personally identifiable information or confidential data.

81. The need to take into account the increasing use of cloud computing in trade-related data processing and storage was mentioned, in particular, with respect to cross-border single window facilities. It was indicated that the increasingly diverse national origin of the various components of the supply chain added further complexity. The example of the large number of parts originating from several countries that were needed to assemble a car was provided as an illustration of the increasing fragmentation of value chains.

82. In conclusion, it was suggested that cloud computing presented some peculiar aspects that called for consideration in a supranational forum. It was further suggested that such legislative work might be usefully undertaken in the context of a broader treatment of legal issues relating to cybersecurity and relevant for electronic commerce.

#### *Electronic invoices*

83. As a practical example of the difficulties encountered in the transition from paper to electronic trade documents, the case of electronic invoices in the European Union was illustrated.

84. It was explained that electronic invoices could contribute meaningfully to a paperless commercial environment, thus saving significant resources. However, it was added that the use of those invoices in the European Union was still limited, as they did not represent more than 10 per cent of the total amount of invoices issued even in more technology-prone countries.

85. It was said that a number of reasons might explain such status. One relevant factor mentioned was the diversity in the implementation of the European Union directive on a common system for Value Added Tax<sup>18</sup> that created up to 27 different legal and regulatory environments. It was explained that commercial companies were not ready to bear the costs of compliance in all jurisdictions.

86. Another relevant factor related to the imposition in certain jurisdictions of more stringent requirements for electronic invoices than for paper ones, for instance by mandating the use of a qualified or advanced electronic signature as defined under relevant European Community<sup>19</sup> and national legislation, and thus possibly discriminating electronic means against non-electronic ones.

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<sup>18</sup> Council Directive 2010/45/EU of 13 July 2010 concerning amendments to Directive 2006/112/EC on the common system of value added tax, with regard to rules on invoicing, *Official Journal L* 189, 22 July 2010, pp. 1-8.

<sup>19</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, *Official Journal L* 013, 19 January 2000, pp. 12-20.



## **VII. CASE LAW ON UNCITRAL TEXTS (CLOUT)**

The secretariat of the United Nations Commission on International Trade Law (UNCITRAL) continues to publish court decisions and arbitral awards that are relevant to the interpretation or application of a text resulting from the work of UNCITRAL. For a description of CLOUT (Case Law on UNCITRAL Texts), see the users guide (A/CN.9/SER.C/GUIDE/1/Rev.2), published in 2000 and available on the Internet at [www.uncitral.org](http://www.uncitral.org).

A/CN.9/SER.C/ABSTRACTS may be obtained from the UNCITRAL secretariat at the following address:

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They may also be accessed through the UNCITRAL homepage on the Internet at [www.uncitral.org](http://www.uncitral.org).

Copies of complete texts of court-decisions and arbitral awards, in the original language, reported on in the context of CLOUT are available from the secretariat upon request.



## VIII. TECHNICAL ASSISTANCE TO LAW REFORM

### Note by the Secretariat on technical cooperation and assistance

(A/CN.9/724)

[Original: English]

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### I. Introduction

1. Pursuant to a decision taken at its twentieth session in 1987, technical cooperation and assistance activities aimed at promoting the use and adoption of its texts represent one of the priorities of the United Nations Commission on International Trade Law (UNCITRAL).<sup>1</sup>

2. In its resolution 65/21 of 10 January 2011, the General Assembly reaffirmed the importance, in particular for developing countries and economies in transition, of the technical cooperation and assistance work of the Commission and reiterated its appeal to bodies responsible for development assistance, as well as to Governments in their bilateral aid programmes, to support the technical cooperation and assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission.

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<sup>1</sup> *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 335.

3. The General Assembly also stressed the importance of bringing into effect the conventions emanating from the work of the Commission to further the progressive harmonization and unification of international trade law, and to this end urged States that have not yet done so to consider signing, ratifying or acceding to those conventions.
4. The status of adoption of UNCITRAL texts is regularly updated and available on the UNCITRAL website. It is also compiled annually in a note by the Secretariat entitled “Status of conventions and model laws” (for the Commission’s forty-fourth session, see A/CN.9/723).
5. This note sets out the technical cooperation and assistance activities of the Secretariat subsequent to the date of the previous note submitted to the Commission at its forty-third session in 2010 (A/CN.9/695 of 23 April 2010), and reports on the development of resources to assist technical cooperation and assistance activities.
6. A separate document (A/CN.9/725) provides information on current activities of international organizations related to the harmonization and unification of international trade law and on the role of UNCITRAL in coordinating those activities.

## **II. Technical cooperation and assistance activities**

7. Technical cooperation and assistance activities undertaken by the Secretariat aim at promoting the adoption and uniform interpretation of UNCITRAL legislative texts. Such activities include providing advice to States considering signature, ratification or accession to UNCITRAL conventions, adoption of an UNCITRAL model law or use of an UNCITRAL legislative guide.
8. Technical cooperation and assistance may involve: undertaking briefing missions and participating in seminars and conferences, organized at both regional and national levels; assisting countries in assessing their trade law reform needs, including by reviewing existing legislation; assisting with the drafting of national legislation to implement UNCITRAL texts; assisting multilateral and bilateral development agencies to use UNCITRAL texts in their law reform activities and projects; providing advice and assistance to international and other organizations, such as professional associations, organizations of attorneys, chambers of commerce and arbitration centres, on the use of UNCITRAL texts; and organizing training activities to facilitate the implementation and interpretation of legislation based on UNCITRAL texts by judges and legal practitioners.
9. Some of the activities undertaken in the relevant time period are described below. Activities denoted with an asterisk were funded by the UNCITRAL Trust Fund for Symposia.

## A. Strategic framework for technical assistance activities

### *Current trade law reform environment*

10. The changes in global political and economic policies in the last two decades, often referred to as the phenomenon of “globalization”, have had a significant impact on the field of trade law reform.

11. The increase in the number of sovereign entities was not always matched with adequate governance capacity-building. Moreover, the urgent need to counter global threats has attracted attention on a priority basis and demanded significant resources, to the detriment of other areas of work, including international trade law, whose role as an important development tool is often overlooked.

12. International and internal conflicts have weakened the capacity of affected States, including in their ability to engage in trade law reform. This happened in spite of the fact that trade may provide an important contribution to post-conflict recovery both by fostering economic development and by building of mutual trust. This contribution has recently been recognized, including with specific reference to the relevance in this context of trade law reform.<sup>2</sup>

13. Moreover, the decision to change economic model made by several newly independent States called for specific trade law reform assistance in a number of areas critical for the successful achievement of that transformation.

14. The last decades have seen a significant increase in international trade with clear positive consequences on economic development. Augmented trade flows led to more demand for an adequate legislative framework with a view, in particular, to assisting small and medium-sized enterprises and other economic operators without easy access to qualified legal counselling. In certain areas, the advent of consumers as direct participants in international transactions also had to be taken into account.

15. In this context, the desire to promote the adoption of UNCITRAL texts has led to a more proactive approach of the Secretariat towards stakeholders. In particular, the Secretariat has identified certain strategies that might assist in promoting texts more effectively in the broader framework of its technical assistance activities. Those strategies include favouring regional approaches, including in cooperation with regional economic integration organizations. They also include initiatives concerning newly adopted treaties, with a view to fostering their early adoption, and the promotion of the universal adoption of fundamental texts of international trade law, in particular, by those countries having yet to develop an international trade law framework, or having an obsolete one. Initiatives to further such strategies complement technical assistance and cooperation efforts undertaken in reaction to specific requests.

### *Initiatives for a regional approach*

16. In its resolution 64/111,<sup>3</sup> the General Assembly noted the request by the Commission to the Secretariat to explore the possibility of establishing a regional

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<sup>2</sup> United Nations General Assembly, *Resolution 65/21* of 10 January 2011, para. 13.

<sup>3</sup> United Nations General Assembly, *Resolution 64/111* of 16 December 2009, para. 10 (e).

presence with a view to facilitating the delivery of technical assistance with respect to the use and adoption of UNCITRAL texts.

17. In accordance with that request, the Secretariat has invited States to express their interest in establishing UNCITRAL regional centres in different parts of the world with a view to providing technical assistance to States on the adoption and uniform interpretation of UNCITRAL texts and to coordinating closely with international and regional organizations active in law reform projects in those regions. As the regular budget of UNCITRAL does not include funds for the establishment or operation of UNCITRAL regional centres and as extrabudgetary funds for technical assistance projects are very limited, the establishment and activities of the UNCITRAL regional centres will require substantive financial contributions from States. In that context, the UNCITRAL Secretariat is making efforts to engage more actively with possible donors in raising funds for relevant technical assistance projects.

18. Also in furtherance of that request, the Secretariat, in close cooperation with the Ministry of Justice of the Republic of Korea and the Korea University Law School, convened the first UNCITRAL Regional Workshop in Asia (the "Workshop") on 23 and 24 November 2010 in Seoul, Republic of Korea. The objective of the Workshop was to obtain the views and draw on the expertise of experts from Governments, international organizations, the academia and the private sector on various topics in the Asian regional context. Those topics included the role of UNCITRAL and the significance of its texts, recent and future work of UNCITRAL and its implications, technical assistance and strategies for implementation of UNCITRAL texts.

19. The participants in the Workshop agreed on the desirability for the Secretariat to focus on the regional approach in Asia, in light of the common desire to harmonize laws relating to international trade. The importance of cross-border trade for the recent economic development in the region was also emphasized.

20. It was suggested that Asian States should participate more actively in the formulation of international trade principles and texts and consider becoming parties to or adopting UNCITRAL texts in a more active manner. In that context, the importance of coordination among domestic stakeholders was emphasized. It was further suggested that States should share information relating to their national laws on international trade with other States, possibly through the Secretariat, and engage with UNCITRAL as well as with other international organizations in providing legal assistance to developing countries.

21. With respect to the role of the Secretariat, it was suggested that the Secretariat should contribute to establishing a more visible presence of UNCITRAL in the region, possibly through the establishment of a regional office, to provide urgently needed technical assistance in trade law reform in line with the needs and requests of recipient States. It was further noted that technical assistance activities should be coordinated with regional and other international organizations as well as with academic and research institutions.

22. The Secretariat's participation in the Asia-Pacific Economic Cooperation (APEC) Ease of Doing Business Project (Enforcing Contracts) offers an example of cooperation between the Secretariat, an international organization and States along the lines recommended at the Workshop. That project, carried out in cooperation

with the Ministry of Justice of the Republic of Korea, aims at strengthening the legislative and institutional framework for the enforcement of contracts in Indonesia and Peru. Possible related law reform measures include the consideration of the adoption of UNCITRAL texts on arbitration and sale of goods.

23. Other regional initiatives involving the Secretariat include the Open Regional Fund for South-East Europe – Legal Reform, a project jointly carried out by the Deutsche Gesellschaft für Internationale Zusammenarbeit (“GIZ”, formerly known as “GTZ”) and the Secretariat with a view to promoting the adoption and uniform interpretation of UNCITRAL texts relating to arbitration and to international sale of goods. That project was concluded and a final report was published.<sup>4</sup> In 2010, activities associated with that project included participating at a conference organized by the Belgrade University and the CISG Advisory Council to celebrate the thirtieth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>5</sup> (Belgrade, 12-13 November 2010).

24. In response to increasing requests, the Secretariat has also made efforts to intensify its presence in Arab countries with a view to promoting the adoption of UNCITRAL texts in those countries. Related activities under consideration include capacity-building, awareness-raising and study of the interaction between uniform trade law sources and regional laws and practice. In this framework, the ongoing cooperation with the Arab Society for Commercial and Maritime Law (ASCML) resulted in the participation in the fourth Arab Conference for Commercial and Maritime Law (ACCML) (Alexandria, Egypt, 29-30 May 2010)\*. The contribution to the first Transport & Maritime Law Conference in Abu Dhabi on “The Rotterdam Rules”, organized by the Paris-Sorbonne University of Abu Dhabi (Abu Dhabi, 2-4 February 2011), and the support provided to the first Annual Willem C. Vis Middle East International Commercial Arbitration Pre-Moot, should also be noted.

#### *Cooperation with regional economic integration organizations*

25. The last decades have witnessed a multiplication of initiatives aimed at promoting global and regional economic integration. In this framework, policies and instruments relating to public international trade law (also referred to as “international economic law”) aim at removing obstacles to trade such as duties, tariffs and equivalent measures, while private international trade law standard-setting activities aim at establishing an enabling legal and regulatory framework for cross-border commercial transactions. However the complementarity between these two areas of international trade law has not yet been sufficiently highlighted. In particular, two positions could be identified at the regional level.

26. On the one hand, regional economic integration organizations with normative power in the field of private international trade law have adopted sets of rules sometimes inspired by global standards such as those prepared by UNCITRAL. However, these organizations did not necessarily focus on the need to ensure seamless interaction between global and regional standards. In countries engaged in

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<sup>4</sup> F. von Schlabrendorff, Implementation of the United Nations Convention on the International Sale of Goods and the system of international commercial arbitration in Southeast Europe. A report on a GTZ project, undertaken with the support of the United Nations Commission on International Trade Law., s.l., 2010.

<sup>5</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3.

such regional integration efforts, limited resources have often been channelled into the preparation, adoption and implementation of regional uniform texts, and therefore subtracted from global projects.

27. On the other hand, States members of regional economic integration organizations without a specific mandate to legislate in the field of private international trade law have sometimes found it possible to adopt global legal standards in order to establish a regional uniform trade law framework. The result in such cases was that the same legal standards would indeed operate both at the regional and at the global level, thus further promoting legal uniformity.

28. An example of the second approach may be found in the adoption by the States parties to the North American Free Trade Agreement (NAFTA) of UNCITRAL texts in the field of arbitration, sale of goods and electronic commerce, and by the adoption by certain member States of the Association of Southeast Asian Nations (ASEAN) of UNCITRAL texts in the field of arbitration and electronic commerce.

29. The Secretariat has made efforts to support this latter approach in response to requests expressed by concerned States and international organizations. Thus, for instance, in the last few years activities have been held on a regular basis in States parties to the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR). Those activities were related, inter alia, to the adoption of UNCITRAL texts by the Dominican Republic, El Salvador and Honduras. Another example of such approach may be found in the Secretariat's contribution to the work of the East African Community (EAC) Task Force on Cyberlaws, a joint initiatives of the EAC Secretariat and of the United Nations Conference on Trade and Development (UNCTAD) aiming at the adoption of uniform laws on electronic transactions in the member States of the EAC, and based, inter alia, on relevant UNCITRAL texts. The Secretariat interacts with the EAC Task Force on Cyberlaws on a regular basis (see also below, para. 47).

*Importance of adoption of uniform legal standards for international trade law harmonization*

30. The adoption of uniform legal standards, be they in the form of international conventions or model laws, is generally seen as a necessary step to achieve the harmonization of international trade law. In addition to harmonization, formal adoption may also provide a first indicator of the commitment of a legal system to modern international trade law. However, the rate of adoption of international trade law treaties and model laws, including those prepared by UNCITRAL, is often considered below expectations, as is the uniform interpretation and widespread application of those legal standards, which are equally important to ensure their effectiveness.

31. The adoption rate may be more easily measured with respect to treaties, as becoming a party to such instruments requires a diplomatic initiative. Moreover, to date, no other commonly accepted indicator of the level of adhesion to uniform trade law texts is available. In this respect, the Commission may wish to consider whether work on identifying international trade law indicators that could receive universal acceptance would be desirable and useful, in particular, with a view to preparing diagnoses for technical assistance activities.



32. A statistical survey indicates that treaties in the field of international trade law have a lower rate of formal adoption than treaties in other areas such as, for instance, environmental law, human rights or international penal matters.

33. At the level of States, trade law reform is a complex activity resulting from the interaction of a large number of political, economic, legal and other considerations. Therefore, a number of different factors may concur to explain the current status of adoption of international trade law treaties.

34. At the level of commercial operators, it should be noted that party autonomy is a fundamental principle in private international trade law. Therefore, treaties in this field may often be varied or opted out by parties in line with their assessment of contractual needs. This possibility is rare in other fields of international law, where mandatory treaty provisions are prevalent.

35. At the same time, contractual parties may also incorporate in their agreements the provisions of a treaty not yet formally enacted in the relevant jurisdictions. An accurate assessment of the actual level of application of international trade law treaties would therefore need to take into consideration these peculiarities.

36. Bearing in mind these considerations, the Secretariat has paid special attention to devising strategic approaches for the more effective promotion of UNCITRAL legislative texts.

*Promotion of the universal adoption of fundamental trade law instruments*

37. One approach relies on promoting primarily the adoption of fundamental trade law instruments, i.e., those treaties that are already enjoying wide adoption and the universal participation to which would therefore seem particularly desirable.

38. The treaties currently considered under that approach are the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>6</sup> (the New York Convention, a United Nations convention adopted prior to the establishment of the Commission, but actively promoted by the Commission), whose universal adoption has already been explicitly called for by the General Assembly,<sup>7</sup> and the CISG.

39. Activities related to those instruments and carried out in the relevant time period include the participation of the Secretariat in the first African Conference on International Commercial Law, co-organized by the University of Basel and the University of Buea (Douala, Cameroon, 13-14 January, 2011)\*.

*Promotion of recent treaties*

40. Another approach relies on promoting specifically newly adopted instruments in order, in particular, to promote their signature and adoption by States with a view to facilitating their early entry into force.

41. In line with that approach, the Secretariat had coordinated a number of awareness-raising activities relating to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam

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<sup>6</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>7</sup> United Nations General Assembly, *Resolution 62/65* of 8 January 2008, para. 3.

Rules”),<sup>8</sup> adopted by the General Assembly on 11 December 2008<sup>9</sup> (see A/CN.9/695/Add.1).

42. The Secretariat continued its engagement in those activities, especially at the regional level, and paying special attention to those parts of the world that were less regularly and actively represented in the Working Group on Transport Law drafting the Rotterdam Rules.

43. Events to which the Secretariat took part include:

(a) The international conference “The Rotterdam Rules: The Maritime Transport Law for the 21st Century?” organized in cooperation with the University Aix-Marseille, the Mediterranean Institute of Maritime Transport and the International Maritime Committee to promote the text in the Mediterranean (Marseille, France, 19-21 May 2010);

(b) The international conference “Las Reglas de Rotterdam: El Nuevo Contrato de Transporte Internacional de Mercancías, Conveniencia o inconveniencia para Latinoamérica”, organized by the Universidad Externado de Colombia (Bogotá, 30 August-4 September 2010)\*;

(c) The seminar on the Rotterdam Rules organized in the context of the annual Colloquium of the Comité Maritime International (Buenos Aires, 24-27 October 2010); and

(d) The Journée nationale de réflexion sur les Règles de Rotterdam organized by the Conseil National des Chargeurs du Cameroun (Douala, Cameroon, 15 November 2010).

44. The first ratification of the Rotterdam Rules was effected by Spain on 19 January 2011. The treaty is indefinitely open for signature. States considering signing the Rotterdam Rules may wish to note the possibility of doing so in the context of the Treaty Event 2011, to be held at United Nations Headquarters in New York in September 2011 on the occasion of the general debate of the sixty-sixth session of the General Assembly.

45. The other recent treaty currently being promoted actively by the Secretariat is the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”).<sup>10</sup>

46. In the relevant time period the Electronic Communications Convention has received the ratifications of Honduras and Singapore. The Convention needs one more treaty action for entry into force. Some States have already declared their interest in becoming a party to the Convention and are making legislative steps in that direction, in particular, by preparing and adopting the necessary implementing legislation.

47. The Secretariat has promoted the adoption of the Electronic Communications Convention in the broader context of the adoption of modern legislation on electronic transactions and with the assistance of other international organizations. One example of such cooperation is provided by the East African Community Task

<sup>8</sup> United Nations publication, Sales No. E.09.V.93.

<sup>9</sup> United Nations General Assembly, *Resolution 63/122* of 2 February 2009.

<sup>10</sup> New York, 23 November 2005, United Nations publication, Sales No. E.07.V.2.

Force on Cyberlaws (see above, para. 29). The legislation of Rwanda on electronic commerce<sup>11</sup> was prepared in that framework. Similar cooperation with the Telecommunication Development Sector of the International Telecommunication Union (ITU-D) and, in particular, its project on Enhancing Competitiveness in the Caribbean through the Harmonization of ICT Policies, Legislation and Regulatory Procedures (HIPCAR), is being considered.

48. The Commission may wish to provide guidance on the strategic framework to technical assistance, in particular, with a view to ensuring closer involvement and cooperation between States and the Secretariat in pursuance of the Commission's mandate.

## **B. Specific activities**

49. As mentioned above, the Secretariat has continued to provide technical assistance in response to specific requests, and taking into consideration, as appropriate, the guidelines highlighted above. Moreover, the Secretariat has also pursued specific objectives for each area of work in light of its specificities, including the progress of related legislative-drafting work.

50. In certain instances, technical assistance activities relate to more than one specific area of work. This was the case, for example, of the Secretariat's participation in the project on Private Sector Development Programme, where, under the leadership of the United Nations Industrial Development Organization (UNIDO), support is being provided on the preparation of new Iraqi legislation on, inter alia, public procurement and alternative dispute resolution (arbitration and conciliation). This Programme aims at creating and enabling an effective, coherent, and comprehensive framework for private sector development in Iraq. Its goals include the enhancement of the legal and regulatory framework to foster economic growth.

### *Sale of goods*

51. The Secretariat has been active in promoting the adoption of the CISG, in connection with the pursuit of the universal adoption of that convention, as mentioned above (para. 38). It should be noted that, among recent adoptions of the text, the accession by the Dominican Republic, effected on 7 June 2010, has taken place in the context of regional promotion activity (see above, para. 29).

52. With a view to supporting ongoing treaty adoption efforts, the Secretariat participated in the CISG seminar organized by the Federation of Industries of the State of Sao Paulo, (Sao Paulo, Brazil, 29-30 April 2010) and the CISG seminar hosted by the Indonesian Government (Jakarta, 8 July 2010).

53. Moreover, the Secretariat is also actively engaged in the promotion of the uniform interpretation of the CISG. In this respect, and as a response to requests from academia and practitioners, the Secretariat is supporting a process of revision of the declarations lodged by States upon becoming a party to the CISG, with a view

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<sup>11</sup> Law No. 18/2010 of 12 May 2010, "Law relating to electronic messages, electronic signatures and electronic transactions".

to inviting States to reconsider them, where appropriate, in order to further harmonize the scope of application of the CISG.

54. Finally, and also as a reaction to suggestions from stakeholders, the Secretariat is making an effort to increase its activities relating to the promotion of the adoption and uniform interpretation of the Limitation Period in the International Sale of Goods (the Limitation Convention).<sup>12</sup> In particular, for the first time cases on the judicial application of the Limitation Convention were collected for publication in the CLOUT case collection (see also below, para. 89, for promotional activities related to new publications in the field).

55. Moreover, States have been invited to consider the adoption of the amended version of the Limitation Convention when already a party to the unamended one. The Dominican Republic has already done so by acceding to the amended version of the Limitation Convention on 30 July 2010.<sup>13</sup>

#### *Dispute resolution*

56. The Secretariat has been engaged in the promotion of recent texts relating to arbitration and conciliation, as well as in supporting ongoing legislative work. Given the high rate of adoption of these texts, the demand for technical assistance in this field is particularly acute.

57. In particular, the Secretariat has provided comments on various draft laws, including a draft arbitration law prepared by the Government of Malawi and a draft arbitration law prepared by the Government of Ecuador.

58. Furthermore, the Secretariat has provided comments to the International Finance Corporation (IFC), which provides technical assistance to numerous States in the field of dispute settlement, on various arbitration and mediation laws. It has also provided comments on laws on mediation to the GIZ as part of the latter's efforts to promote alternative dispute settlement in the Balkans (see also above, para. 23).

59. The Secretariat is currently providing technical assistance to the World Bank in an effort to promote the adoption of the New York Convention in Africa.

60. The Secretariat has also provided comments to the OECD on a draft statement on Harnessing Freedom of Investment for Green Growth, in particular transparency in treaty-based investor State arbitration, to assist the OECD-hosted Freedom of Investment Roundtable, which was at that time finalizing the draft statement for the attention of the OECD Ministerial Meeting.

61. Events that saw the participation of the Secretariat include:

(a) The conference "New Trends in International Arbitration" and the seminar "Arbitration and the not unlimited party autonomy: the impact of competition law and company law" organized by University of Oslo (Oslo, 6-7 May 2010);

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<sup>12</sup> United Nations, *Treaty Series*, vol. 1511, No. 26119 and No. 26121.

<sup>13</sup> The Dominican Republic had acceded to the original text of the Limitation Convention on 23 December 1977.

(b) The third Sharm El Sheik conference “The role of State Courts in Arbitration”(Sharm El Sheik, Egypt, 1-5 June 2010) which brought together some 200 judges, arbitrators, practitioners and academics from across the Arab world and several other countries and regions to discuss the developments in arbitration;

(c) A workshop on the UNCITRAL Arbitration Law which had the purpose to train members of the judiciary (Santiago de Chile, 26 June 2010);

(d) The UNCTAD’s 2010 International Investment Agreements Conference (Xiamen, China, 8 September 2010), which focused on the central development and systemic challenges facing the current regime of international investment agreements (IIAs) and its investor-State dispute settlement system. The Secretariat provided a review of the recent amendments which resulted in the UNCITRAL Arbitration Rules 2010, their possible relevance in treaty arbitration, and a discussion of the upcoming work of Working Group II on the subject of transparency in investor-State arbitrations;

(e) The IBA Annual Conference to deliver a presentation on the use of mediation in the context of investor-State arbitration (Vancouver, Canada, 6 October 2010);

(f) A conference organized by the Permanent Arbitration Court at the Croatian Chamber of Economy, the Mediation Centre of the Croatian Chamber of Economy and the Croatian Arbitration Association to explain and discuss, inter alia, the UNCITRAL Arbitration Rules as revised in 2010 (Paris, 2 December 2010);

(g) The second Symposium on International Investment Agreements and Investor-State Dispute Settlements at OECD Headquarters to take stock of current developments in international investment agreements and investor-State dispute settlement with a view to improve the system (Paris, 14 December 2010);

(h) A conference organized by the Government of Mauritius to launch the new platform created by the Government of Mauritius for international commercial and investment arbitration (Mauritius, 14-15 December 2010); and

(i) The Vienna Arbitration Days, a conference organized by major Austrian arbitration associations and institutions, to deliver a presentation on the UNCITRAL Arbitration Rules, as revised in 2010 (Vienna, 4-5 March 2011).

62. The Secretariat collaborated with a number of arbitral institutions and organizations, including by coordinating training for judges on the New York Convention) and co-organizing with the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC) the VIAC-UNCITRAL Conference 2011 (Vienna, 14-15 April 2011).

#### *Electronic commerce*

63. The Secretariat has promoted the adoption of the Electronic Communications Convention and other texts on electronic commerce, in particular, as noted above (paras. 45-47), in cooperation with other organizations and adopting preferentially a regional approach.

64. Partly also as a result of those promotional activities, several new national enactments of legislation on electronic commerce and electronic signatures were recorded (see A/CN.9/723).

65. One remarkable trend in this field relates to the adoption of substantive provision of the Electronic Communications Convention in national legislation without formal adoption of that treaty by the concerned country. In this respect, it should be noted that one of the goals of the Electronic Communications Convention is to update and complement the provisions of the UNCITRAL Model Law on Electronic Commerce,<sup>14</sup> and of the UNCITRAL Model Law on Electronic Signatures.<sup>15</sup> The incorporation of the provisions of the Convention at the domestic level is fully in line with that goal. However, the lack of formal treaty adoption does not allow achieving other important goals of the Convention such as the removal of obstacles to the use of electronic communications contained in other treaties. It seems therefore desirable that jurisdictions having already enacted some or all of the substantive provisions of the Electronic Communications Convention would consider formal adoption of that Convention.

#### *Procurement*

66. In accordance with requests of Working Group I (Procurement), the Secretariat has established links with other international organizations active in procurement reform to foster cooperation with regard to UNCITRAL's work on revising the UNCITRAL Model Law on Procurement of Goods, Construction and Services.<sup>16</sup> The aims of such cooperation are to ensure that regional requirements and circumstances are understood by the Working Group when revising the Model Law, and that reforming organizations are informed of the policy considerations underlying those revisions, so as to promote a thorough understanding and appropriate use of the Model Law, once it is adopted by the Commission, at both regional and national levels.<sup>17</sup> The Secretariat is taking a regional approach to this cooperation, and activities with the multilateral development banks in several regions, focusing on good governance and anti-corruption (in which procurement reform plays a pivotal role), are envisaged.

67. The Secretariat has participated, among others, in the following regional activities:

(a) The sixth Public Procurement Forum, organized in conjunction with the World Bank and the Asian Development Bank, presenting a paper on the reforms to the Model Law (Istanbul, Turkey, 26-29 April 2010);

(b) The International Conference on Public Procurement Regulation at the University of Malaya, presenting a paper on the use of electronic procurement as a way to achieve the goals of a procurement system (Kuala Lumpur, 9 August 2010);

(c) The fourth International Conference of Public Procurement (IPPC 2010), delivering a keynote speech on procurement reform and presenting a paper on electronic procurement (Seoul, 26-28 August 2010);

(d) The conference Global Revolution IV, delivering a keynote speech on the reform of the Model Law and participating in a panel on negotiated procurement (Copenhagen, 9-10 September 2010); and

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<sup>14</sup> United Nations publication, Sales No. E.99.V.4.

<sup>15</sup> United Nations publication, Sales No. E.02.V.8.

<sup>16</sup> United Nations publication, Sales No. E.98.V.13.

<sup>17</sup> See documents A/CN.9/575, paras. 52 and 67, and A/CN.9/615, para. 14.

(e) The International Public Procurement Forum on “Public Procurement Reform and Modernization” held at the Chinese University for Finance and Economics, and the Asian Development Bank and WTO Conference on Public Procurement (Beijing, 13-18 October 2010).

68. Other relevant activities included participation in the following events:

(a) Delivering a presentation on avoiding “Fraud and corruption in public procurement” at a dedicated event held by the Procurement Policy Office and Independent Commission against Corruption, and on the reforms to the Model Law at the Third Annual Stakeholders’ Forum (Mauritius, 19 and 21 October 2010); and

(b) Attending a Procurement Leadership Conference aimed at EU policymakers and practitioners for the promotion of the Model Law on procurement (Düsseldorf, Germany, 7-8 November 2010).

69. Among legislative drafting activities, assistance was provided to the Government of Mauritius National Review Committee with a view to reviewing the current procurement legislation and including provisions, inter alia, for framework agreements, electronic procurement and sustainable public procurement (Mauritius, 18-23 October 2010).

70. The Secretariat also works with the UNODC Secretariat on the implementation of the procurement-related aspects of the United Nations Convention against Corruption, using the UNCITRAL Model Law on Procurement as implementing legislation, and the Conference of States Parties to that Convention has requested that such cooperation should continue (CAC/COSP/WG.4/2010/7, para. 59).<sup>18</sup>

### *Insolvency*

71. The Secretariat has promoted the use and adoption of insolvency texts, particularly the Model Law on Cross-Border Insolvency and the Legislative Guide on Insolvency Law, through participation in various international fora. Such activities included:

(a) Participating at the annual conference of the section on Insolvency, Restructuring and Creditor Rights of the International Bar Association in order to promote UNCITRAL’s work on mediation, insolvency and secured transactions (Hamburg, Germany, 16-18 May 2010);

(b) Participating in a meeting of the World Bank’s Insolvency and Creditor/Debtor Regimes Task Force (Washington D.C., 10-11 January 2011). The purpose of the meeting was to discuss the updating of the Insolvency and Creditor Rights Standard (“ICR Standard”) in view of part three of the UNCITRAL Legislative Guide on Insolvency Law<sup>19</sup> as well as other matters relating to insolvency with a view to improving the capacity of insolvency regimes to address legal and policy issues. The ICR Standard belongs to the Financial Stability Board’s Standards and Codes Initiative and was used by the World Bank in the ICR Reports on the Observance of Standards and Codes. The Standard, developed in coordination

<sup>18</sup> See also document CAC/COSP/WG.4/2010/3, “Good practices in the prevention of corruption in public procurement”.

<sup>19</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 233.

with the UNCITRAL Secretariat, includes (a) recommendations from the UNCITRAL Legislative Guide on Insolvency Law and (b) the World Bank Principles for Effective Insolvency and Creditor Rights Systems. Prior to the Task Force meeting, the UNCITRAL Secretariat had consultations with the World Bank in order to ensure appropriate incorporation of part three of the UNCITRAL Legislative Guide on Insolvency Law in the updated ICR Standard; and

(c) Co-organizing with INSOL International and the World Bank, a Multinational Judicial Colloquium on insolvency law (Singapore, 12-13 March 2011)\*.<sup>20</sup> The purpose of the Colloquium was to assist judges, regulators and justice officials to understand developments in the handling of international insolvency cases and learn about international frameworks for judicial coordination and cooperation. The Colloquium is the ninth in a series co-organized initially with INSOL International and, since 2007, also with the World Bank. Around 80 judges and Government officials, from over 40 States, participated, representing a broad range of practical experience and perspectives, particularly with respect to cross-border insolvency, from diverse legal systems. The Colloquium provided a widely welcomed opportunity for judges to exchange experiences and to further their understanding of the various national approaches to cross-border insolvency cases. It is anticipated the tenth judicial colloquium will be organized in 2013.

#### *Security interests*

72. The approach taken by the Secretariat in providing technical assistance related to UNCITRAL texts on security interests (the United Nations Convention on the Assignment of Receivables in International Trade,<sup>21</sup> the UNCITRAL Legislative Guide on Secured Transactions<sup>22</sup> and its Supplement on Security Rights in Intellectual Property<sup>23</sup>) is twofold. The first approach focuses on disseminating information about those texts to Government officials, legislators, judges, academics and practitioners and thus, promoting their implementation. Such activities included participation at the following events:

(a) The World Bank and the Modern Law Review Conference on International Legal Standards on Secured Transactions, Facilitation of Credit and Financial Crisis organized by Newcastle University to discuss the role of UNCITRAL in the preparation of international legal standards, relevant activities of the World Bank and their impact, in particular, on the English law reform (Newcastle, United Kingdom, 14-16 May 2010);

(b) A seminar organized by the Commercial Law Development Program (CLDP) of the United States Department of Commerce and the National Center for Judicial Studies, Egyptian Ministry of Justice to provide training for Egyptian economic court judges on secured financing and insolvency law and to attract support for the current law reform projects in Egypt (Cairo, 20-22 May 2010);

(c) The annual meeting of the Advisory Committee on Private International Law (ACPIL) organized by the United States State Department, discussing various

<sup>20</sup> The report of the colloquium will be available from [www.uncitral.org/uncitral/en/commission/colloquia.html](http://www.uncitral.org/uncitral/en/commission/colloquia.html).

<sup>21</sup> United Nations publication, Sales No. E.04.V.14.

<sup>22</sup> United Nations publication, Sales No. E.09.V.12.

<sup>23</sup> United Nations publication, Sales No. E.11.V.6.



UNCITRAL texts including those on security interests (Washington, D.C., 28-29 October 2010);

(d) The International Symposium on Intellectual Property 2010 organized by the Korea Institute of Intellectual Property and Korea Intellectual Property Society on intellectual property financing (Seoul, 17 November 2010);

(e) A colloquium organized by the Centre de droit des affaires et de gestion (Université Paris - Descartes), the Centre de droit des affaires du patrimoine et de la responsabilité (Université Rennes 1) and the Centre Michel de l'Hospital (Université d'Auvergne) on the renovation of the sources of law and the recent UNCITRAL work on security interests (Paris, 18-19 November 2010);

(f) A conference organized by the Ministry of Foreign Affairs, the Athens Bar Association and the Democritus University of Thrace on current international trends and developments in private international law in the work of UNCITRAL, Unidroit and the Hague Conference on Private International Law (Athens, 25 November 2010); and

(g) A seminar organized by Istanbul Chamber of Commerce and Yeditepe University Law School on intellectual property financing (Istanbul, Turkey, 6-8 December 2010).

73. The second approach focuses on international financial institutions including the World Bank, the International Finance Corporation (IFC) and regional development banks, which provide technical assistance to States in the field of secured transactions, yet without formulating legislative standards of their own. As such law reform-related activities, including the establishment of security rights registries, need to be based on internationally recognized legislative standards, the Secretariat coordinates with those international financial institutions to ensure that technical assistance is provided in consistency with UNCITRAL texts on secured transactions.

74. An example of such approach would be the Secretariat's review of the Secured Transactions Systems and Collateral Registries toolkit of the World Bank (January 2010), which resulted in the toolkit being consistent with the recommendations of the Guide. Another example is the Secretariat's participation in the IFC Advisory Panel on Secured Transactions hosted by the Investment Climate Advisory Services of IFC (Washington, D.C., 21-22 October 2010). Yet another example is the participation of delegates to Working Group VI in the Financial Infrastructure Conference (Secured Transactions Stream), organized by the World Bank and the International Finance Corporation (Rio de Janeiro, Brazil, 14-17 March 2011), where several references were made to the use of the Guide in secured transactions law reform around the world.

75. The Secretariat also engages in informal consultation with legislators and policymakers from various jurisdictions, in some instances as a follow-up to the aforementioned activities. Such constant interaction with relevant actors have resulted in the UNCITRAL Legislative Guide on Secured Transactions (the "Guide") being reflected in recent enactments and law revisions in Australia (Personal Property Securities Act, 2009), Malawi (draft Secured Transactions Law) and the Republic of Korea (Act on Securities in Movable Property and Receivables, 2010). Such activities have also resulted in the Principles, Definitions and Model

Rules of a European Private Law, Draft Common Frame of Reference (DCFR), volume 6, book IX (Proprietary security in movable assets) prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), being largely consistent with the recommendations of the Guide.

*Other capacity-building activities*

76. The Secretariat has also been engaged in other capacity-building activities aimed at increasing the knowledge of international trade law. Among these, the cooperation with the International Trade Center of the International Labour Organization (ITC-ILO) and the University of Turin may be noted.

77. Based on the experience of the Master Course on Public Procurement for Sustainable Development, also co-managed with ITC-ILO and the University of Turin, the Secretariat has contributed to the development and is involved in the management of a new Master of Laws course in International Trade Law.<sup>24</sup> These master courses form integral part of the broader educational programme denominated “Turin School of Development”.<sup>25</sup>

78. International development agencies and other institutions managing comprehensive technical assistance programmes may wish to consider sponsoring the attendance of such courses as a measure to strengthen in the longer term local capacity in partner countries.

### **III. Dissemination of information**

79. A number of publications and documents prepared by UNCITRAL serve as key resources for its technical cooperation and assistance activities, particularly with respect to dissemination of information on its work and texts. These resources are being constantly developed to further improve the ease of dissemination of information and ensure that it is current and up to date.

#### **A. Website**

80. The UNCITRAL website, available in the six official languages of the United Nations, provides access to full-text UNCITRAL documentation and other materials relating to the work of UNCITRAL, such as publications, treaty status information, press releases, events and news. In line with the organizational policy for document distribution, official documents are provided, when available, via linking to the United Nations Official Document System (ODS).

81. The number of visits to the UNCITRAL website has steadily increased over the last years and this trend continued in 2010. Approximately 60 per cent of the traffic is directed to pages in English, 25 per cent to pages in French and Spanish, and the remaining 15 per cent to pages in Arabic, Chinese and Russian. In this respect, it should be noted that, while the UNCITRAL website is among the most

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<sup>24</sup> For more information on these master courses, see [www.itcilo.org/en/standard-courses-registration/masters-postgraduates-2](http://www.itcilo.org/en/standard-courses-registration/masters-postgraduates-2).

<sup>25</sup> [www.itcilo.org/en/news/masters](http://www.itcilo.org/en/news/masters).

important electronic sources of information on international trade law in all languages, it may represent currently the sole available source of information in its class in some of those languages.

82. The content of the website is updated and expanded on an ongoing basis in the framework of the activities of the UNCITRAL Law Library and therefore at no additional cost to the Secretariat. In particular, UNCITRAL official documents relating to earlier Commission sessions are continuously uploaded in the ODS and made available on the website under a project on digitization of UNCITRAL archives conducted jointly with the UNOV Documents Management Unit. In 2010, about 550 additional official documents were made available on the UNCITRAL website.

## **B. Library**

83. Since its establishment in 1979, the UNCITRAL Law Library has been serving research needs of Secretariat staff and participants in intergovernmental meetings convened by UNCITRAL. It has also provided research assistance to staff of Permanent Missions, other Vienna-based international organizations, external researchers and law students. In 2010, library staff responded to approximately 500 reference requests originating from over 26 countries.

84. The collection of the UNCITRAL Law Library focuses primarily on international trade law and currently holds over 10,000 monographs, 150 active journal titles, legal and general reference material, including non-UNCITRAL United Nations documents, and documents of other international organizations; and electronic resources (restricted to in-house use only). Particular attention is given to expanding the holdings in all of the six United Nations official languages.

85. The UNCITRAL Law Library maintains an online public access catalogue (OPAC) jointly with the other United Nations libraries in Vienna and with the technical support of the United Nations Library in Geneva. The OPAC is available via the library page of the UNCITRAL website.

86. The UNCITRAL Law Library staff prepares for the Commission an annual "Bibliography of recent writings related to the work of UNCITRAL". The bibliography includes references to books, articles and dissertations in a variety of languages, classified according to subject (for the forty-fourth Commission session, see A/CN.9/722). Individual records of the Bibliography are entered into the OPAC, and the full-text collection of all cited materials is maintained in the Library collection. Monthly updates from the date of the latest annual Bibliography are available in the bibliography section of the UNCITRAL website.<sup>26</sup>

87. An advanced version of the consolidated bibliography of writings related to the work of UNCITRAL was made available on the UNCITRAL website in 2009.<sup>27</sup> The consolidated bibliography aims to compile all entries of the bibliographical reports submitted to the Commission since 1968. It currently contains over 5,500 entries, reproduced in the English and the original language versions, verified and standardized to the extent possible. The final version of the consolidated

<sup>26</sup> [www.uncitral.org/uncitral/en/publications/bibliography\\_monthly.html](http://www.uncitral.org/uncitral/en/publications/bibliography_monthly.html).

<sup>27</sup> [www.uncitral.org/uncitral/en/publications/bibliography\\_consolidated.html](http://www.uncitral.org/uncitral/en/publications/bibliography_consolidated.html).

bibliography will be made available as an official UNCITRAL publication subject to availability of financial resources.

### C. Publications

88. In addition to official documents, UNCITRAL traditionally maintains two series of publications, namely the texts of all instruments developed by the Commission and the *UNCITRAL Yearbook*. Publications are regularly provided in support of technical cooperation and assistance activities undertaken by the Secretariat, as well as by other organizations where the work of UNCITRAL is discussed, and in the context of national law reform efforts.

89. The following works were published in 2010: the *UNCITRAL Legislative Guide on Secured Transactions*, the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*,<sup>28</sup> the collection of UNCITRAL legal texts on CD-ROM and the 2005 *UNCITRAL Yearbook*. The 2006 *Yearbook* was published in early 2011, and the text of the 2007 *Yearbook* has been finalized and submitted for publication.

90. Moreover, a new e-book containing the text and explanatory note of the CISG has been prepared<sup>29</sup> and is available on the UNCITRAL website.<sup>30</sup> The new text incorporates corrections to the text of that convention effected by the treaty depositary. It is expected that a similar publication containing the text and the explanatory note of the Limitation Convention will also be published.

91. The proceedings of the UNCITRAL Congress “Modern Law for Global Commerce”, held on the occasion of the fortieth session of the Commission (Vienna, 9-12 July 2007), are also expected to be published as an e-book in 2011.

92. While all recent publications are available both in hard copy and electronically, efforts are being made to make greater use of electronic media in light of budget and environmental concerns and as appropriate in light of technological capacity. This has resulted, inter alia, in the preparation of event-specific CDs containing a compilation of UNCITRAL texts for distribution instead of paper documents.

### D. Press releases

93. Press releases are being regularly issued when treaty actions relating to UNCITRAL texts take place or information is received on the adoption of a UNCITRAL model law or other relevant text. Press releases are also issued with respect to information of particular importance and direct relevance to UNCITRAL. Those press releases are provided to interested parties by e-mail and are posted on the UNCITRAL website, as well as on the website of the United Nations Information Service (UNIS) in Vienna or of the Department of Public Information, News and Media Division in New York, if applicable.

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<sup>28</sup> United Nations publication, Sales No. E.10.V.6.

<sup>29</sup> United Nations publication, Sales No. E.10.V.14.

<sup>30</sup> [www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf](http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf).

94. To improve the accuracy and timeliness of information received with respect to the adoption of UNCITRAL model laws, since such adoption does not require a formal action with the United Nations Secretariat, and to facilitate the dissemination of related information, the Commission may wish to request Member States to advise the Secretariat when enacting legislation implementing a UNCITRAL model law.

#### **E. General enquiries**

95. The Secretariat currently addresses approximately 2,000 general enquiries per year concerning, inter alia, technical aspects and availability of UNCITRAL texts, working papers, Commission documents and related matters. Increasingly, these enquiries are answered by reference to the UNCITRAL website.

#### **F. Information lectures in Vienna**

96. The Secretariat provides upon request information lectures in-house on the work of UNCITRAL to visiting university students and academics, members of the bar, Government officials including judges and others interested. Since the last report, lectures have been given to visitors from, inter alia, Austria, Germany, Hungary, Republic of Korea, Slovenia, Ukraine and the United States.

### **IV. Resources and funding**

97. The costs of most technical cooperation and assistance activities are not covered by the regular budget. The ability of the Secretariat to implement the technical cooperation and assistance component of the UNCITRAL work programme is therefore contingent upon the availability of extrabudgetary funding.

98. The Secretariat has explored a number of manners to increase resources for technical assistance activities, including through in-kind contribution. In particular, a number of missions have been funded, in full or in part, by the organizers. Additional potential sources of funding could be available if trade law reform activities could be mainstreamed more regularly in broader international development assistance programme. In this respect, the Commission may wish to provide guidance on possible future steps.

#### **A. UNCITRAL Trust Fund for symposia**

99. The UNCITRAL Trust Fund for symposia supports technical cooperation and assistance activities for the members of the legal community in developing countries, funding the participation of UNCITRAL staff or other experts at seminars where UNCITRAL texts are presented for examination and possible adoption and fact-finding missions for law reform assessments in order to review existing domestic legislation and assess country needs for law reform in the commercial field.

100. In the period under review, contributions and a new pledge were received from the Government of Indonesia, to whom the Commission may wish to express its appreciation.

101. The Commission may wish to note that, in spite of efforts by the Secretariat to solicit new donations, funds available in the Trust Fund are sufficient only for a very small number of future technical cooperation and assistance activities. Efforts to organize the requested technical cooperation and assistance activities at the lowest cost and with co-funding and cost sharing whenever possible are ongoing. However, once current funds are exhausted, requests for technical cooperation and assistance involving the expenditure of funds for travel or to meet other costs will have to be declined unless new donations to the Trust Fund are received or alternative sources of funds can be found.

102. The Commission may once again wish to appeal to all States, relevant United Nations Agencies and bodies, international organizations and other interested entities to make contributions to the Trust Fund, if possible in the form of multi-year contributions, so as to facilitate planning and to enable the Secretariat to meet the demand for technical cooperation and assistance activities and to develop a more sustained and sustainable technical assistance programme. The Commission may also wish to request Member States to assist the Secretariat in identifying sources of funding within their Governments.

## **B. UNCITRAL Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL**

103. The Commission may wish to recall that, in accordance with General Assembly resolution 48/32 of 9 December 1993, the Secretary-General was requested to establish a Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL. The Trust Fund so established is open to voluntary financial contributions from States, intergovernmental organizations, regional economic integration organizations, national institutions and non-governmental organizations, as well as to natural and juridical persons.

104. In the period under review, a contribution was received from the Government of Austria, to whom the Commission may wish to express its appreciation.

105. In order to ensure participation of all Member States in the sessions of UNCITRAL and its Working Groups, the Commission may wish to reiterate its appeal to relevant bodies in the United Nations system, organizations, institutions and individuals to make voluntary contributions to the Trust Fund established to provide travel assistance to developing countries that are members of the Commission.

106. It is recalled that in its resolution 51/161 of 16 December 1996, the General Assembly decided to include the Trust Funds for UNCITRAL symposia and travel assistance in the list of funds and programmes that are dealt with at the United Nations Pledging Conference for Development Activities.

## **IX. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS**

### **Status of conventions and model laws**

**(A/CN.9/723)**

**[Original: English]**

Not reproduced. The updated list may be obtained from the UNCITRAL secretariat or found on the Internet at [www.uncitral.org](http://www.uncitral.org)





## **X. COORDINATION AND COOPERATION**

### **Note by the Secretariat on coordination activities**

**(A/CN.9/725)**

**[Original: English]**

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### **I. Introduction**

1. In resolution 34/142 of 17 December 1979, the General Assembly requested the Secretary-General to place before the United Nations Commission on International Trade Law 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 resolution 36/32 of 13 November 1981, the General Assembly endorsed various suggestions by the Commission to implement further its coordinating role in the field of international trade law.<sup>1</sup> Those suggestions included presenting, in addition to a general report of activities of international organizations, reports on specific areas of activity focusing on work already under way and areas where unification work was not under way but could appropriately be undertaken.<sup>2</sup>

3. This report, prepared in response to resolution 34/142 and in accordance with UNCITRAL's mandate,<sup>3</sup> provides information on the activities of other international organizations active in the field of international trade law in which the UNCITRAL Secretariat has participated, principally working groups, expert groups and plenary meetings. The purpose of that participation has been to ensure coordination of the related activities of the different organizations, share information and expertise and avoid duplication of work and the resultant work products.

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<sup>1</sup> *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, paras. 93-101.

<sup>2</sup> *Ibid.*, para. 100.

<sup>3</sup> See General Assembly Resolution 2205 (XXI), sect. II, para. 8.

## II. Coordination activities

### A. The International Institute for the Unification of Private Law (Unidroit) and the Hague Conference on Private International Law

#### 1. International Institute for the Unification of Private Law (Unidroit)

4. The Secretariat participated in the following meetings of Unidroit:

(a) The 4th session of the Unidroit Committee of government experts for the preparation of the draft Protocol to the Convention in International Interests in Mobile equipment on matters specific to Space Assets (Rome, 3-7 May 2010). The session was attended by Government representatives, representatives of intergovernmental organizations and non-governmental organizations, as well as representatives of the international commercial space, financial and insurance communities;

(b) The 89th Session of the Unidroit Governing Council (Rome, 10-12 May 2010). Items on the agenda included, among others, the progress report on the work on the new edition the Principles of International Commercial Contracts; the follow-up and promotion of the Model Law on Leasing (2008); the implementation and status of the Cape Town Convention (2001) and its protocols; the Triennial Work Programme of the Organisation (2011-2013);

(c) The 5th session of the Unidroit Working Group on the preparation of Principles of International Commercial Contracts (Rome, 24-28 May 2010). This third edition of the Principles includes new chapters on the unwinding of failed contracts, illegality, plurality of obligors and/or obligees, conditional obligations and termination of long-term contracts for just cause.<sup>4</sup> The new edition is expected to be formally approved by the Unidroit Governing Council at its next session in May 2011; and

(d) The 1st meeting of the Unidroit Committee on Emerging Markets Issues, Follow-Up and Implementation which was preceded by a colloquium on “The Law of Securities Trading in Emerging Markets: Lessons Learned from the Financial Crisis and Long-term Trends” (Rome, 6-9 September 2010).<sup>5</sup> The purpose of the meeting of the inter-governmental Committee was to discuss reception by States of the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009) (“Geneva Securities Convention”) and proposals for its promotion. It also reviewed the Accession Kit to the Geneva Securities Convention, which addresses the relationship between the Geneva Securities Convention and the UNCITRAL Legislative Guide on Secured Transactions. In addition, the Committee considered proposals for future work by Unidroit including (a) a model law on the netting of financial instruments; and (b) a legislative guide on securities trading in emerging markets. Coordination with the UNCITRAL Secretariat was emphasized

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<sup>4</sup> See *Current activities of international organizations related to the harmonization and unification of international trade law* (A/CN.9/707), Note by the Secretariat, 23 April 2010, p. 4.

<sup>5</sup> The programme of the colloquium is available at [www.unidroit.org/english/cem1/programme.pdf](http://www.unidroit.org/english/cem1/programme.pdf).

so as to ensure consistency of these projects with the UNCITRAL Legislative Guide on Secured Transactions, in particular, with respect to issues relating to security rights in non-intermediated securities.

## **2. Hague Conference on Private International Law**

5. The Secretariat participated in the following meetings of the Hague Conference on Private International Law (Hague Conference):

(a) The Council on General Affairs and Policy (The Hague, The Netherlands, 7-9 April, 2010),<sup>6</sup> at which, among others, the current work of the Conference was discussed. The Council took note of a proposal to examine the topic of the law applicable to the property aspects of moveable assets, with a view to further elaborating it. The Council also invited the Permanent Bureau of the Conference to continue following developments on issues relevant to private international law in electronic commerce, e-justice and data protection. Assessment and analysis of transnational legal issues relating to security interests, taking into account in particular the work undertaken by other international organizations, was indicated as another topic on which the Permanent Bureau should ensure monitoring;

(b) A judges' expert group meeting to discuss guidelines on cross-border judicial communication (The Hague, The Netherlands, 28 June 2010). The purpose of the meeting was to consider the latest draft of guidelines for cross-border judicial communication in the context of the Hague Conference conventions on child protection and the judges' network established in that context. The draft (dating from 2006) was accompanied by a policy paper suggesting various revisions, emanating from judges part of the expert group; and

(c) The 2nd meeting of the Working Group on Choice of Law in International Contracts (The Hague, The Netherlands, 15-17 November 2010).<sup>7</sup> At the meeting, a tentative agreement was reached by the participating experts on the text of fundamental issues of the instrument<sup>8</sup> such as the existence and material validity of the agreement on choice of law and the consent of the parties, the implicit choice of law, change of the choice of law and severability, formal conditions, and the range of the selected law (including the choice non-State rules).

## **3. Joint activities with Unidroit and the Hague Conference**

6. The Secretariat attended the annual coordination meeting with Unidroit and the Hague Conference at which current work of the three organizations and potential areas for cooperation were discussed (The Hague, The Netherlands, 9 June 2010).

7. Further to meetings held among the secretariats of the three organizations,<sup>9</sup> a publication introducing and illustrating the interrelationship among their texts on security interests is being prepared. The publication will assist States considering the implementation of those texts by summarizing ways in which these texts may be

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<sup>6</sup> The Secretariat attended the Council as an observer.

<sup>7</sup> The Secretariat attended this meeting as an observer.

<sup>8</sup> Available at [www.hcch.net/upload/wop/contracts\\_rpt\\_nov2010e.pdf](http://www.hcch.net/upload/wop/contracts_rpt_nov2010e.pdf).

<sup>9</sup> Current activities of international organizations related to the harmonization and unification of international trade law, Note by the Secretariat (A/CN.9/657/Add.1), paras. 1-2.

adopted to establish a modern comprehensive legislative regime on secured transactions.

## **B. Other organizations**

8. The Secretariat has undertaken other coordination activities with various international organizations. These have included provisions by the Secretariat of comments on documents drafted by those organizations, as well as participation in and, in some cases, conducting presentations of the work of UNCITRAL at various meetings and conferences.

### **1. General**

9. The Secretariat attended, and gave a paper at, the IDLO Conference on Legal and Judicial Development Assistance: Realising the Paris Declaration and Accra Agendas for Rule of Law and Human Rights (Rome, 21 October 2010). The Secretariat set out the relevance of UNCITRAL's work in a presentation on "Ensuring compatibility of commercial law reform relating to international treaty obligations with national development strategies". The Conference discussed the extent to which developing countries are devising national strategies for justice and the rule of law; the donor experience and support for such strategies; and their actual impact on legal reform and empowerment of the poor. Interventions also explored the challenges of involving civil society in the planning and implementation of national strategies, the progress in their monitoring and evaluation, and experiences of implementing sectoral strategies in post-conflict and fragile States.

10. Since December 2010 the Secretariat has joined the Inter Agency Cluster of the Chief Executives Board for Coordination (CEB), an inter-agency mechanism dedicated to the coordination of trade and development operations at the national and regional levels within the United Nations system. The Cluster is led by UNCTAD and includes UNIDO, UNDP, ITC, FAO, WTO, UNEP, ILO, UNCITRAL, UNOPS and the five United Nations Regional Commissions. One of the objectives of the Cluster is to ensure that the issues related to trade and productive sectors and their interface with the Millennium Development Goals are adequately taken into account in the "Delivering as One" and United Nations-wide coherence process. The Cluster intends to raise awareness at national levels, in particular in developing countries, with regard to the development potential of trade policies and activities and the opportunities offered by the international trading system.

11. The Secretariat participated in the United Nations (UN) Interagency meeting on inclusive finance for development, hosted by UNDP and the United Nations Secretary-General's Special Advocate for Inclusive Finance of Development (New York, 22 March 2011). The meeting aimed at developing a shared understanding of the importance of financial inclusion as a key element of the work of the United Nations system, and reaching consensus on a shared agenda that would help various agencies of the system to achieve their mandates more effectively and quickly, and use United Nations resources and know-how to maximum impact.

## 2. Procurement

12. The multilateral banks and other international governmental organizations involved in public procurement negotiations have been participating in expert consultations at the request of Working Group I with a view to enhancing the understanding and the use of the Model Law as well as its use as a tool in capacity development.

## 3. Dispute settlement

13. The Secretariat carried out the following activities:

(a) Contributing to the World Bank Group initiative on Investing Across Borders, in particular its arbitration component. The initiative compares regulation of foreign direct investment around the world and presents quantitative indicators on economies' laws, regulations, and practices affecting how foreign companies invest across sectors, start businesses, access industrial land, and arbitrate commercial disputes (since 2010);<sup>10</sup>

(b) Participating in the round table organized by the Organisation for Economic Co-operation and Development (OECD), "Expert Dialogue on International Investment Agreements and Investor-State Dispute Settlement", in order to present the existing UNCITRAL instruments in the field of arbitration, and the current work of Working Group II (Arbitration and Conciliation) on transparency in treaty-based investor-State arbitration (21 March 2011); and

(c) Participating in a subcommittee of the International Bar Association (IBA) devoted to mediation with States, whose primary objective is to examine the current use of mediation in relation to investor-State disputes (since February 2011).<sup>11</sup>

14. The UNCITRAL Arbitration Rules, as revised in 2010, have been adopted by the following arbitration centres:

(a) The Kuala Lumpur Regional Centre for Arbitration (KLRCA) (15 August 2010), which was established under the auspices of the Asian-African Legal Consultative Organization (AALCO) an inter-governmental organization comprising 47 governments of the Asian and African region, in cooperation with the Government of Malaysia;<sup>12</sup> and

(b) The Cairo Regional Centre for International Commercial Arbitration (CRCICA) (1 March 2011), which was established by AALCO, in cooperation with the Government of Egypt.<sup>13</sup>

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<sup>10</sup> Information on the initiative can be found at <http://iab.worldbank.org>.

<sup>11</sup> Information on the initiative can be found at [www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Mediation/State\\_Mediation/Default.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx).

<sup>12</sup> Information on the KLRCA can be found at [www.klrca.org.my](http://www.klrca.org.my).

<sup>13</sup> Information on the CRCICA can be found at [www.crcica.org.eg](http://www.crcica.org.eg).

#### 4. Electronic commerce

15. The Secretariat carried out the following activities:

(a) Providing comments on United Nations/CEFACT draft recommendation 37 on Digital Evidence Certification; and

(b) Consultations on the International Single Window in the context of the collaboration with the World Customs Organization (WCO) and the United Nations Centre for Trade Facilitation and Electronic Business (UNCEFACT). As part of this effort, collaboration was also established with the Advisory Group on Legal Framework for National and Regional Single Window of the United Nations Network of Experts for Paperless Trade in Asia and the Pacific (UNNExT).

#### 5. Security interests

16. Coordination with relevant organizations has been pursued to ensure that States are offered comprehensive and consistent guidance in the area of secured transactions law.

17. Specific activities of the Secretariat included:

(a) Participating in the International Finance Corporation (IFC) Advisory Panel on Secured Transactions (Washington D.C., 21-22 October 2010) hosted by the IFC Investment Climate Advisory Services. The purpose of the meeting was to share information on various IFC secured transactions law reform projects (including establishment of registries) all over the world and to seek the feedback of Advisory Panel members. The discussion exemplified that the UNCITRAL Legislative Guide on Secured Transactions and the Supplement on Security Rights in Intellectual Property, as well as current work on security rights registries had attracted a lot of interest from relevant actors. The importance of receivables financing at a time of financial crisis and the interest in the United Nations Convention on the Assignment of Receivables in International Trade were also highlighted; and

(b) Participating in a meeting of the European Max-Planck-Group for Conflict of Laws in Intellectual Property (CLIP)<sup>14</sup> (Hamburg, Germany, 4 June 2010) to exchange information on the law applicable to security rights in intellectual property, an issue which had not been resolved at Working Group VI prior to the deliberation at the forty-third session of the Commission.<sup>15</sup>

18. At its forty-third session, in 2010, the Commission considered that intellectual property licensing is a topic at the intersection of intellectual property and commercial law.<sup>16</sup> It was agreed that such a topic fell within the mandate of the

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<sup>14</sup> Established in 2004, the European Max-Planck-Group for Conflict of Laws in Intellectual Property (CLIP) is a group of scholars in the fields of intellectual property and private international law that meets regularly to discuss issues of intellectual property, private international law and jurisdiction. The goal of CLIP is to draft a set of principles for conflict of laws in intellectual property and to provide independent advice to European and national law makers. Information is available at [www.ip.mpg.de/ww/de/pub/mikroseiten/cl\\_ip\\_eu/](http://www.ip.mpg.de/ww/de/pub/mikroseiten/cl_ip_eu/).

<sup>15</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 210-223.

<sup>16</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 269-273.

Commission.<sup>17</sup> The Secretariat was thus requested to prepare a study that would identify specific issues and discuss the desirability and feasibility of the Commission preparing a legal text on removing obstacles to international trade with regard to intellectual property licensing practices.<sup>18</sup> In that context, the Secretariat was requested to consult with relevant international organizations, including the World Intellectual Property Organization (WIPO), as well as experts with significant experience in that field, both from the public and the private sector.<sup>19</sup>

19. The Seventh Inter-American Specialized Conference on Private International Law, organized by the Organization of American States<sup>20</sup> (CIDIP-VII, Washington D.C., 7-9 October 2009) approved the Model Registry Regulations under the Model Inter-American Law on Secured Transactions.<sup>21</sup> As the current work of Working Group VI on a text on registration of security rights in movable assets is highly relevant, the UNCITRAL Secretariat, in cooperation with the OAS Secretariat, is closely monitoring the implementation of the OAS Model Registry Regulations, particularly in the Latin American region.

## 6. Insolvency

20. The Secretariat promoted the use and adoption of insolvency texts, particularly the Model Law on Cross-Border Insolvency and the Legislative Guide on Insolvency Law, through participation in various international forums. Activities included:

(a) Attending, as an observer, the second meeting of the European Commission Insolvency Law Expert Group on cross-border crisis management in the banking sector (Brussels, 15 October 2010). The meeting discussed the preparation of the Crisis Management Directive and possible harmonization of substantive insolvency law. The possible contours of the Directive as well as targeted issues such as asset transfers within group entities in stressed situations and write down of debts were also discussed. The participation of the Secretariat aimed at promoting greater awareness and knowledge of the UNCITRAL Model Law on Cross-Border Insolvency and recent developments, including the Practice Guide on Cross-Border Insolvency Cooperation; and ensuring coordination of the UNCITRAL work on groups with work being undertaken by the EU;

(b) Participating in a meeting of the World Bank's Insolvency and Creditor/Debtor Regimes Task Force (Washington D.C., 10-11 January 2011) to discuss the updating of the Insolvency and Creditor Rights Standard ("ICR Standard") in light of the 2010 Part three of the UNCITRAL Legislative Guide on Insolvency Law and other matters relating to insolvency, with a view to improving the capacity of insolvency regimes to address legal and policy issues. The ICR Standard is part of the Financial Stability Board's Standards and Codes Initiative and was used by the World Bank in the ICR Reports on the Observance of Standards and Codes. The Standard, developed in coordination with the UNCITRAL

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<sup>17</sup> Ibid., paras. 269-270.

<sup>18</sup> Ibid., para. 273.

<sup>19</sup> Ibid.

<sup>20</sup> [www.oas.org](http://www.oas.org).

<sup>21</sup> See [www.oas.org/dil/CIDIP-VII\\_secured\\_transactions.htm](http://www.oas.org/dil/CIDIP-VII_secured_transactions.htm). Model regulations are available at [www.oas.org/dil/CIDIP-VII\\_doc\\_3-09\\_rev3\\_model\\_regulations.pdf](http://www.oas.org/dil/CIDIP-VII_doc_3-09_rev3_model_regulations.pdf).

Secretariat, includes (a) recommendations from the UNCITRAL Legislative Guide on Insolvency Law; and (b) the World Bank Principles for Effective Insolvency and Creditor Rights Systems; and

(c) Co-organizing with INSOL International and the World Bank, a Multinational Judicial Colloquium on insolvency law (Singapore, 12-13 March 2011). Aimed at assisting judges, regulators and justice officials to understand developments in the handling of international insolvency cases and learn about international frameworks for judicial coordination and cooperation, the Colloquium is the 9th in a series co-organized initially with INSOL International and, since 2007, also with the World Bank. As such, this activity is an important element of UNCITRAL'S ongoing coordination efforts with international organizations involved in the field of insolvency law assessment and reform, notably INSOL International, the World Bank and the IMF. In addition to the colloquium, these activities include the regional forums established for insolvency law reform and dialogue in Asia, the Middle East and North Africa and, most recently, Africa. It is anticipated the 10th judicial colloquium will be organized in 2013.



*Part Three*

ANNEXES



# I. SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

## Finalization and adoption of the UNCITRAL Model Law on Public Procurement

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

[A/CN.9/SR.925]

*Temporary Chairperson:* Mr. Sorieul ( Secretary of the Commission)

*Acting Chairperson:* Mr. Wiwen-Nilsson (Sweden)

*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.*

**Finalization and adoption of the UNCITRAL Model Law on Public Procurement** (*continued*)

**Summary record of the 926th meeting, held at the Vienna International Centre, Vienna, on Monday, 27 June 2011, at 2 p.m.**

[A/CN.9/SR.926]

*Acting Chairperson:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 2.20 p.m.*

**Finalization and adoption of the UNCITRAL Model Law on Public Procurement** (*continued*) (A/CN.9/729 and Add.1 to 8)

1. **The acting Chairperson** invited **Mr. Fruhmann** (Austria) to report on the progress of work in the drafting group.

2. **Mr. Fruhmann** (Austria) said that the drafting group had agreed that “procurement” should be taken to mean “public procurement” throughout the Model Law.

3. The drafting group had agreed that there should be definitions of “pre-qualification” and “pre-selection” in article 2, with “pre-qualification” defined as “the procedure set out in article 17 to identify, prior to solicitation, suppliers or contractors that are qualified” and “pre-selection” defined as “the procedure set out in article 48 (3) to identify, prior to solicitation, a limited number of suppliers or contractors that best meet the qualification criteria for the procurement concerned”.

4. The drafting group agreed that the definition of “solicitation” in article 2 (o) should be amended to read “an invitation to tender, to present submissions or to participate in request for proposals proceedings or electronic reverse auctions;”. The definition would not cover invitations to pre-qualification or pre-selection, as those actions preceded the solicitation proceedings.

5. Regarding article 2 (e), the drafting group agreed that the phrase “a procurement conducted” should be amended to read “a procedure conducted”, in order to be consistent with the use of “procedure” in subparagraph (2)(e)(iv).

6. Regarding article 5, the drafting group had agreed that the phrase “Except as provided for in paragraph (2) of this article, the text of” in paragraph (1) should be deleted and that the Guide to Enactment would explain that paragraph (2) covered case law while paragraph (1) covered legal texts of general application, which would not include things such as internal memoranda.

7. The drafting group had agreed that the terms “the public” and “the general public” should be amended to “any person” throughout the text.

8. **Ms. Nicholas** (Secretariat), recalling the point raised during the previous meeting by the representative of Mexico with regard to the words “the reasons and circumstances” in article 8 (4) and her response,<sup>1</sup> said that, if the legal tradition of an enacting State required the inclusion in procurement proceedings records of statements of “grounds and circumstances”, that State could, in the article drawing on article 8 (4), specify “grounds and circumstances” instead of “reasons and circumstances”.

9. Recalling the point raised by the representative of Mexico with regard to subparagraph (8)(b) of article 9,<sup>2</sup> she said that in expressions like “materially inaccurate” and “materially incomplete” the word “materially” was difficult to translate from English into other languages, especially as it was understood differently in different jurisdictions. There seemed to be no intention of changing the wording of article 9 (8), where the aim of subparagraph (8)(a) was to ensure that if information was false there would automatically be disqualification while the aim of subparagraph (8)(b) was to give the procuring entity some leeway in less serious cases. The Guide to Enactment should explain the policy objective of article 9 (8) and the concept of “materiality”.

10. **Ms. Andres** (Canada), pointing out that subparagraph (2)(f) of article 9 spoke of “false statements or misrepresentations as to ... qualifications” while subparagraph (8)(a) spoke of information concerning qualifications that was “false”, suggested that subparagraph (8)(a) be amended to read “... the information submitted ... was false or misleading”.

11. She asked what the difference was between “false statements” and “misrepresentations” in subparagraph (2)(f).

<sup>1</sup> See document A/CN.9/SR.925, paragraphs 53, 55 and 56.

<sup>2</sup> See document A/CN.9/SR.925, paragraphs 54 and 59-61.



12. **Ms. Nicholas** (Secretariat) said that, in the Secretariat's view, "misrepresentation" was always understood to imply an intention to mislead.

13. **Mr. Yukins** (United States of America) asked how the comments from Ukraine contained in document A/CN.9/730 were to be dealt with.

14. **The acting Chairperson** said that it was for Ukraine to present those comments orally in the Commission. As there was no delegation from Ukraine present, they would not be considered, unless they were presented orally by another delegation.

15. **Mr. Fruhmenn** (Austria), referring to article 14 (5), asked how suppliers or contractors not known to the procuring entity could access information on deadline extensions.

16. **Ms. Nicholas** (Secretariat) said that a deadline extension constituted a material change to the original information published by the procuring entity and would therefore, pursuant to article 15 (3), require the publication of a general notice. The link between article 14 (5) and article 15 (3) could be explained in the Guide to Enactment.

17. **Mr. Fruhmenn** (Austria), referring to article 16, proposed that subparagraph (1)(c)(ii) be deleted as subparagraph (1)(b) already covered the question of the issuing of a tender security in cases of domestic procurement.

18. He took it that subparagraph (1)(f)(i) should be read to mean "Withdrawal or modification of the submission after the deadline for presenting submissions, or withdrawal or modification of the submission before the deadline if so stipulated in the solicitation documents;"

19. **The acting Chairperson** said that the proposal made by the representative of Austria regarding subparagraph (1)(c)(ii) could be dealt with as a drafting issue.

20. As to his comment regarding subparagraph (1)(f)(i), in the light of subparagraph (2)(d) the presumption was that a submission could be withdrawn or modified before the deadline but only under exceptional circumstances afterwards. That too could be dealt with as a drafting issue.

21. **Mr. Loken** (United States of America), referring to the first sentence in article 17 (2), recalled that in document A/CN.9/730 his delegation had recommended that it be amended to read "If the procuring entity engages in pre-qualification proceedings ... an invitation to pre-qualify

to be published in the publication identified in the procurement regulations".

22. **Mr. Fruhmenn** (Austria), having endorsed the proposal made by the delegation of the United States of America, questioned the use in article 17 (3)(b) of the words "the timetable"; at the time when an invitation to pre-qualify was sent out, there would usually not be a timetable for the provision of the services. Perhaps one could say "the envisaged timetable" or "the indicative timetable".

23. **The acting Chairperson** suggested the words "the time period". Perhaps the matter should be referred to the drafting group.

24. **Mr. Fruhmenn** (Austria), referring to subparagraph (1)(a) of article 20, said that, while he did not think that there should be a "de minimis" gratuity threshold, he would like it to be clearly explained in the Guide to Enactment that not every offer of a gratuity should trigger exclusion, as a misinterpretation of the subparagraph could give rise to unintended consequences.

25. He would also like the meaning of the term "unfair competitive advantage" in subparagraph (1)(b) to be clarified in the Guide to Enactment.

26. **Mr. Yukins** (United States of America) said that his delegation was opposed to the idea of a "de minimis" gratuity threshold as even a very small gratuity could constitute a significant inducement in some cases.

27. As to the meaning of "unfair competitive advantage", the draft Guide already gave instances of what might constitute an unfair competitive advantage, and it rightly indicated that the enacting State itself should address the issue in the light of prevailing circumstances.

28. It was important for procurement specialists to consider competition issues not only in the context of a single procurement exercise, but also in the context of the overall competition policies of States.

29. **Mr. Jezewski** (Poland), expressing opposition to the idea of a "de minimis" gratuity threshold, said that the important consideration was whether there had been intent to influence the decision of a public official.

30. **Mr. Grand d'Esnon** (France), having expressed opposition to the idea of a "de minimis" gratuity threshold, said that the Guide to Enactment should perhaps point out that some States had codes of conduct for public officials

that public officials involved in public procurement were required to sign.

31. **Mr. Phua** (Singapore), expressing opposition to the idea of a “de minimis” gratuity threshold, said that public officials in his country had to seek the approval of their superiors before accepting even small gifts.

32. As regards the issue of “unfair competitive advantage”, the WTO General Procurement Agreement of 1994 provided examples of measures taken to preclude unfair competitive advantage in procurement proceedings.

33. **The acting Chairperson** took it that the Commission did not wish to change article 20.

34. **Mr. Loken** (United States of America), drawing attention to his delegation’s proposal contained in document A/CN.9/730 for an article 20 bis on clarifications of qualification data and submissions, asked whether it would be appropriate to include in the Model Law a similar provision to govern pre-qualification data and whether there should be a generic article on clarifications of qualification data and submissions in chapter I.

35. **The acting Chairperson** suggested that the issue of clarifications of qualification data and submissions be dealt with in the relevant articles.

36. **Mr. D’Allaire** (Canada), expressing support for that suggestion, said that the point in time when a procuring entity would seek clarification would vary between procurement methods.

37. Referring to article 21 (3)(b), he proposed amending it to read “Where the contract price is less than the threshold amount set out in the procurement regulations;”. That wording would be similar to that at the end of article 28 (2).

38. **Ms. Andres** (Canada) proposed the addition, at the end of the last sentence of article 21 (7), of the words “unless the extension has been granted to the procuring entity by suppliers or contractors that presented submissions and the entities that provided the tender security”. With such an addition to article 21 (7) the solicitation process would not have to be reopened.

39. **The acting Chairperson** said that, if there were no objections, he would assume that the proposal made by the delegation of the United States of America regarding an article 20 bis was acceptable.

40. **Mr. Fruhmann** (Austria) endorsed the proposal made by the delegation of the United States of America

regarding an article 20 bis and the proposal made by the delegation of Canada regarding article 21 (7).

41. **Mr. Grand d’Esnon** (France), while expressing support for the wording proposed by the delegation of the United States of America for an additional article, suggested that the additional article be placed before article 19.

42. **The acting Chairperson** noted, with regard to the proposal made by the delegation of Canada for an addition to article 21 (7), that article 40 (2) provided for the extension of periods of effectiveness of tenders.

43. **Ms. González Lozano** (Mexico), expressing support for the proposal made by the representative of the United States of America regarding an article 20 bis, asked if the clarification provided by a supplier or contractor would ever be disclosed to other suppliers or contractors and, if so, at what point.

44. **Mr. Loken** (United States of America), noting that the proposed language was based to a large extent on article 42 (1), said that the clarification provided by a supplier or contractor would not be disclosed to other suppliers or contractors.

45. **Ms. González Lozano** (Mexico) said that, if a supplier or contractor was requested to provide a clarification, there should be a point at which all suppliers or contractors that had submitted tenders ought to be informed of the content of the clarification. For example, if the supplier or contractor providing the clarification subsequently won the contract and other suppliers or contractors wished to challenge the decision, they should be entitled to know what the clarification had been.

*The meeting was suspended at 3.45 p.m. and resumed at 4.10 p.m.*

46. **The acting Chairperson**, recalling that the representative of the United States of America had said that the proposed article 20 bis was based to a large extent on article 42 (1), asked the Secretariat to comment on the connection between the two articles.

47. **Ms. Nicholas** (Secretariat) said that, in the light of consultations during the suspension of the meeting, it was the Secretariat’s understanding that article 42 (1) would be used as the basis for article 20 bis/article 18 bis, the aim being to ensure the same procedures applied in the clarification of tenders as in the clarification of qualification data. Care would be taken to make it clear that

the clarification procedures should not be a cover for negotiations.

48. **The acting Chairperson** said he assumed that the Commission wished to accept the proposals made by the delegation of Canada regarding article 21 (3)(b) and article 21 (7), with possible drafting refinements.

49. **Ms. Nicholas** (Secretariat), referring to subparagraph (2)(c) of article 21 and to document A/CN.9/731/Add.3, said that Working Group I had recognized that it would be difficult to specify one minimum standstill period for all types of procurement. The subparagraph was therefore drafted in such a way as to allow the enacting State to determine what the minimum standstill period should be in each instance.

50. **The acting Chairperson** proposed that the subparagraph provide for the duration of the standstill period to be as established in the solicitation documents in accordance with the requirements of the procurement regulations, which could specify different standstill periods for different situations.

51. **Mr. Yukins** (United States of America), recalling the proposal made by the delegation of Canada with regard to article 21 (3)(b), proposed that article 22 (2) provide for the minimum threshold to be specified in the procurement regulations.

52. **Mr. Fruhmann** (Austria), referring to the second sentence in article 23 (3), said that procuring entities in some European Union countries included in their solicitation documents a requirement that suppliers or contractors give their consent to the disclosure of all information provided by them to the procuring entities, acceptance of that requirement being a precondition for participation in the procurement proceedings. That practice, which could open the way to manipulation, would be permitted under article 23 (3) as it now stood.

53. **The acting Chairperson** proposed that the phrase “or permitted in the solicitation documents” in article 23 (3) be deleted.

54. **Mr. Fruhmann** (Austria), while expressing support for the proposal, said that the deletion of that phrase would not be sufficient to cover all cases of attempts to circumvent the spirit of the Model Law.

55. **Mr. Grand d’Esnon** (France), while expressing support for deletion of the phrase “or permitted in the solicitation documents”, said that, even without that phrase, disclosure would be possible at a later stage with “the

consent of the other party”. In that connection, he suggested that “the other party” be amended to “the other parties”.

56. **The acting Chairperson** said that confidentiality should be equally strong throughout the procurement process and proposed that it be made clear in the Guide that the option of “consent in advance” should be resorted to only under exceptional circumstances.

57. **Mr. Maradiaga Maradiaga** (Honduras) said it was important that the problem of possible manipulation by the procuring entity through its handling of confidential information be addressed fully in the Guide to Enactment.

58. **Mr. Fruhmann** (Austria), referring to article 24, said that, in the event of a cancellation of procurement proceedings, some of the information whose inclusion in the record was required might not yet exist or might not be available.

59. He proposed the insertion of the phrase “unless such information has not arisen in the procurement proceedings” in paragraph (3) following “, on request,”, with an accompanying explanation in the Guide to Enactment.

60. **Ms. Nicholas** (Secretariat), responding to a point raised by the representative of Austria, said that it was the Secretariat’s understanding that the price in the winning submission would usually be disclosed to the general public in the contract award notice, but not the prices in the other submissions. However, there was a need to clarify whether prices should be disclosed to competing suppliers or contractors. Working Group I had highlighted the tension between the need to avoid collusion and the need to be transparent, and the Secretariat would welcome the Commission’s guidance in that matter.

61. As regards the proposal made by the representative of Austria for an addition to paragraph (3) of article 24, in the event of a cancellation of the procurement there would be no acceptance of a successful submission. The Secretariat would need to check why it was provided that the cancellation of a procurement should lead to the disclosure of information that had become irrelevant. Perhaps the phrase “or on cancellation of the procurement” should be deleted.

62. **Mr. Yukins** (United States of America), referring to subparagraph (1)(s) of article 24, said that most suppliers or contractors had no problem with the disclosure of contract prices, but did not like to disclose component prices, as competitors might then be able to work out the cost

structure on which a winning bid was based — in other words, “the basis for determining the price”.

63. **The acting Chairperson** proposed that the words “the basis for determining the price” in subparagraph (1)(s) of article 24 be deleted.

64. **Ms. Nicholas** (Secretariat) said that the references to subparagraph (1)(s) should then be deleted from paragraph (3), which would then be consistent with paragraph (4).

65. The record maintained by the procuring entity should still include the information called for in subparagraph (1)(s), but that information would not be disclosed.

66. **The acting Chairperson** proposed that the matter be referred to the drafting group.

*The meeting rose at 5 p.m.*

## Finalization and adoption of the UNCITRAL Model Law on Public Procurement (*continued*)

Summary record of the 927th meeting, held at the Vienna International Centre,  
Vienna, on Tuesday, 28 June 2011, at 9.30 a.m.

[A/CN.9/SR.927]

*Acting Chairperson:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 9.35 a.m.*

### Finalization and adoption of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/729 and Add.1 to 8)

1. **Mr. Fruhmenn** (Austria), further reporting on the discussions in the drafting group, said that it proposed that the reference to requirements for prequalification and preselection be moved from article 10 to article 9, so that article 9 (4) would end with the additional sentence “The prequalification or preselection documents shall set out a description of the subject matter of the procurement.”

2. The drafting group proposed that the words “including concerning” be deleted from article 10 (3).

3. It proposed that the first sentence of article 10 (4) be amended to read “To the extent practicable, the description of the subject matter of the procurement shall be objective, functional and generic, and shall set out the relevant technical, quality and performance characteristics of that subject matter.” It also proposed that that formulation be used elsewhere in the text of the revised Model Law as appropriate.

4. With regard to article 11, the drafting group proposed that: the words “relating to the subject matter” be inserted in the chapeau of article 11 (2), so that it would read “The evaluation criteria relating to the subject matter may include:”, the word “The” be deleted from article 11 (2)(a), so that it would read simply “Price”; article 11 (3) be modified to read “To the extent practicable, all non-price evaluation criteria shall be objective, quantifiable and expressed in monetary terms.” — with a note in the Guide to Enactment stating that it was not always possible to express non-price evaluation criteria in monetary terms; the phrase “or any other preference” be added in article 11 (4)(b), so that it read “A margin of preference for the benefit of domestic suppliers or contractors or domestically produced goods or any other preference, if authorized or required ...”;

article 11 (5)(b) be amended to read “All evaluation criteria established pursuant to this article, including price as modified by any preference”; and article 11 (5)(c) be modified to read “The procuring entity shall set out the relative weights of all evaluation criteria, except where the procurement is conducted under article 48, in which case the procuring entity may list all evaluation criteria in descending order of importance;”.

5. **The acting Chairperson**, in response to a point raised by **Mr. Wallace** (United States of America), said that “The procuring entity shall set out ...” could be deleted from the modified article 11 (5)(c) as that wording was already contained in the chapeau to the paragraph. The beginning of article 11 (5)(c) would then read: “The relative weights of all evaluation criteria, except ...”.

6. **Ms. Nicholas** (Secretariat), in response to a question from **Mr. D’Allaire** (Canada), said that the Secretariat understood that the policy objective behind article 24 (3) was that full transparency should be the rule, but an exception could be made when the disclosure of prices might impede future fair competition — for example, by facilitating collusion. Perhaps article 24 (3) might indicate that prices should in principle be disclosed only to the suppliers that had made submissions, particularly as in tendering proceedings the prices were read out at a public hearing.

7. **Mr. Fruhmenn** (Austria) said that article 24 (4) absolutely prohibited the disclosure of information relating to prices, as subparagraph (a) contained a reference to the impediment of fair competition and there was no such reference in subparagraph (b).

8. **The acting Chairperson**, recalling previous discussions, invited the Commission to consider the connection between subparagraph (1)(s) and paragraphs (3) and (4) of article 24 and whether there should be a policy that, as a rule, there should be disclosure of non-winning competitors’ prices, except when such disclosure would have a negative impact on

fair competition. He further invited the Commission to consider whether prices should be disclosed in the event of cancellation of the procurement.

9. **Mr. D’Allaire** (Canada), agreeing with the Secretariat’s understanding of the policy objective behind article 24 (3), said that for each submission “the price, or the basis for determining the price, and a summary of the other principal terms and conditions” should appear in the record of the procurement proceedings; thus, subparagraph (s) was needed. Paragraph (3) achieved the policy objective of enabling bidders to learn the price in each submission and obtain any other information covered by that paragraph. Paragraph (4) provided appropriate safeguards, especially through the provision that information should not be disclosed if its disclosure would impede fair competition.

10. The possible ambiguity in subparagraph (s) could perhaps be addressed through a change in the order of the words so that the subparagraph read “For each submission, the price, or the basis for determining the price, and a summary of the other principal terms and conditions;”. Otherwise, the text reflected the policy objective behind article 24 (3).

11. In response to a question from the **acting Chairperson**, he said that the stage at which a cancellation occurred would determine whether or not prices were disclosed. If, at the time of the cancellation, the submission envelopes had already been opened with all suppliers present, the prices would have been disclosed; otherwise, they would not be in the record. It was hard to imagine a situation where a cancellation would determine whether the record was disclosed or not.

12. **The acting Chairperson** said that that was true in the case of tenders, but the Model Law covered other procurement methods involving several stages, such as negotiations where the price was subject to scrutiny. He invited the Commission to consider whether the price should be included in the record in such cases.

13. **Mr. Grand d’Esnon** (France) said, regarding subparagraph (s), that a distinction should be made between “the price” and “the basis for determining the price”. It was normal practice for prices to be disclosed to all suppliers or contractors in the tendering proceedings at the opening of tenders, but “the basis for determining the price” was often an industrial secret,

and he therefore believed that it should not have to be disclosed.

14. Regarding paragraph (3), he considered that the phrase “or on cancellation of the procurement” should be deleted. The disclosure of prices after a procurement had been cancelled might well facilitate future collusion.

15. **The acting Chairperson** said it was his understanding that the information indicated in subparagraph 4 (b) could be covered by subparagraph (a) unless the disclosure of that information was prohibited absolutely.

16. With regard to paragraph (3), he asked whether the Commission agreed with the representative of France that the phrase “or on cancellation of the procurement” should be deleted.

17. **Mr. Yukins** (United States of America) said that in his view the phrase should be deleted.

18. Regarding what the acting Chairperson had just said about subparagraphs (4) (a) and (b), he wondered whether the acting Chairperson was proposing that they be merged. Paragraph (4) (b) probably referred to bid evaluation sheets, which could be extremely valuable to competitors with access to them as they gave an insight into the views of bid evaluators; they were therefore sensitive documents. The conditions referred to in subparagraph 4 (a) would not normally apply to bid evaluation sheets. However, there appeared to be no reason not to merge the two subparagraphs, since the reference to information relating to the examination and evaluation of submissions could be included in subparagraph (a) without prejudice to the intention of subparagraph (b).

19. **The acting Chairperson** said that, given the sensitivity of bid evaluation sheets, as pointed out by the representative of the United States of America, it might be preferable to keep subparagraph (b) separate.

20. With regard to paragraph (3), he took it that the Commission wished to delete the phrase “or on cancellation of the procurement” and to retain both subparagraph (1) (s) and the references to that subparagraph in paragraph (3), subject to any further drafting changes.

21. **Mr. D’Allaire** (Canada) said that his delegation had no objection to deletion of the reference to cancellation in paragraph (3). In the event of the cancellation of a procurement, suppliers should not be

provided with the information in question unless they applied successfully to a court with a view to obtaining that information.

22. His delegation shared the concerns of the delegation of France with regard to the reference, in subparagraph 1 (s), to “the basis for determining the price”. Perhaps the reference could simply be deleted, since, as was clear from the chapeau of paragraph 1, the procuring entity would be expected to maintain a detailed record of the proceedings, and such a record might well include “the basis for determining the price”. Alternatively, “the basis for determining the price” could be included as a separate subparagraph under paragraph (1) but not referred to in paragraph (3), thus ensuring that the basis for determining the price was not subject to disclosure.

23. **Mr. Fruhmann** (Austria), having endorsed the comments made by the representative of Canada, said that, if paragraph (4) was going to be revised, his delegation would like to see the revised text before drawing any conclusion with regard to that paragraph and to subparagraph (1) (s). The paragraph should simply reflect the fact that the non-disclosure rule applicable to submission prices was absolute and was not linked to the fair competition rule set out in subparagraph 4 (a).

24. **Mr. Wallace** (United States of America), noting that the purpose of the reference to “a basis for determining the price” in the 1994 Model Law was explained in the Guide to Enactment, said that it might be unwise to remove the reference to “the basis for determining the price” from article 24 (1)(s) of the revised Model Law.

25. **Mr. Fruhmann** (Austria) said that information on the basis for determining the price could be important, enabling the procuring entity to determine whether the price indicated in a submission was abnormally low, and a requirement that such information be included in the record of the procurement proceedings might deter bidders from making submissions with abnormally low prices. However, while the basis for determining the price should be included in the record, such information was sensitive and should therefore never be disclosed. The present wording of subparagraph (1) (s) was, in his view, therefore acceptable.

26. **Ms. Nicholas** (Secretariat), referring to article 26, said that the implementation of an open framework

agreement was in fact a procurement method. Chapter VII of the draft revised Model Law made it clear that closed framework agreements were implemented within a procurement method, whereas the implementation of an open framework agreement was a stand-alone procurement method equivalent to an electronic reverse auction. The Secretariat therefore proposed the inclusion of open framework agreements in the list of procurement methods in article 26 (1).

27. **Mr. Wallace** (United States of America) asked why open framework agreements should be treated as a separate procurement method while closed framework agreements were not. In the United States of America, both open and closed framework agreements were procurement methods.

28. **Ms. Nicholas** (Secretariat) said that, while it was possible for a closed framework agreement to be treated as a procurement method, article 57 (1) referred to the awarding of closed framework agreements “(a) By means of open tendering proceedings ...” or “(b) By means of other procurement methods ...”.

29. If the Commission wished both open and closed framework agreements to be treated as separate procurement methods, drafting changes would have to be made to article 57 (1). In the Secretariat’s view, it would be simpler to refer only to open framework agreements in article 26.

30. **Mr. Grand d’Esnon** (France) said that, in view of the late stage of consideration of the draft revised Model Law, his delegation was in favour of the retention of article 26 as drafted.

31. **Mr. Yukins** (United States of America), referring to article 25, drew attention to the fact that the code of conduct provided for in that article applied only to the conduct of public officials, whereas codes applying to the conduct of suppliers and contractors were becoming increasingly common worldwide. The Model Law would soon have to be amended or supplemented in order to reflect such developments.

32. **The acting Chairperson** suggested that Working Group I examine that issue in the context of the Commission’s future work.

*The meeting was suspended at 10.40 a.m. and resumed at 11.05 a.m.*

33. **Mr. Seweha Boles** (Egypt), referring to article 29 (2)(c), asked how the procuring entity would in practice indicate that it wished to use a particular procurement method because it was the most appropriate one for “the protection of essential security interests of the State”. That might be a valid reason, but article 27 (3) spoke of “a statement of the reasons and circumstances”.

34. **The acting Chairperson** said that, in his view, the “security” reason would have to be backed up by a statement of circumstances.

35. **Mr. Seweha Boles** (Egypt) asked whether that would apply even in times of high international tension affecting the State.

36. **The acting Chairperson** said that, in his view, it would.

37. **Mr. Fruhmenn** (Austria), referring to article 31 (1)(a), proposed the insertion of the words “or repeated” after “indefinite” in the phrase “is expected to arise on an indefinite basis”.

38. If that proposal were not acceptable, perhaps the drafting group could agree on a definition of “indefinite” for inclusion in the Guide to Enactment.

39. **The acting Chairperson**, following an intervention by **Mr. Yukins** (United States of America), suggested the insertion of the words “or repeated” after “indefinite”.

40. **Ms. Nicholas** (Secretariat) said that it was the Secretariat’s understanding that the use of the word “indefinite” was intended to permit the conclusion of a framework agreement in order to ensure security of supply. If the Secretariat’s understanding was considered to be correct, that could be stated in the Guide to Enactment.

41. **Mr. Fruhmenn** (Austria) proposed the deletion of the words “the low value of” in article 32 (4). The expression “low value” was being used there in a manner different from the manner in which it was being used elsewhere in the draft revised Model Law, where it was being used to indicate a threshold value. The subject matter of the procurement should be what counted.

42. **Mr. Yukins** (United States of America) said that his delegation was strongly opposed to that proposal. The deletion would open the door to domestic preferences based on subjective judgements.

43. The present wording was in accordance with the World Bank’s procurement guidelines.

44. **Ms. Andres** (Canada) said that the purpose of article 32 (4) was presumably to relieve the procuring entity of the obligation to widely publicize an invitation to tender if the costs of so doing were disproportionately high relative to the value of the subject matter of the procurement, which was a good reason for retention of the words “the low value of”. However, their retention might create problems. Perhaps the purpose of article 32 (4) could be achieved through reformulation.

45. **The acting Chairperson** said that the phrase “only domestic suppliers or contractors are likely to be interested in presenting submissions” suggested that the issue was not that of the disproportionate relationship between the costs of widely publicizing an invitation to tender and the value of the subject matter of the procurement.

46. **Ms. Nicholas** (Secretariat) said that article 32 (4) was not designed to enable procuring entities to reject foreign suppliers and contractors; it would only enable them to decide not to widely publicize invitations to tender. That point could be explained in the Guide to Enactment.

47. **Mr. Grand d’Esnon** (France), calling for retention of the words “the low value of”, said that all international instruments relating to public procurement contained the concept of a “threshold value” below which foreign suppliers and contractors would not be interested in tendering.

48. **The acting Chairperson** suggested the deletion simply of the word “low”.

49. **Mr. Yukins** (United States of America) urged that article 32 (4) be left as it stood. Readers of the revised Model Law would not be confused by the words “the low value” in that paragraph, whereas they might well wonder why those words did not appear in the revised text.

50. **The acting Chairperson**, after consulting with **Mr. Fruhmenn** (Austria), suggested that article 32 (4) be left as it stood.

51. **Mr. Xiao** (China), referring to article 32 (2), said that his delegation had problems with the idea of invitations to tender having to be published “in a language customarily used in international trade”. In many countries, especially developing ones,



procurement officials would have problems in meeting the requirement in question, particularly officials who dealt only with small-scale procurement.

52. **The acting Chairperson** pointed out that article 32 (2) referred only to invitations to tender, not to solicitation documents.

53. **Mr. Grand d'Esnon** (France), expressing support for the intervention of the representative of China, said that the situation regarding the languages customarily used in international trade was constantly evolving. In his opinion, therefore, the phrase "in a language customarily used in international trade" should be dropped.

54. **Mr. Yukins** (United States of America), calling for retention of the phrase, said that the growing translation capabilities available through the Internet would with time make translating into languages customarily used in international trade very easy.

55. The **acting Chairperson** suggested, following an intervention by **Mr. Grand d'Esnon** (France), that article 32 (2) be amended so that it read something like "The invitation shall also be published internationally such that it will attract international suppliers and contractors."

56. **Mr. Loken** (United States of America) suggested wording on the lines of "The invitation shall also be published internationally in a medium accessible to international suppliers and contractors."

57. **The acting Chairperson** said that, if the underlying idea was clear, the formulation of the sentence could be left to the drafting group.

58. **Mr. Loken** (United States of America), drawing attention to the recommendation made in writing by his country with regard to article 33 (5),<sup>3</sup> said that the recommendation was applicable to article 32 (1) also.

59. **Mr. Seweha Boles** (Egypt) questioned the rationale for omitting from article 33 (6) a reference to article 29 (4)(a).

60. **Ms. Nicholas** (Secretariat) said that Working Group I had decided to omit a reference to article 29 (4)(a) because there could be many kinds of urgency, some purely the fault of the procurement entity, and the omission of a reference to

article 29 (4)(a) was intended to prevent misuse of the provision in question.

61. In that connection, she said that there was no mandatory deadline for the publication of a notice of a procurement; publication merely had to occur reasonably in advance of the solicitation of tenders.

62. **Mr. Loken** (United States of America) said that he recalled no discussion on the issue in Working Group I. At all events, he saw no reason to make a distinction between various kinds of urgency.

63. **Ms. Nicholas** (Secretariat) said that Working Group I had considered that, in the event of a lesser degree of urgency, there should be an opportunity to publish a notice of the procurement in the interests of transparency, so that the use of single-source procurement pursuant to article 29 (5) or of competitive negotiations pursuant to article 29 (4) could be subjected to scrutiny and, if necessary, challenged.

64. **The acting Chairperson** said that the Commission ought perhaps to review the system provided for in article 50 so as to determine whether there was a need for a notice.

65. **Mr. Seweha Boles** (Egypt) said that, to avoid confusion over various degrees of urgency, article 33 (6) should read something like "The requirements of paragraph (5) shall not apply in the case of a catastrophic event."

66. **Mr. Grand d'Esnon** (France) expressed support for the position of the representative of Egypt.

67. **The acting Chairperson** said that no delegation appeared to be against the inclusion of a reference to article 29 (4)(a) in article 33 (6).

68. **Mr. D'Allaire** (Canada), referring to article 45, said that it should provide for a procuring entity to seek clarification from suppliers and contractors even though no negotiations were permitted. Perhaps the drafting group could agree on a way of amending article 45 so that it provided for that.

69. Referring to article 46, he said that paragraphs (5) and (9) related to two different points in time when the procuring entity might need to seek clarifications from a supplier or contractor. The drafting group should bear that in mind when considering article 46.

70. **Mr. Wallace** (United States of America) said that it would be difficult to provide separately for every

<sup>3</sup> See document A/CN.9/730.

situation where the procuring entity might need to seek clarifications. The general provision on seeking clarifications would therefore have to be drafted with great care.

71. **Mr. Fruhmann** (Austria), referring to article 47, asked whether he understood correctly that, in two-stage tendering the procuring entity could not make a material change to characteristics of the subject matter of the procurement between the first and the second stage.

72. **Ms. Nicholas** (Secretariat) said that Working Group I had decided that “material change” was not a useful concept.

73. From article 47 (4) it was clear that the procuring entity could revise procurement terms and conditions, but only the suppliers or contractors that had participated in the first stage and whose tenders had not been rejected would be allowed to present final tenders in response to the revised set of terms and conditions. Tenders from other suppliers or contractors would not be considered, as they had not participated successfully in the first stage.

74. The aim, as the Secretariat understood it, was to exclude from the second stage the suppliers or contractors that had not bothered to participate in the first stage.

75. **Mr. Yukins** (United States of America) said that the expression “material change” might be open to differences of interpretation, and it could give rise to translation problems, but the concept of “material change” was widely accepted in the world of procurement and there should be a general provision relating to it in the revised Model Law.

76. **The acting Chairperson** said that, according to his understanding, a material change could be made as long as the subject matter of the procurement was not modified.

77. **Ms. Nicholas** (Secretariat) suggested that the words “the procuring entity shall not modify the subject matter of the procurement” in article 48 (9) be included also in article 47.

78. **Mr. Yukins** (United States of America) said that the problem would be to determine what “modify the subject matter” meant in the Guide to Enactment.

79. **The acting Chairperson** expressed support for the suggestion made by the representative of the Secretariat.

80. **Mr. Wallace** (United States of America) said that the definition of “subject matter” in article 2 (h) was not very precise. That should be borne in mind in any attempt to determine what “modify the subject matter” meant.

*The meeting rose at 12.30 p.m.*

**Finalization and adoption of the UNCITRAL Model Law on Public Procurement** (*continued*)

**Summary record of the 928th meeting, Held at the Vienna International Centre,  
Vienna, on Tuesday, 28 June 2011, at 2 p.m.**

[A/CN.9/SR.928]

*Acting Chairperson:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 2.15 p.m.*

**Finalization and adoption of the UNCITRAL  
Model Law on Public Procurement** (*continued*)  
(A/CN.9/729 and Add.1 to 8)

1. **Mr. Fruhmann** (Austria), referring to article 10 said that the drafting group proposed that paragraph (1) be split into two subparagraphs.

2. Subparagraph (1)(a) would read “The pre-qualification or pre-selection documents, if any, shall set out a description of the subject matter of the procurement”. Subparagraph (1)(b) would read “The procuring entity shall set out in the solicitation documents the detailed description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied”. The sentence whose addition at the end of article 9 (4) had been proposed at the previous meeting should, naturally, be deleted.

3. Also, the drafting group had agreed on language for the Guide to Enactment setting out the general rules and exceptions in relation to article 10, which would include reference to article 29 (1)(a) and (2)(a). In that connection, it was proposed to add at the beginning of article 29 (1)(a) the first part of article 29 (2)(a), with a view to aligning the two provisions. Article 29 (1)(a) would thus read “It is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement in accordance with article 10 of this Law, and the procuring entity assesses that ... its procurement needs;”.

4. **Mr. Wallace** (United States of America) said that the proposed wording of article 29 (1)(a) would misrepresent the procedure for two-stage tendering, which presupposed a detailed description at the start of the procurement proceedings.

5. **Mr. Fruhmann** (Austria) said that the issue raised by the representative of the United States of America was not one for the drafting group to resolve.

6. **Ms. Miller** (Observer for the World Bank) said that, under World Bank guidelines, two-stage tendering could be used where it was undesirable and impracticable to prepare a complete technical specification in advance. Although the present wording of article 29 (1)(a) was not ideal, the World Bank had come to terms with it.

7. **Ms. Nicholas** (Secretariat) said that Working Group I, when considering two-stage tendering, had decided that such tendering could start either with a detailed technical specification that could be amended or with broad terms of reference that could be refined. A suggestion made by Working Group I had been that one condition for the use of two-stage tendering might read “The procuring entity assesses that there may be a need for a stage in the process to refine the technical and policy characteristics of the subject matter of the procurement, which may include discussions with suppliers and contractors in order for the procuring entity to formulate them in accordance with the procedures required under article 10 and so as to allow the procuring entity to obtain the most satisfactory solution to its needs.”

8. **Mr. Wallace** (United States of America) said that two-stage tendering was unpopular with many, including the Secretariat, but it was used in some countries.

9. When the 1994 text of the Model Law was being drafted, the Commission had known there were different kinds of two-stage tendering, and that had been reflected in the text. His delegation was, however, in favour of tightening up that text.

10. **The acting Chairperson** said that the text should also be aligned with that of article 47 (2) and (3).

11. **Mr. Fruhmann** (Austria), referring to article 14 (1), said that the drafting group proposed that the word “in” be inserted before the words “the pre-qualification or pre-selection documents”. Referring to article 36 (c), he said that the drafting group proposed that the words “A summary of” be added at the beginning, so that the text would read “A summary of the criteria and ...”.

12. **Mr. D’Allaire** (Canada), referring to article 52 (1)(k), said that the footnote to it stated the obvious and should be deleted.

13. **Ms. Nicholas** (Secretariat) said that parenthetical article 52 (1)(k) reflected the fact that, when electronic auctions had first been discussed by Working Group I, some years earlier, there had been a fear that computer systems might not be able to cope with them. As new computer technology emerged, that risk was clearly decreasing. Working Group I had not wished to delete subparagraph (1)(k), however, even though it might come to have little relevance.

14. **Mr. Grand d’Esnon** (France), expressing support for the deletion of the footnote, said that footnotes would in most cases be made redundant by the Guide to Enactment. Thus, the footnotes to articles 26 (1) and 29 (2) should be deleted — especially the latter.

15. **Mr. Fruhmann** (Austria) said that he had no strong opinion about the footnote to parenthetical subparagraph (1)(k), although, if retained, it should logically become a footnote to paragraph (2). The Commission should, however, decide on how to deal with the text in parenthesis.

16. **The acting Chairperson** suggested, following comments by **Mr. Fruhmann** (Austria) and **Ms. Nicholas** (Secretariat), that the final phrase in article 52 (1)(c) — “and the contract form, if any, to be signed by the parties” — be deleted.

17. **Mr. Wallace** (United States of America) said that, if the footnote to subparagraph (1)(k) of article 52 was deleted, that subparagraph should appear without parenthesis and the footnote should be replaced by an explanation in the Guide to Enactment, if necessary.

18. He asked whether, in countries where electronic auctions were used, such as Brazil and Singapore, procuring entities had been swamped by suppliers or contractors.

19. **Ms. González Lozano** (Mexico) said that she would not welcome the deletion of the reference to “the

contract form” in article 52 (1)(c). Suppliers and contractors needed to know in advance the “small print” in the document that they would have to sign if the contract was awarded to them.

20. **The acting Chairperson** said that perhaps the phrase “and the contract form, if any, to be signed by the parties” could be retained and the meaning of “contract form” explained in the Guide to Enactment.

21. **Mr. Phua** (Singapore) said, in response to the question asked by the representative of the United States, that procuring entities in Singapore had not been swamped by suppliers or contractors even though it did not place limits on the numbers that might participate in electronic reverse auctions. However, it required that, before participating in electronic reverse auctions, suppliers and contractors be trained in the use of the electronic reverse auction system.

22. **The acting Chairperson** suggested, following an explanation by **Ms. Nicholas** (Secretariat) of how parentheses were used in the draft revised Model Law, that the parentheses around subparagraph (1)(k) and paragraph (2) of article 52 be retained but the footnote to subparagraph (1)(k) be deleted.

23. **Mr. Grand d’Esnon** (France) said that all parentheses in the draft revised Model Law should be deleted and, where necessary, explanations given in the Guide to Enactment.

24. **Mr. Fruhmann** (Austria) said that article 57 should, for consistency’s sake, contain a reference to article 8 similar to that in article 59 (3)(e)(i).

25. **Ms. Nicholas** (Secretariat) said that the award of a closed framework agreement was conducted through procurement methods that already required a declaration pursuant to article 8. There was therefore no need for a reference to article 8 in article 57.

26. **The acting Chairperson** took it that article 57 should remain unchanged.

27. **Mr. D’Allaire** (Canada), referring to the parenthetical subparagraph (3)(e)(ii) of article 59, said that it should remain in parentheses but the footnote to it should be deleted. The issue was particularly sensitive, while the footnote added nothing of significance.

28. **Mr. Fruhmann** (Austria) said that, in article 59 (3), subparagraphs (b) and (c) seemed to say the same thing

in slightly different words. One of the subparagraphs should therefore be deleted.

29. **Ms. González Lozano** (Mexico) said that the phrase “, or only to each of those parties of the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement” in article 61 (4)(a) would open the way to subjective judgements on the part of the procuring entity, and that could give rise to complaints. Written invitations to present submissions should be issued to all suppliers or contractors party to the framework agreement.

30. **The acting Chairperson** said that in his view it would do no harm if that phrase were deleted.

31. **Mr. Yukins** (United States of America) said that, if the phrase were deleted, the procuring entity might have to issue hundreds of written invitations.

32. **Ms. González Lozano** (Mexico) said that, if the phrase were retained, the procuring entity might arbitrarily decide not to issue a written invitation to a supplier or contractor that would with time quite possibly become capable of meeting its needs. For example, could one be certain in January whether a supplier or contractor would be capable of meeting one’s needs in September?

33. **Mr. Yukins** (United States of America) said that the ideal would be for all suppliers or contractors party to a framework agreement to receive a written invitation. The problem was that, in the case of closed framework agreements, the prices were already set, and the parties could not refuse to tender on the basis of those prices if invited to do so.

*The meeting was suspended at 3.30 p.m. and resumed at 4.00 p.m.*

34. **Mr. Cachapuz de Medeiros** (Brazil) said that the phrase “, or only to each of those parties ... the subject matter of the procurement” in article 61 (4)(a) was unnecessary, and it created uncertainty and could lead to challenges in the courts.

35. **Mr. Yukins** (United States of America) said that, during the suspension, there had been informal discussions regarding possible new language for article 61 (4)(a), but further informal discussions were required.

36. **Mr. Fruhmenn** (Austria), referring to article 62, proposed that the title be amended to read “[Possible] Changes during the operation of a framework agreement”.

37. **Mr. Yukins** (United States of America), calling for retention of the title as it stood, said that the principle of “no material change” applied at every stage of procurement proceedings. Disallowing change of any kind would constitute a straitjacket.

38. **Mr. Maradiaga Maradiaga** (Honduras) said that the title should be left as it stood.

39. **The acting Chairperson** said that, given the problems raised by the word “material”, the Commission should perhaps accept the proposal made by the representative of Austria or refer the matter to the drafting group.

40. **Mr. D’Allaire** (Canada), referring to article 63, said that it was not clear as to what suppliers or contractors should do if they wanted to challenge a decision or action of the procuring entity. Was it compulsory, for example, to begin by submitting an application for review to an administrative body, or could an appeal be made direct to a court? It would be a pity if a State spent money on setting up an administrative body specializing in procurement matters only for it to be bypassed. It was essential that the Model Law provide guidance on what challenge possibilities were available and in what sequence.

41. **Mr. Yukins** (United States of America) said that in his country a complainant could apply either to an administrative body or to a court.

42. **Mr. Grand d’Esnon** (France) said that greater clarity was needed. The article could not list all possible scenarios; that was a matter for the Guide to Enactment. The drafting group should take a close look at the article.

43. **Mr. D’Allaire** (Canada) said that one solution might be for the article to indicate — say — three possible scenarios, with a proviso that States could opt for something else if they wished. Another solution might be to delete the article and let States decide for themselves, with help from the Guide to Enactment, what challenge system they should have.

44. **Ms. Anchishkina** (Russian Federation) said that, in her delegation’s view, the present wording of article 63 was well balanced.

45. **Mr. Wallace** (United States of America) said that the present wording of article 63 reflected the fact that it was hard to generalize about challenge systems. There should be room for experimentation, so that challenge systems might evolve.

46. **Mr. Xiao** (China) said that article 63 should allow as far as possible for different challenge systems.

47. **Mr. Jezewski** (Poland) said that, while his country's challenge system worked well, with challenge proceedings taking no more than two months, his delegation was in favour of the solutions suggested by the representative of Canada.

48. He suggested attaching to article 63 a footnote similar to footnote 7 to article 66. That might meet the concerns of States lacking an independent arbitration body.

49. **Mr. Phua** (Singapore) said that article 63 was not intended as an invitation to pick and choose; it was simply an introduction to chapter VIII, making it clear that suppliers or contractors that challenged a decision or action of the procuring entity would have to demonstrate that they had suffered loss or injury.

50. **The acting Chairperson** suggested that paragraph (1) of article 63 end at the phrase "... challenge the decision or action concerned" and that there be a paragraph for enabling the enacting State to indicate the challenge options that it wished to offer.

51. **Mr. Grand d'Esnon** (France), urging that article 63 be left as it stood, said that the main question seemed to be whether the three challenge options indicated in it should be available in parallel or sequentially. The whole point of chapter VIII as a whole was that there was no one solution; any given challenge system would suit some States and not others.

52. **Mr. Yukins** (United States of America) said that his delegation was in favour of an explanation in the Guide to Enactment to the effect that States could adopt either a parallel approach or a sequential hierarchical approach, together with a reference to some of the problems that should be taken into consideration. For example, if a hierarchical approach was adopted, suppliers or contractors might be forced to apply to a corrupt or weak body at a lower level before they could seek a remedy at the judicial level, the intention being to deter potential remedy-seekers.

53. **Mr. Fruhmenn** (Austria) said that, at its forty-second session, the Commission had decided not to pronounce on how an enacting State should choose which challenge system to use. It was up to States to choose, so long as certain standards were met.

54. **Mr. Yukins** (United States of America) said that there was a good case for deleting the second half of paragraph (1) of article 63 and all of paragraph (2), thus leaving States free to choose, with the addition of a footnote saying that States could adopt either a parallel or a hierarchical approach.

*The meeting rose at 5 p.m.*

## Finalization and adoption of the UNCITRAL Model Law on Public Procurement (*continued*)

Summary record of the 929th meeting, held at the Vienna International Centre,  
Vienna, on Wednesday, 29 June 2011, at 9.30 a.m.

[A/CN.9/SR.929]

*Acting Chairperson:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 9.50 a.m.*

### Finalization and adoption of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/729 and Add.1 to 8)

1. **The acting Chairperson** invited **Mr. Fruhmann** (Austria) to report further on the results of the drafting group's discussions.

2. **Mr. Fruhmann** (Austria), referring to the definition of "procurement" contained in article 2 (h) of the draft revised text of the Model Law, said that the drafting group had felt that the words "the acquisition of goods, construction or services" did not define "the subject matter of the procurement" and that the latter text, contained in parentheses, should therefore be deleted. However, some participants had felt that "subject matter of the procurement" should be defined, but no consensus had been reached with regard to the possible wording of a definition. The issue of whether and how to define "subject matter of the procurement" had been considered a substantive one that should be considered in a meeting of the Commission.

3. With regard to article 15 (1), the drafting group proposed the replacement of the words "such time as will" with the words "a time period that will".

4. The United States delegation had stated that it would be proposing an article 15 bis on the clarification of qualification information and of submissions.

5. With regard to article 16 (1), the drafting group proposed that subparagraph (c)(ii) be deleted and subparagraph (c)(i) be absorbed into subparagraph (1)(c), which would then read "Notwithstanding ... set out 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."

6. The drafting group proposed that the end of article 17 (3)(b) be amended to read "... as well as the desired or required time for the supply of the goods, for

the completion of the construction or for the provision of the services;".

7. With regard to article 19 (1), the drafting group proposed that subparagraph (c) be deleted and paragraph (2) be amended to read "The decision of the procuring entity to reject a submission in accordance with this article and reasons for the decision, and all communications with the supplier or contractor under this article, shall be included in the record of the procurement proceedings. The decision of the procuring entity and the reasons therefor shall be promptly communicated to the supplier or contractor concerned."

8. With regard to article 21 (7), the drafting group proposed the addition of the phrase ", unless extended under article 40, paragraph (2)" at the end.

9. With regard to article 23 (3), it proposed that the words "or permitted in the solicitation documents" be deleted and that the word "such" should be added after the words "no party to any". Thus, the second sentence of the paragraph would read "Unless required by law or ordered by the [name of court or courts] or [name of the relevant organ designated by the enacting State], no party to any such discussions, communications, negotiations or dialogue shall disclose ...".

10. With regard to article 24, it proposed that: in subparagraph (1)(r) the words "where the written procurement contract" be amended to read "where a written procurement contract"; in subparagraph (1)(s) the phrase ", or the basis for determining the price," be deleted, the deletion to be explained in the Guide to Enactment; in the first sentence of paragraph (3) the phrases "of paragraph (1) of this article" and "or on cancellation" be deleted and the phrase ", unless the procuring entity determines that disclosure of such information would impede fair competition" be added after the words "become known to them", so that the first sentence would read "Except as disclosed pursuant to article 41 (3) of this Law, the portion of the record referred to in subparagraphs (p) to (t) shall, on request,

be made available to suppliers or contractors that presented submissions after the decision on acceptance of the successful submission has become known to them, unless the procuring entity determines that disclosure of such information would impede fair competition.”; and in subparagraph (4)(b) the phrase “, and submission prices,” be deleted.

11. Lastly, the drafting group proposed that in article 29 (1)(a), the word “precision” be replaced with the word “detail”.

12. **Mr. Wallace** (United States of America) asked whether the drafting group had concluded its consideration of the second sentence of paragraph (3) and its consideration of paragraph (4).

13. There was a need to clarify the relationship between article 29 (1)(a) and article 47. Perhaps that issue could be taken up during the consideration of article 47.

14. **Mr. Fruhmenn** (Austria), referring to the second sentence of paragraph (3), said that the issue regarding the type of information that might be disclosed remained to be discussed.

15. With regard to article 29 (1)(a), there had been no objection in the drafting group to the idea of redrafting article 29 (1)(a) in the light of article 47, and it had been decided that that idea would be taken up during the consideration of article 47.

16. **Mr. D’Allaire** (Canada), referring to the first sentence of article 24 (3), questioned the proposed deletion of the phrase “of paragraph (1) of this article”; in his view that phrase added to the clarity of the text. The proposed addition of the phrase “, unless the procuring entity determines that disclosure of such information would impede fair competition”, was, in his view, unnecessary since the intention of not impending fair competition was covered in article 24 (4), the content of which was understood to apply to article 24 (3). The inclusion of the proposed additional text might raise the question of why the elements of article 24 (4) other than impediment to fair competition were not covered in the first sentence of article 24 (3).

17. **Ms. Nicholas** (Secretariat) said it was the Secretariat’s understanding that the outstanding issue was that of the interaction between paragraphs (3) and (4) of article 24 and that that reference to fair competition might not be needed in both paragraphs.

Consideration should perhaps also be given to the question of whether not impending fair competition should be added to the objective reasons for non-disclosure as set out in paragraph (4); any assessment of whether disclosure would impede fair competition was likely to be subjective.

18. **The acting Chairperson** suggested the addition of wording along the lines of “, unless as stated in subparagraph (4)(a)” in the first sentence of paragraph (3).

19. **Mr. Yukins** (United States of America), recalling that the issue of whether to define the term “subject matter of the procurement” (which appeared in parentheses in article 2 (h)) remained open, said that the term appeared in effect to be defined in article 17 (3)(b), article 36 (b) and article 38 (d). In his view, the language in article 36 (b) would be the most suitable and could be used provided that the phrase “, if appropriate” were inserted after the word “including”.

20. **The acting Chairperson** suggested that the issue be taken up by the drafting group in the light of what had just been said by the representative of the United States of America.

21. **Mr. Grand d’Esnon** (France) said that in his view the term “subject matter of the procurement” needed to be defined.

22. **Mr. D’Allaire** (Canada) said that he was not sure that whether the term “subject matter of the procurement” needed to be defined. It was not defined in Canadian legislation.

23. Caution would have to be exercised in framing a definition as there were — if he had counted correctly — 59 references to “the subject matter of the procurement” in the draft revised Model Law.

24. **The acting Chairperson** said that he could work with the Secretariat on drafting an appropriate definition.

25. **Ms. Nicholas** (Secretariat) said that “subject matter of the procurement” had been included in parenthesis in article 2 (h) because Working Group I had concluded that there should not be references to “goods, construction and services” in the revised Model Law.

26. She suggested that the Commission leave aside the issue of how to refer to “goods, construction and services” for the time being as the current discussion related to the use of the term “subject matter of the



procurement” in the context of changing needs of the procuring entity.

27. **The acting Chairperson** said that it might be possible to draft a definition that covered both “goods, construction and services” and the meaning necessary in order to provide for the changing needs of the procuring entity.

28. **Mr. D’Allaire** (Canada), supported by **Ms. González Lozano** (Mexico), said that in articles 64-69 there needed to be more consistency in the use of the words “reconsideration”, “review” and “appeal”. The word “reconsideration” should be used only with reference to the procuring entity, the word “review” should only be used with reference to the independent body, and the word “appeal” should only be used in the sense of judicial review.

29. **The acting Chairperson**, in response to a question from **Mr. D’Allaire** (Canada), recalled that the words “by way of an application for reconsideration to the procuring entity under article 65 of this Law, an application for review to the [name of the independent body] under article 66 of this Law, or an application to the [name of court or courts]” were to be deleted from article 63 (1).

30. As regards article 63 (2), the Guide to Enactment would state that there were different possibilities as to what the enacting State might wish in its own legal system.

31. **Mr. D’Allaire** (Canada), supported by **Mr. Fruhmenn** (Austria), said that the words “lawful” and “unlawful” in article 66 (9) did not seem appropriate in such a text.

32. Supported by **Ms. González Lozano** (Mexico) and **Mr. Maradiaga Maradiaga** (Honduras), he said that article 69 could be deleted if article 63 were modified.

33. **The acting Chairperson** noted that footnote 14 might be moved to the Guide to Enactment.

34. **Mr. Fruhmenn** (Austria) said that the present wording of article 66 (8) suggested that “all documents relating to the procurement proceedings” would have to be delivered to the reviewing body. That might be complicated if the amount of documentation was large and if classified information was involved. Perhaps the words “or grant access to all documents” could be inserted, so that the paragraph read “... the procuring entity shall provide the [name of the independent body]

with all documents or grant access to all documents relating to the procurement proceedings ...”.

35. He asked whether the Guide to Enactment would explain what was meant by “any governmental authority” in article 67 (1) and whether the Guide would address the question of the right, in a federal State, of the government of a region unaffected by that procurement to participate in proceedings relating to that procurement.

36. As regards article 67 (3), perhaps the drafting group could consider whether there should be a provision in the revised Model Law to the effect that restricted access to classified information might be possible in some cases.

37. **Mr. Wallace** (United States of America) said that if article 69 were deleted, article 63 (2) should provide for a reference to the judicial authority that would consider the appeal.

38. **Mr. Yukins** (United States of America) said, in response to the suggestion made by the representative of Austria regarding article 66 (8), that it was inappropriate that a representative of the reviewing body should have to visit premises of the procuring entity and ask for permission to examine documents. If a procuring entity knew that it might have to deliver documents to a reviewing body, it would no doubt keep them in electronic form so that they could be delivered easily.

39. Regarding the words “lawful” and “unlawful” in article 66 (9), the use of formulations such as “in accordance with this Law” and “in violation of this Law” might be feasible. In practice, however, the reviewing body would usually be considering the appeal in the light not only of legislation based on the Model Law but also of other applicable legislation. The full scope of potential reviews seemed to be efficiently captured by the words “lawful” and “unlawful”.

40. In his view, without the words “lawful” and “unlawful” in article 66 (9) the reviewing body could have too much scope for reversing decisions of the procuring entity.

41. **The acting Chairperson** said, regarding article 66 (8), that language could probably be found that did not imply that representatives of reviewing bodies would have to visit the premises of procuring entities. Perhaps the article could state that, where delivering documents was impractical, access to the documents

should be provided through, for example, guidance on where to find the documents in electronic form.

42. **Mr. D’Allaire** (Canada) said that, while he understood the concern that the reviewing body could have too much scope for reversing decisions of the procuring entity if the words “lawful” and “unlawful” were removed from article 66 (9), there was a conceptual difficulty in that it was impossible to be sure that a decision was lawful or unlawful at the time when an application for review was made.

43. **Ms. Andres** (Canada) said that the drafting group should consider whether some of article 66 (4) was superfluous given the contents of article 66 (3), although the element relating to “urgent public interest considerations” might need to be retained. Similarly, the drafting group should consider whether article 66 (5)(a) could be deleted on the grounds of redundancy.

44. **Mr. Yu** (China), noting that article 64 (1) stated that the procuring entity “shall not enter into a procurement contract ...”, while article 65 (3) stated that “the procuring entity shall ... Decide ... whether the procurement proceedings shall be suspended”, asked what actions the procuring entity was free to take in the light of urgent public interest considerations if the procurement proceedings had been suspended.

45. **Ms. Nicholas** (Secretariat) said that the representative of China had in effect highlighted the tension that existed between, on one hand, the right of a supplier or contractor to challenge a decision or action of the procuring entity and, on the other, the interest of the public in a continuation of the procurement proceedings. Article 64 (1) and (2) represented an attempt to resolve that tension. The issue had been the subject of lengthy discussion in Working Group I.

46. Ways in which a procurement contract could enter into force were provided for in article 21, and the text of the draft revised Guide to Enactment relating to article 21 made it clear that differences in that respect might well exist between countries with different legal traditions.

47. **The acting Chairperson** said that, given the many possibilities envisaged in article 21, perhaps article 64 (1) should be amended to read something like “The procuring entity shall not take any action whose effect would be to bring a procurement contract ... into force” or “The procuring entity shall not take any action for the purpose of entering into a procurement contract ...”.

48. **Mr. Jezewski** (Poland), referring to article 66 (9), suggested that the word “unlawful” be replaced by a formulation on the lines of “deemed to be unlawful”, so that — for example — “an unlawful act” would become “an act deemed to be unlawful”.

49. He was concerned about the proposed deletion of article 69. He would like Chapter VIII to provide for judicial review, and he agreed with the representative of the United States of America that article 63 should be amended in such a way that judicial review would be provided for in Chapter VIII.

50. **The acting Chairperson** said that, if article 69 was going to be deleted, article 63 would have to be redrafted.

51. **Mr. Phua** (Singapore), referring to article 66 (8), which spoke of the procuring entity providing the independent body “with all documents relating to the procurement proceedings in its possession”, suggested that the procuring entity be required to submit simply a list of all documents in its possession.

52. **The acting Chairperson** said that the important thing was that the procuring entity should provide the independent body with effective access to all documents in its possession.

53. **Ms. González Lozano** (Mexico) said that there appeared to be some inconsistency in Chapter VIII as regards notification requirements. The parties who had to be notified were different in different parts of that chapter — for example, all participants in the procurement proceedings in the case of article 65 (3)(b) and all other participants in the challenge proceedings and all other participants in the procurement proceedings in the case of article 65 (6).

54. Perhaps one could simply provide for the notification of all parties with a legitimate interest in the matter.

55. **Ms. Nicholas** (Secretariat) said that the Secretariat had drafted the notification requirements contained in articles 64 and 65 in accordance with instructions received from Working Group I, which had recognized that the notification requirements should be different at different stages of challenge and appeal proceedings.

56. As regards the very first stage, Working Group I had been keen to ensure that the general public was notified — hence the requirement, in the chapeau of article 65 (3), that the procuring entity publish a notice

of any application for reconsideration of one of its actions or decisions.

*The meeting rose at 11.35 a.m.*

**Finalization and adoption of the UNCITRAL Model Law on Public Procurement** (*continued*)

**Summary record of the 930th meeting, held at the Vienna International Centre,  
Vienna, on Wednesday, 29 June 2011, at 2 p.m.**

[A/CN.9/SR.930]

*Acting Chairperson:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 2.15 p.m.*

**Finalization and adoption of the UNCITRAL  
Model Law on Public Procurement** (*continued*)  
(A/CN.9/729 and Add.1 to 8)

1. **The acting Chairperson** invited Mr. Fruhmann (Austria) to report on the progress being made in the drafting group.
2. **Mr. Fruhmann** (Austria) said that the drafting group still needed considerable time in which to complete its work.
3. **The acting Chairman** proposed that the meeting be suspended and the Committee reconvene in two hours time.

*The meeting was suspended at 2.20 p.m. and resumed at 4.30 p.m.*

4. **Mr. Fruhmann** (Austria) said that the drafting group had still not completed its work.
5. **The acting Chairperson** proposed that the meeting be adjourned and that the Commission reconvene at 9.30 a.m. on the following day.

*The meeting rose at 4.35 p.m.*

**Finalization and adoption of the UNCITRAL Model Law on Public Procurement** (*continued*)

**Summary record of the 931st meeting, held at the Vienna International Centre,  
Vienna, on Thursday, 30 June 2011, at 9:30 a.m.**

[A/CN.9/SR.931]

*Acting Chairperson:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 11.30 a.m.*

**Finalization and adoption of the UNCITRAL  
Model Law on Public Procurement** (*continued*)  
(A/CN.9/729 and Add.1 to 8)

1. **The acting Chairperson** said he understood that the drafting group had completed its consideration of the draft revised Model Law.

2. Proposals made by the drafting group regarding which no suggestions for amendment were made in the Commission would be considered to have been accepted by the Commission.

3. He invited the representative of Austria to present the drafting group's proposals.

4. **Mr. Fruhmann** (Austria) said that he was grateful to his colleagues in the drafting group for the constructive spirit displayed by them.

5. Regarding article 10 (3), the drafting group proposed that the expression "inter alia" be inserted between "may include" and "specifications" and that the words "including concerning" be deleted, with the addition in the Guide to Enactment of comments regarding "description of the subject matter of the procurement".

6. The drafting group proposed that article 13 be left unchanged, but that a comment regarding the language(s) used in documents be added in the Guide to Enactment.

7. The drafting group proposed a new article — article 15 bis — reading as follows:

**"Clarification of qualification information and of submissions**

"1. At any stage of the procurement proceedings, the procuring entity may ask a supplier or contractor for clarifications of its qualification information or of its submission, in order to assist in the ascertainment of

qualifications or the examination and evaluation of submissions.

"2. The procuring entity shall correct purely arithmetical errors that are discovered during the examination of submissions. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that presented the submission concerned.

"3. No substantive change to qualification information, and no substantive change to a submission (including changes aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive) shall be sought, offered or permitted.

"4. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to qualification information or submissions, nor shall any change in price be made, pursuant to a clarification that is sought under this article.

"5. Paragraph (4) of this article shall not apply to proposals submitted under articles 48, 49, 50 or 51.

"6. All communications generated under this article shall be included in the record."

8. The proposed article 15 bis, which had originated with the delegation of the United States of America, dealt with the same issues as article 42 (1), which would therefore be deleted, with consequential renumbering of the subsequent paragraphs of article 42, with consequential changes in the numbers of the articles referred to in the present paragraphs (5) and (6) of that article and with the reference "paragraph (1)(b) of this article" in the present article 42 (3)(b) amended to read "article 15 bis (2)". The drafting group also proposed that, in connection with article 15 bis, the Guide to Enactment elaborate on the difference between the expressions "change in price" and "correction of price".

9. **The acting Chairperson** took it that the proposed article 15 bis was acceptable to the Commission.

10. **Mr. Fruhmann** (Austria) said that the drafting group proposed that article 17 (2) be amended to read “If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published internationally, so as to be widely accessible to international suppliers and contractors.”

11. In that connection, the drafting group proposed that article 32 (2) be amended to read “The invitation shall also be published internationally, so as to be widely accessible to international suppliers and contractors.”

12. **Ms. Miller** (Observer for the World Bank) expressed concern about the proposed change to article 32 (2). The proposed new wording was less specific and could make it easier for procuring entities to discriminate against foreign bidders.

13. If the Commission accepted the proposed change, she hoped that the Guide to Enactment would state clearly why more specific language and publication medium requirements might be desirable.

14. **Ms. Robert** (Observer for the International Development Law Organization), expressing support for the intervention of the Observer for the World Bank, said that it would be useful if the Guide to Enactment provided information on the options available to countries that could not afford to publish invitations to tender internationally.

15. **The acting Chairperson** said that the reason for the proposed change was that the present wording of article 32 (2) might be taken to imply that the language used in invitations to tender should always be English, even though the procuring entity found it more practical to use another language.

16. **Mr. Grand d’Esnon** (France) said that the underlying issue had been thoroughly considered and should not be reopened given the time constraints under which the Commission was working.

17. **Mr. D’Allaire** (Canada) suggested that, if there was enough time, the Observers’ concerns be addressed after all the proposals of the drafting group had been considered.

18. **The acting Chairperson** agreed with that suggestion.

19. **Mr. Phua** (Singapore), supported by **Mr. Li** (China), proposed that the Guide to Enactment include a reference to article XVII (Transparency) of the WTO Government Procurement Agreement of 1994.

20. **The acting Chairperson** welcomed that proposal.

21. **Mr. Loken** (United States of America), recalling discussions in the drafting group, said that the Guide should include a reference to the use of electronic publication media.

22. **Mr. Li** (China) said that Working Group I should perhaps consider the role of the Internet in relation to the issue of transparency.

23. **Mr. Fruhmann** (Austria), continuing with the proposals of the drafting group, said that it proposed that article 24 (3) be amended to read “Subject to paragraph (4) of this article, or except as disclosed pursuant to article 41 (3) of this Law, the portion of the record referred to in subparagraphs (p) to (t) of paragraph (1) of this article shall, after the decision on acceptance of the successful submission has become known to them, be made available, on request, to suppliers or contractors that presented submissions.”

24. The drafting group proposed that the second sentence of the present text be included in the Guide to Enactment, which would also state that the procuring entity should inform suppliers or contractors of the disclosure to others of the information provided by them.

25. In connection with the proposed changes to article 24 (3), he recalled that it had already been decided that the words “and submission prices” would be deleted from article 24 (4)(b).

26. **Ms. Nicholas** (Secretariat), in response to a request for clarification made by **Ms. González Lozano** (Mexico), said that in the Secretariat’s view the two qualifications referred to in the proposed wording “Subject to paragraph (4) of this article, or except as disclosed pursuant to article 41 (3) of this Law” were not cumulative — either one qualification or the other might apply. The Secretariat believed that the appropriate conjunction should be “and”, not “or”, so that the phrase would read “Subject to paragraph (4) of this article and except as disclosed ...”.

27. **Mr. Fruhmann** (Austria), continuing with the proposals of the drafting group, said that it proposed that the words “and precise” be deleted from

article 30 (1)(a), as there was agreement that article 10 would refer to only a “detailed description” and not to a “detailed and precise description” of the subject matter of the procurement.

28. The drafting group proposed that the beginning of article 36 (c) be changed to “A summary of the criteria and procedures ...”.

29. In response to a question asked in that connection by **Ms. Nicholas** (Secretariat), he said that the drafting group had not discussed whether in article 36 (c) the summary would relate to only “the criteria and

procedures” or also to “the documentary evidence”, but in his view it related to both.

30. **The acting Chairperson** said that, if the intention was that there should also be a summary of the documentary evidence, the word “of” should be added, so that the phrase would read “A summary of the criteria and procedures ... and of any documentary evidence ...”.

*The meeting rose at 12.30 p.m.*

## Finalization and adoption of the UNCITRAL Model Law on Public Procurement (*continued*)

Summary record of the 932nd meeting, held at the Vienna International Centre,  
Vienna, on Thursday, 30 June 2011, at 2 p.m.

[A/CN.9/SR.932]

*Acting Chairperson:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 2.10 p.m.*

### Finalization and adoption of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/729 and Add.1 to 8)

1. **Mr. Fruhmenn** (Austria), reporting again on the work of the drafting group, said that the group had agreed that article 41 (2) should read “All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to participate in the opening of tenders.” The Guide to Enactment should explain that such participation could be either physical or virtual.

2. In article 46 (2)(b), the word “detailed” should be inserted before the word “description”, in order to bring the provision into line with the wording of article 10. In article (4)(d), “formulated or expressed” should be replaced by “formulated and expressed”.

3. In order to prohibit modification of the subject matter of the procurement, article 47 (4)(b) should read as follows:

“(b) In revising the relevant terms and conditions of the procurement, the procuring entity may not modify the subject matter of the procurement but may refine aspects of the description of the subject matter of the procurement by:

(i) deleting or modifying any aspect of the technical or quality characteristics of the subject matter of the procurement initially provided, and adding any new characteristic that conforms to the requirements of this Law;

(ii) deleting or modifying any criterion for examining or evaluating tenders initially provided, and adding any new criterion that conforms to the requirements of this Law, to the extent only that the deletion or

modification is required as a result of changes made in the technical or quality characteristics of the subject matter of the procurement;”.

4. **Ms. Nicholas** (Secretariat) said that “deletion or modification” in the second part of subparagraph (b)(ii) should read “deletion, modification or addition” in order to ensure consistency with the first part of the subparagraph.

5. **Mr. Fruhmenn** (Austria) said that in article 47 (4)(e) the phrase “as defined in article 42 (4)(b)” should read “as defined in article 42 (3)(b)” in order to reflect the fact that article 42 (1) had been deleted.

6. In article 48 (5)(d), the phrase “formulated or expressed” should read “formulated and expressed”, as elsewhere in the text.

7. The title of article 52 should read “Electronic reverse auction as a stand-alone method of procurement” and that of article 53 should read “Electronic reverse auction as a phase preceding the award of the procurement contract”.

8. A paragraph (3) should be added to article 53, containing the text found in article 52 (4)(c): “Where an evaluation of initial bids has taken place, each invitation to the auction shall also be accompanied by the outcome of the evaluation as relevant to the supplier or contractor to which the invitation is addressed.”

9. In article 57 (2), the words “pre-qualification and” should be added after the word “regulating”. The paragraph would thus begin “The provisions of this Law regulating pre-qualification and the contents ...”.

10. In article 58, a subparagraph (f) should be inserted after subparagraph (1)(e), to read “The manner in which the procurement contract will be awarded.”

11. In article 59 (2), the words “in accordance with” should be replaced with the words “following the requirements of”. It was proposed that subparagraph (3)(c)



of article 59 be deleted, since the information contained in that subparagraph was already set out in subparagraph (3)(b), the numbering of subparagraphs (d) to (h) would have to be adjusted. In the new subparagraph (3)(d)(ii), the old subparagraph (3)(e)(ii), the phrase “in conformity with this Law” should be replaced with the phrase “in conformity with paragraph (7) of this article”.

12. In article 59 (7), the phrase “and shall select suppliers or contractors to be parties to the closed framework agreement in a non-discriminatory manner” should be added at the end of the first sentence, with equivalent wording in relation to electronic reverse auctions in article 52.

13. **Ms. Nicholas** (Secretariat) confirmed that in article 52 (Procedures for soliciting participation in procurement by means of an electronic reverse auction) the phrase “the provisions of this Law” in subparagraph (1)(k) should be replaced with the phrase “paragraph (2) of this article” and the phrase “and shall select the suppliers or contractors to be so registered in a non-discriminatory manner” should be added at the end of the first sentence of paragraph 2.

14. **Mr. Fruhmenn** (Austria), referring to article 62, said that the title should be amended to read “Changes during the operation of a framework agreement”.

15. With regard to article 61, subparagraph (4)(a), he said that the drafting group had been unable to agree on the wording and was therefore referring the matter back to the Commission. However, a provisional text had been drafted:

“(a) The procuring entity shall issue a written invitation to present submissions simultaneously:

(i) to each supplier or contractor party to the framework agreement, or

(ii) only to each of those parties to the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement, provided that, at the same time, notice of the second-stage competition is given to all parties to the framework agreement so that they have the opportunity to participate in the second-stage competition;”

16. **Mr. Grand d’Esnon** (France), calling for deletion of the proposed subparagraph (a)(ii), said that the phrase

“only to each of those parties to the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement” would allow the procuring entity too much discretion in selecting “capable” suppliers or contractors; consequently, the parties to the framework agreement would have no assurance that they would be invited to present submissions.

17. **Ms. González Lozano** (Mexico) said that her delegation understood the concern of the delegation of France. However, it also understood the concern of the United States delegation, expressed in the drafting group, regarding the possible presentation of submissions by large numbers of suppliers and contractors incapable of meeting the procuring entity’s needs. The text proposed by the drafting group sought to address both concerns, and it was in line with the Model Law’s provisions relating to restricted tendering proceedings. Perhaps the concern of the delegation of France could be addressed in the Guide to Enactment.

18. **Mr. Yukins** (United States of America), expressing support for the text just read out, said it was important that framework agreements function efficiently. To that end, the procuring entity should be permitted to identify in advance those suppliers or contractors party to the framework agreement which it considered to be capable of meeting its needs and to issue the written invitation to present submissions only to them. That applied particularly in the case of central purchasing agencies, which might otherwise have to deal with many submissions from suppliers or contractors incapable of meeting their needs.

19. In the opinion of his delegation, the text just read out, which would provide for the participation of all parties to the framework agreement in the second-stage competition, effectively addressed the risk of corruption in the form of “cronyism”.

20. **The acting Chairperson** said that there seemed to be agreement that all parties to a framework agreement would receive notices of the second-stage competition.

21. **Mr. Fruhmenn** (Austria), agreeing with the acting Chairperson, wondered whether the provisional version of subparagraph (4)(a) that he had read out was necessary.

22. **Mr. Yukins** (United States of America) said that the provisional text reflected the compromise approach that had been adopted in his country, where the

procuring entity issued two types of notice: the notice sent to those suppliers or contractors party to the framework agreement which were considered to be “capable” took the form of an e-mail addressed to them, while the notice intended for the other parties to the framework agreement was posted on the procuring entity’s website. Thus, it was clear which suppliers or contractors were being invited to present submissions.

23. **Mr. Grand d’Esnon** (France) said that suppliers or contractors not considered to be “capable” should not have to check a website for notices.

24. **The acting Chairperson**, drawing attention to the phrase “provided that, at the same time, notice of the second-stage competition is given to all parties to the framework agreement so that they have the opportunity to participate in the second-stage competition” in the provisional version of subparagraph (4)(a), said it was clear from that phrase that notices of second-stage competitions would be communicated directly to suppliers or contractors and not simply posted on websites. The means by which such notices might be communicated could be dealt with in the Guide.

25. **Ms. Nicholas** (Secretariat) said that, regardless of the solution adopted, the Guide would note that framework agreements should spell out the criteria and procedures for identifying “capable” suppliers or contractors.

26. **Mr. Yukins** (United States of America) suggested framework agreements contain, for specification purposes, product or service codes, so that only the suppliers or contractors able to offer exactly the products or services indicated would receive invitations to present submissions. That would avoid subjective assessments of the ability of suppliers or contractors to meet the procuring entity’s needs.

27. **Mr. Grand d’Esnon** (France) said that the simplest solution would be to use only the first part of subparagraph (4)(a) as originally drafted: “The procuring entity shall issue a written invitation to present submissions simultaneously to each supplier or contractor party to the framework agreement;”. His delegation could go along with the provisional text that had been read out, although subparagraph (4)(a)(ii) appeared to be unnecessary and somewhat complicated.

28. **Mr. Yukins** (United States of America) requested clarification regarding the form that notices sent to “incapable” suppliers or contractors would take. His

delegation did not interpret the provisional text as meaning that individual notices would have to be sent to all parties to the framework agreement.

29. **Mr. Grand d’Esnon** (France) said that the provisional text was unclear on that point. In order to avoid a reopening of the discussion on article 61 (4)(a) during work on the Guide, the Commission should decide whether the Model Law should provide for different types of notice.

30. **Mr. Fruhmann** (Austria) said that electronic means of communication made it possible to communicate individual notices automatically to all parties to framework agreements at relatively little cost, even when the number of notices was very large.

31. **The acting Chairperson** said that the issue of the nature and content of notices to parties to framework agreements was a complicated one that should not be addressed in the Model Law, particularly since such notices might be handled in different ways in years to come. Possible solutions to that issue would have to be developed in light of implementation of the Model Law.

32. **Mr. Yukins** (United States of America) said it was important that the procuring entity be allowed to send notices to a restricted category of suppliers or contractors that was defined on the basis of clear criteria, so that both the procuring entity and suppliers or contractors did not incur excessive costs.

33. **The acting Chairperson** said that the Guide should indicate: that there might be a number of possible ways in which to communicate notices; that consideration should be given to the potential costs of communication; and that it was for the procuring entity to decide on the form that the notice would take.

34. **Mr. Fruhmann** (Austria) said that the drafting group proposed that the title of chapter VIII be “Challenge proceedings” and that the title of article 63 be “Right to challenge”.

35. It proposed that paragraph (1) of article 63 end with the words “decision or action concerned”, thus reading “A supplier or contractor that claims to have suffered or claims that it may suffer, loss or injury because of alleged non-compliance of a decision or action of the procuring entity with the provisions of this Law may challenge the decision or action concerned.”

36. Paragraph (2) would then read “Challenge proceedings may be made by way of an application for

reconsideration to the procuring entity under article 65 of this Law, an application for review to the independent body under article 66 of this Law, or an appeal to [...].” The drafting group had felt that it should not consider the content of the square brackets, which related to judicial review, until the Commission decided whether or not to retain article 69. It proposed that the Guide include a sentence along the following lines: “The enacting State may add provisions addressing the sequence of applications, if desired, and to allow an independent body or court to hear an appeal from an application for review; the application for reconsideration can be followed by an application for review or for judicial review, according to the domestic enactment of the Model Law.” It would thus be left to the enacting State to decide on the sequence of applications and on the review body or bodies to which appeals should be made.

37. **Mr. D’Allaire** (Canada) said that if paragraph (2) as originally drafted were deleted it would be difficult to delete article 69. It might be logical to incorporate article 69 into article 63.

38. He asked whether the proposed paragraph (2) would be in square brackets.

39. **Mr. Fruhmenn** (Austria) said that, in view of the content of articles 64 to 69, it might be wise to place part of the proposed paragraph (2) in square brackets in order to indicate the optional nature of the provision and of the decisions that the enacting State would need to make when implementing the Model Law. He suggested that square brackets be placed around the part of paragraph (2) following the words “Challenge proceedings may be made by way of”.

40. Regarding article 64, the drafting group proposed that the title be “Effect of a challenge” and that the chapeau of paragraph 1 be amended to read “The procuring entity shall not take any step that would bring a procurement contract or framework agreement in the procurement proceedings concerned into force”.

41. It proposed that subparagraph (1)(b) be split into two subparagraphs reading as follows:

“(b) Where it receives notice of an application for review from the [name of independent body] under article 66 (5)(b); or

“(c) Where it receives notice of an application or of an appeal from the [name of court or courts].”

42. It proposed that paragraph (2) be amended to read “The prohibition referred to in paragraph (1) shall lapse ... working days (the enacting State specifies the period) after the decision of the procuring entity, the [name of independent body] or the [name of court or courts] has been communicated to the applicant or appellant, as the case may be, to the procuring entity where applicable, and to all other participants in the challenge proceedings.” The Guide should explain the term “participants in the challenge proceedings” and note that the enacting State might wish to use another term when referring to parties with an interest necessary in order to participate in challenge proceedings.

43. The drafting group proposed that in subparagraph 3 (b) the phrases “or appellant, as the case may be” and “or appeal” be deleted.

44. In paragraphs (4) and (7) of article 65, the words “in the [name of independent body] under article 66 of this Law or in the [name of court or courts]” should be in square brackets, in order to indicate optionals.

45. The drafting group proposed that in the title of article 66 and throughout that article all references to appeals and all instances of the wording “or appellant, as the case may be” be deleted, since that article dealt only with reviews before independent bodies, not with appeals. The footnote to the title of the article should be incorporated into the Guide, with improvements made in the wording.

46. In paragraph (1), the phrase “and may also file an appeal to that body against a decision of the procuring entity taken under article 65 of this Law” should be deleted.

47. The drafting group proposed that in subparagraph (2)(d) the words “Appeals against decisions of the procuring entity taken under article 65 of this Law, or” be deleted; consequently, the subparagraph would begin with the words “Applications for review of a failure”. In addition, the phrase “after the decision of the procuring entity was communicated or should have been communicated to the appellant in accordance with” should be amended to read “after the decision of the procuring entity should have been communicated to the applicant in accordance with”.

48. Footnotes 8 and 9 should be moved to the Guide, with improvements in the wording.

49. At the end of subparagraph (5)(a), the words “in accordance with paragraphs (3) and (4) of this article” should be added.

50. Paragraph (8) should be amended to read “Promptly upon receipt of a notice under paragraph (5)(b) of this article, the procuring entity shall provide the [name of the independent body] with effective access to all documents relating to the procurement proceedings in its possession, in a manner appropriate to the circumstances.” The Guide should explain how physical or virtual access to documents could be granted and that the relevant documents could be provided in steps; for example, the procuring entity could provide the review body with a list of documents from which that body could choose the documents it needed.

51. In paragraph (9), subparagraphs (a) and (b) should be amended to read as follows:

“(a) Prohibit the procuring entity from acting, taking a decision or following a procedure that is not in compliance with the provisions of this Law;

“(b) Require the procuring entity that has acted or proceeded in a manner that is not in compliance with the provisions of this Law to act, take a decision or proceed in a manner that is in compliance with the provisions of this law;”.

52. It was proposed that subparagraph (9)(c) be amended to read “Overturn in whole or in part an act or a decision of the procuring entity that is not in compliance with the provisions of this Law (other than any act or decision bringing the procurement contract or the framework agreement into force);”.

53. Subparagraph (9)(d) should read “Revise a decision by the procuring entity that is not in compliance with the provisions of this Law (other than any act or decision bringing the procurement contract or the framework agreement into force);”.

54. There should be an additional subparagraph, subparagraph (9)(e), reading: “Confirm a decision by the procuring entity;”, with subparagraphs (e) to (i) as set out in document A/CN.9/729/Add.8 becoming subparagraphs (f) to (j). In the renumbered subparagraph (f), the word “unlawfully” would be

replaced with the phrase “in a manner that is not in compliance with the provisions of this Law”.

55. The entire text of subparagraphs (c) to (f) should be in square brackets in order to indicate that those subparagraphs contained optional provisions.

56. The renumbered subparagraph (i) should read as follows: “Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting an application as a result of an act or decision of, or procedure followed by, the procuring entity in the procurement proceedings, which is not in compliance with the provisions of this Law, and for any loss or damages suffered [, which shall be limited to costs for the preparation of the submission, or the costs relating to the application, or both];”.

57. In paragraph (10), the words “challenge or appeal proceedings” should be replaced with the words “application for review”.

58. In article 67, all references to “appeal” in the title and throughout the article should be deleted. In paragraph (3) of the article, the words “relevant challenge or appeal” should also be deleted.

59. In article 68, the words “and appeal” should be deleted from the title and the words “or appeal” from the text of the article.

60. All footnotes in document A/CN.9/729/Add.8 should be deleted, and a new footnote, which would refer to the chapter as a whole, would direct enacting States to consider the various options that were explained in the Guide.

61. Article 69 remained to be discussed by the Commission, since it had been felt that the issue raised by that article was substantive.

62. **Mr. Yukins** (United States of America), referring to the proposed wording of article 66 (9)(d), said that he was not aware of any conclusion to the effect that the words “or substitute its own decision for such a decision” appearing in document A/CN.9/729/Add.8 should be deleted.

63. **Ms. Nicholas** (Secretariat) said it was the Secretariat’s understanding of the drafting group’s discussions that, in the drafting group’s view, the revision by the independent body of a decision made by the procuring entity would involve the replacement of

that decision by a decision of the independent body to the extent that such replacement was required.

64. **The acting Chairperson** took it that the Commission agreed to the deletion of the words in question and thus accepted the proposed wording of article 66 (9)(d).

65. **Mr. Grand d'Esnon** (France) said that the drafting group had considered deleting article 69 if article 63 provided for the possibility of an appeal and hence of judicial review. As the proposed wording of paragraph (2) of article 63 seemed to provide for that possibility, his delegation was in favour of the deletion of article 69.

66. **Mr. D'Allaire** (Canada) said that article 69 should not be deleted unless article 63 required that the enacting State allow not only challenges but also appeals.

67. He proposed the retention of the original wording of paragraph (2), as contained in document A/CN.9/729/Add.8, and the addition of the proposed paragraph (2) as paragraph (3), with the insertion of the words "name of court or courts" in the square brackets.

68. **The acting Chairperson** said that, while chapter VIII should reflect the need to provide for appeals by including references to "court or courts" in square brackets, it should not itself deal with appeals. For that reason, he considered that article 69 and the original wording of article 63 (2) should be deleted.

69. **Ms. Nicholas** (Secretariat) said it was her understanding of the proposal just made by the representative of Canada that the options available to the supplier or contractor by virtue of article 63 should include a first-instance application to a court.

70. She proposed that paragraph (2) of that article read "Challenge proceedings may be made by way of [an application for reconsideration to the procuring entity under article 65 of this Law, an application for review to the independent body under article 66 of this Law, or an application or appeal to [name of court]]". It would then be up to the enacting State to decide on the sequence of applications and whether both an application and an appeal could be made to a court. It was the Secretariat's understanding that the Commission wished the Model Law to provide for both those possibilities.

71. **The acting Chairperson** took it that the Commission wished to accept the Secretariat's proposal

and to delete article 69, with the Commission's discussion reflected in the Guide.

72. **Ms. Miller** (Observer for the World Bank) said that, if the Model Law contained a reference to the right to judicial review but no provision expressly acknowledging that right, that might cause confusion. It was important that the Model Law contain such a provision; the issue was too important to be left to the Guide to explain. She was therefore in favour of retaining article 69.

73. **Ms. Nicholas** (Secretariat) said that, in the wording of article 63 (2) just proposed by her, the options available to the supplier or contractor would appear in square brackets, thus indicating that enacting States should refer to the Guide for an explanation of those options. The Guide would clarify that challenge proceedings included both first-instance applications and appeals.

74. **The acting Chairperson** said that it was important that the Model Law not dictate to enacting States which review system they should adopt. However, the Guide should make it clear that the possibility of appeal must be available, in line with international requirements.

75. **Mr. D'Allaire** (Canada) said that, in his view, the wording in square brackets in the proposed article 63 (2) did not give a clear indication that the enacting State was required to provide both for first-instance applications and for appeals. However, his delegation had no objection to the idea that the matter should be addressed in the Guide.

76. **Mr. Grand d'Esnon** (France) said that article 63 should make it clear that enacting States must provide for an appeal system; the proposed text did not do that.

77. **The acting Chairperson** said that, if article 63 did not make it clear, the references to appeals and appellants that the Commission apparently had decided to delete throughout chapter VIII would have to be reinstated.

78. **Mr. Loken** (United States of America) said that, if challenge proceedings were understood to include the possibility of an application to a court, reinstatement of the original language of paragraph (2) of article 63 would mean that the Model Law provided for appeals against court judgements. The Model Law should not provide for that.

79. **The acting Chairperson** proposed that, in order to clarify the distinction between the right to challenge and the right to appeal while also avoiding the problem pointed out by the representative of the United States, the wording of paragraph 2 of article 63 proposed by the Secretariat be retained and the original wording of paragraph (2) as set out in document A/CN.9/729/Add.8 appear in square brackets as paragraph (3). The original wording of paragraph (2) could not be interpreted as providing for the right to appeal against a court judgement, since articles 65 and 66 dealt only with applications to the procuring entity and to an independent body.

80. **Mr. Yukins** (United States of America) said that that solution would be acceptable provided that the Guide addressed the fact that the steps that a supplier or contractor could take would vary depending on the jurisdiction concerned; for example, the supplier or contractor might be able to appeal directly against a decision of the procuring entity, or it might be required to apply for review by an independent body before being able to appeal; in other cases, it might be able to apply to a court without any administrative review.

81. **The acting Chairperson** took it that the proposed solution was acceptable to the Commission.

82. Recalling that there had been some discussion as to whether footnotes should be retained in the revised Model Law, he said that, since other Model Laws adopted by the Commission typically contained footnotes, those footnotes in the revised Model Law which had not been deleted would remain.

83. Turning to editorial matters, he said it had been suggested that all optional provisions be in square brackets. He took it that the Commission wished the Secretariat to deal with the relevant provisions accordingly and also to deal with the numbering in cases of “bis” provisions.

84. **Ms. Nicholas** (Secretariat) said that the Secretariat would make as few editorial changes as possible. One consideration would be consistency of language — to be achieved by, for example, the replacement of the word “aspects”, used in a number of provisions to refer to technical or quality characteristics, with the word “characteristics”.

85. **Mr. Piedra** (Observer for Ecuador) said that he wished to make a number of general comments and would like those comments to be duly reflected in the Guide to Enactment.

86. Ecuador recognized the enormous efforts made during the past several years in revising the Model Law and welcomed the fact that the revised Model Law reflected the experience and concerns of many countries. Ecuador was of the view that, when engaging in public procurement, States should take into account the different levels of development of other States and bear in mind the principles of environmental and social responsibility. The international community should respect the fact that, for less advanced countries, public investment continued to be important for promoting economic development, and particularly the development of the production sector and of small and medium-sized enterprises. For such countries, public procurement was not simply a means of promoting international trade.

87. The revised Model Law should be understood as a tool that could be adapted to the circumstances and the level of development of each country, and it should be implemented in accordance with the social and economic situation of each country in order to avoid negative consequences for less advanced countries.

88. Ecuador would like UNCITRAL to take account of its concerns and not attempt, at either the bilateral or the multilateral level, to seek wholesale incorporation of the revised Model Law into the national legislation of every country, particularly within the framework of international trade negotiations in which less advanced countries engaged.

89. Despite its concerns, Ecuador fully endorsed the principles of transparency, efficiency and quality in the field of public procurement.

90. **The acting Chairperson** said that the Secretariat had taken note of the comments just made.

*The meeting rose at 5.05 p.m.*

**Finalization and adoption of the UNCITRAL Model Law on Public Procurement** (*continued*)

**Summary record of the 933rd meeting, held at the Vienna International Centre,  
Vienna, on Friday, 1 July 2011, at 9.30 a.m.**

[A/CN.9/SR.933]

*Acting Chairperson:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 9.50 a.m.*

**Finalization and adoption of the UNCITRAL  
Model Law on Public Procurement** (*continued*)  
(A/CN.9/729 and Add.1 to 8)

1. **The acting Chairperson** said he took it that the Commission wished to adopt the UNCITRAL Model Law on Public Procurement as read out during earlier meetings in the current session.

2. *It was so decided.*

**Preparation of a Guide to Enactment of the  
UNCITRAL Model Law on Public Procurement**

3. **The acting Chairperson** invited comments on how to proceed with the adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement.

4. **Ms. Nicholas** (Secretariat) said that before the Commission's next session the Secretariat could continue to hold informal consultations with experts for the purpose of finalizing the draft text in documents A/CN.9/731 and Add.1 to 9. Also, Working Group I could review the draft text during one or two sessions, later in 2011 and/or early in 2012. In addition, Working Group I could go into more detail regarding issues that might arise in particular regions.

5. In view of questions about matters such as defence procurement, and given the commentaries regarding the objectives of the Model Law in academic journal articles, the Commission might want to take the lead in ensuring that the commentary in the Guide was consistent with those objectives.

6. The Commission might wish to consider publication of the Guide in electronic form so that it could be a living document, updated to reflect input from experts on the implementation of the Model Law and changing business practices.

7. **Mr. Yukins** (United States of America), supported by **Mr. D'Allaire** (Canada), **Mr. Fruhmenn** (Austria), **Mr. González** (Argentina) and **Mr. Maradiaga Maradiaga** (Honduras), said that his delegation would not welcome two Working Group I sessions for finalizing the draft Guide; much of the work could be done at meetings of experts. His delegation was open to a Working Group I session early in 2012 or immediately before the 45th session of the Commission.

8. **Mr. D'Allaire** (Canada) said that it was important to preserve the expertise accumulated during the seven years of work on the Model Law and requested the Secretariat to submit to the Commission, for its consideration, proposals for its future work, with an indication of priorities. In the area of public procurement, he would like to see further work done on the issue of public-private partnerships.

9. Regarding finalization of the draft Guide, budgetary considerations would probably dictate the number of Working Group I sessions. Perhaps the Secretariat could prepare a finalized draft of the Guide in consultation with experts for submission to members of the Commission well in advance of its 45th session.

10. **Mr. Fruhmenn** (Austria) said that it was very important to finalize the Guide; experts could assist the Secretariat in that task.

11. His delegation would like the Guide to be a living document, with proposed updates reported to the Commission for approval.

12. **The acting Chairperson** noted that the dates proposed for a possible Working Group I session in 2012 were 27 February-2 March, in Vienna, or 9-13 April, in New York.

13. **Mr. Fruhmenn** (Austria) noted that 9 April 2012 would be Easter Monday.

14. **Mr. Sorieul** (Secretary of the Commission) said that Easter Monday would not be a holiday in New York.

15. **Mr. Grand d'Esnon** (France) said that in his view at least two Working Group I sessions would be required for finalization of the draft Guide. Expert meetings would be useful but would not speed up the process.

16. Regarding future work, he believed that the subject of public-private partnerships could usefully be revisited.

17. **Mr. González** (Argentina) said, with regard to the Commission's future work that the Commission needed an overview of its budgeting situation in order to decide how many working groups would hold how many sessions.

18. His delegation believed that the Guide to Enactment, which should be a living document, could be finalized through consultations with experts.

19. **Mr. Maradiaga Maradiaga** (Honduras) said that the revised Model Law would be particularly important for Central American countries, where enormous efforts were being made to combat corruption.

20. As regards finalization of the Guide to Enactment, the Secretariat should draw on experts' contributions.

21. **Mr. Wallace** (United States of America) said that it would be too soon to hold a Working Group I session on the Guide in 2011. He proposed the convening of a "working party", which would be more flexible — and require less in the way of language services — than a working group. The "working party" could meet early in 2012, and possibly just before the 45th session of the Commission.

22. **Mr. Yukins** (United States of America) invited Commission members to participate in a blog on the UNCITRAL Model Law on Public Procurement.

23. **Mr. Díaz y Pérez Duarte** (Mexico) said that top priority should be assigned to finalization of the draft Guide to Enactment.

24. The Guide should be a periodically updated living document. The same applied to other Commission texts, such as the UNCITRAL Legislative Guide on Insolvency Law.

25. **Ms. Nicholas** (Secretariat) said that, even if the Guide was in electronic form, the Commission could control the updating process.

26. **Ms. Keyte** (United Kingdom) said that the servicing of a Working Group I session on the Guide

would draw heavily on the Commission's very limited resources. Consideration should be given to — for example — the idea of convening a "working party" before or during the Commission's 2012 session. In her view, meetings in 2011 would not be advisable.

27. **Mr. Grand d'Esnon** (France) said that there appeared to be a growing consensus against meetings on the Guide in 2011; his delegation would go along with such a consensus. However, if meetings were not held until early in 2012, the Commission would not be able to finalize the draft Guide during that year.

28. **The acting Chairperson** said that he was not clear as to what the difference was between a working group and a "working party".

29. **Mr. d'Allaire** (Canada) said that there were significant differences between a working group and a group of experts or "working party". For example, a working group was provided with extensive conference services and the members represented their countries. Experts conducted their discussions in whichever language was most convenient and they acted in a personal capacity.

30. **Mr. Sorieul** (Secretary of the Commission), concurring with the representative of Canada, said that a working group meeting was an intergovernmental meeting, whereas at meetings of experts only very limited conference services were provided, such services being dependent on the current resource situation.

31. **The acting Chairperson** said that he was nevertheless in favour of a Working Group I session, as there were important issues to be resolved in connection with the Guide to Enactment.

32. He suggested that the Secretariat be requested to prepare a paper on the Commission's future activities.

33. **Mr. Fruhmann** (Austria) said that he was concerned about the possibility that there would be no Working Group I session in the early months of 2012. If only meetings of experts were held, any new texts to be considered would presumably not be available in all the official languages of the United Nations.

34. **Mr. Sorieul** (Secretary of the Commission) confirmed that only working groups of the Commission could be provided with full translation and interpretation services.



35. **Mr. González** (Argentina) said that the Guide was only a supporting text without legal force, and long-distance air travel by national representatives in order to work on a draft text could not be justified, especially in the case of developing countries.

36. **The acting Chairperson** said that the Model Law itself did not have legal force; States could draw on it in any way they wished. The draft Guide to Enactment contained very important material relating to elements of policy on which the Commission had not been able to decide.

37. **Mr. Wallace** (United States of America) said that, if meetings on the draft Guide were held in the early months of 2012, the text should be as final as possible, and in all six official languages of the United Nations.

38. As to future activities, perhaps the Secretariat could prepare a paper on private finance initiatives in support of public-private partnerships.

*The meeting was suspended at 11.10 a.m. and resumed at 11.55 a.m.*

39. **The acting Chairperson** said that, during informal consultations, some delegations had proposed the holding of a Working Group I session on the draft revised Guide to Enactment late in 2011. However, there was no possibility of changing the dates of the Working Group I session scheduled for the week beginning 17 October 2011, which was somewhat early in that the Secretariat would need to have completed its preparations by 10 August 2011. It would be preferable for the Secretariat to have more time to finalize the text of the draft revised Guide and prepare notes on the issues that the Commission might wish to work on in the future. Consequently, the idea of holding one Working Group I session early in 2012, that session having been scheduled provisionally for 27 February-2 March 2012, was more realistic.

40. **Mr. González** (Argentina) said that his delegation required additional time to consider the issue. Perhaps a decision could be taken during the following week, in the light of the Commission's overall financial situation, the situation with regard to the financing and location of meetings and the possible establishment of new working groups.

41. **Mr. Li** (China) said that the work on the Model Law could not be regarded as finished without the approval of a Guide to Enactment. In his view, therefore,

a Working Group I session should be held later in 2011 as scheduled. However, finalization of the Guide was likely to require a number of sessions, and budget constraints might prevent developing countries from sending delegations to all of the sessions. Informal consultations might be the answer.

42. **Mr. León Vargas** (Mexico) suggested that the 17-21 October 2011 slot be exchanged with the 14-18 November 2011 slot of Working Group III. That would give the Secretariat more time for preparations, and it would not create financial problems.

43. That having been said, his delegation was not entirely convinced that a Working Group I session was necessary.

44. **Mr. Sorieul** (Secretary of the Commission) said that in his view the only option was an exchange of slots. The latest slot available was 12-16 December 2011, when Working Group VI was scheduled to meet; however, Working Group VI was on the point of concluding its work and should not be forced to meet earlier than in December 2011.

45. An exchange of slots with Working Group III, while creating other problems, would give the Secretariat four additional weeks to prepare for the session of Working Group I.

46. **The acting Chairperson** took it that the Commission wished a Working Group I session to be held either late in 2011 or early in 2012, depending on the scheduling of other meetings.

47. **Mr. González** (Argentina) said that, as pointed out by the representative of Mexico, the holding of a Working Group I session in November 2011 would not create financial problems; the holding of a Working Group I session early in 2012 would.

#### **Future work**

48. **Ms. Nicholas** (Secretariat) said that there were two aspects to the Commission's future work in the area of public procurement.

49. The first was promotion and implementation of the revised Model Law, which the Commission might wish to consider in the light of operative paragraphs 2 to 6 of the draft decision on the adoption of the UNCITRAL Model Law on Public Procurement (A/CN.9/XLIV/CRP.2). Promotion of the revised Model Law raised logistical and budgetary issues, since

UNCITRAL texts were promoted mainly through conferences, publications and technical assistance projects.

50. The Secretariat was working with the European Bank for Reconstruction and Development (EBRD) and the Organization for Security and Cooperation in Europe (OSCE) on promotion of the revised Model Law in countries of the Commonwealth of Independent States (CIS) and in Mongolia. The Commission might wish to consider, or request Working Group I to consider, what else the Secretariat should do and what information in the revised Guide would need to be updated from time to time.

51. During the following week, the Commission might also wish to consider how the Secretariat should continue to promote the increasing number of UNCITRAL texts with the decreasing resources available to it. In that regard, it might be helpful for States to consider how they could support the promotion and implementation of the revised Model Law.

52. Since there was no requirement for a State to inform the Secretariat that it had adopted UNCITRAL texts, the Secretariat might well prove to be ill-informed about the extent of the revised Model Law's use. That would be unfortunate, since the Secretariat would benefit from knowing — for example — how provisions of the revised Model Law were being interpreted by administrative review bodies and courts in different States. Such knowledge would be useful to the Commission if it decided to consider how best to bring about uniform interpretation of the revised Model Law.

53. The other aspect to the Commission's future work in the area of public procurement was connected with the fact that there were many standards at the international and the regional level that could be applied in that area, and an enacting State might have to review numerous texts when deciding how to improve its public procurement legislation. The Secretariat could be mandated to cooperate with other bodies involved in public procurement law reform in determining how harmonization of those standards might be achieved, including through use of the revised Model Law, and to report back to the Commission in due course.

54. Lastly, she expressed the hope that Commission members that were major donors would commit themselves to using the revised Model Law when

engaging in procurement activities involving other States.

#### **Election of officers (*resumed*)**

55. **The acting Chairperson** said that the delegation of Honduras had nominated Mr. Sánchez Mejorada y Velasco (Mexico) as Vice-Chairperson of the Commission and that it had been suggested that, in view of his substantial knowledge of the issues involved, Mr. Sánchez Mejorada y Velasco chair the Commission during its consideration of agenda item 5 — Finalization and adoption of judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency.

56. *Mr. Sánchez Mejorada y Velasco (Mexico) was elected Vice-Chairperson by acclamation.*

#### **Draft decision on the adoption of the UNCITRAL Model Law on Public Procurement (A/CN.9/XLIV/CRP.2) (*resumed*)**

57. **Mr. Yukins** (United States of America), drawing attention to the reference to “novel issues and practices” in the fifth preambular paragraph, pointed out that the word “novel” in English meant not only “new” but also “unusual” or “out of the ordinary” and might therefore be misunderstood. He suggested that the word “novel” be deleted or replaced with the word “new”.

58. **Mr. González** (Argentina), referring to the Spanish text, proposed that in operative paragraph 3 “apliquen” be replaced by “consideren aplicar” and “estudien” be replaced by “consideren estudiar”.

59. **The acting Chairperson**, commenting on the second proposed change, said that, if the proposal was accepted the words “give favourable consideration to” in the English text could probably remain unchanged.

60. **Ms. González Lozano** (Mexico), referring to the proposals for change made by the representative of Argentina, said that a recommendation that States only “consider using” the Model Law would constitute a substantial watering-down of the draft resolution. In any case, what operative paragraph 3 contained was merely a recommendation — not a requirement. In her view, operative paragraph 3 should be left as drafted.

61. **The acting Chairperson**, pointing out that “use” in the English text had been rendered as “apliquen” (“apply”) in the Spanish text, wondered whether “apliquen” could be taken to imply “application” in the sense of “enactment”.

62. **Mr. González** (Argentina) said that the drafting group had initially thought of using “Invites” or “Encourages” rather than “Recommends” in operative paragraph 3. In his view, the use of “Recommends” warranted a change from “apliquen” to “consideren aplicar” and from “estudien” to “consideren estudiar”.

63. **The acting Chairperson** suggested that the use of the word “apliquen” (“apply”) in the Spanish text be

reviewed by the Secretariat in consultation with interested delegations.

*The meeting rose at 12.30 p.m.*

## Finalization and adoption of judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency

**Summary record of the 934th meeting, held at the Vienna International Centre,  
Vienna, on Friday, 1 July 2011, at 2 p.m.**

[A/CN.9/SR.934]

*Chairperson:* Mr. Sánchez Mejorada y Velasco (Mexico)

*The meeting was called to order at 2.10 p.m.*

### **Finalization and adoption of judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency** (A/CN.9/732 and Add.1-3, A/CN.9/733 and Add.1, A/CN.9/715, A/CN.9/XLIV/CRP.3)

1. **Ms. Clift** (Secretariat) said that the Commission had before it documents A/CN.9/732 and Add.1-3 containing draft judicial materials for the information and guidance of judges on cross-border insolvency issues and, in particular, on the UNCITRAL Model Law on Cross-Border Insolvency.

2. The Secretariat had received from the Commission a mandate to develop a text in a flexible manner as had been achieved with respect to the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*, through consultations with judges and with insolvency practitioners and professionals.

3. The draft text had been considered by Working Group V at its latest session, as reported in paragraphs 110-116 of document A/CN.9/715, and circulated to Member States. The comments received were contained in document A/CN.9/733 and Add.1, and they had been addressed to the extent possible.

4. The draft text had also been considered by judges and other participants in the Ninth Judicial Colloquium organized jointly by UNCITRAL, the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International) and the World Bank, and held in Singapore in March 2011.

5. The provisions of the Model Law were examined in the draft text in a way that reflected the sequence in which applications for recognition and assistance would generally be considered by the receiving court. The draft text did not purport to instruct judges on how to deal with such applications or suggest that a single approach was possible or desirable, but provided general guidance on the issues that a judge might need to consider on the

basis of the intentions of those who had crafted the Model Law.

6. To illustrate how the provisions had been interpreted and applied in practice and possible strands of reasoning that might be adopted in addressing specific issues, the draft text included references to court decisions from different jurisdictions. There was no attempt to criticize the decisions; attention was drawn to issues that a judge might want to consider if dealing with a similar case, while taking account of domestic law including the terms of the legislation enacting the Model Law.

7. A new annex, contained in document A/CN.9/732/Add.3, consisted of short notes on the facts of the cases and the decisions taken to provide orientation for those who had not had the opportunity to read the judgements in question in their original languages.

8. In addition to considering the draft text, the Commission might wish to address the possibility of developing a mechanism for updating it periodically in a manner similar to that in which it had been developed and maintaining a neutral approach, as described in paragraphs 3 and 4 of document A/CN.9/732.

9. The Commission might also wish to consider acknowledging in a preface the substantial contribution to the project by Justice Paul Heath of New Zealand.

10. **Mr. González** (Argentina) expressed appreciation for the Secretariat's work in preparing the draft judicial materials, which would be important for the possible incorporation and subsequent application of the Model Law in his country.

11. In particular, Argentina welcomed the provision in the Model Law that the foreign representative must inform the receiving court of any other foreign proceeding regarding the same debtor, the definition of the "establishment" of a debtor, the fact that there was

no requirement for reciprocity, the provisions regarding the presumption of the authenticity of documents, and the fact that the materials reflected the spirit of broad cooperation that was a key aspect of the Model Law.

12. Argentina would like to see a fuller reflection in the revised text of two issues raised by it in its comments contained in document A/CN.9/733/Add.1.

13. Firstly, under the Model Law courts were entitled to communicate directly with foreign courts or foreign representatives without the need for requests or letters rogatory. In many countries, including Argentina, letters rogatory were important for ensuring effective communication. Therefore, the judicial materials should stress the importance of ensuring more efficient cooperation with a view to effective recognition while safeguarding the interests of the parties.

14. The second issue was connected with recourse to public policy as grounds for declining recognition as discussed in paragraphs 47-51 of document A/CN.9/732. Argentina considered the situation to be more akin to fraud and abuse, which constituted hindrances or limits based on manipulation of the facts, and it would like to see that view reflected more fully in the judicial materials, possibly in a subsequent update.

15. **Mr. Redmond** (United States of America) expressed appreciation to the Secretariat for producing the draft judicial materials in such a short time. Intended to educate judges regarding the application of the Model Law, the materials would also provide useful background information for academics, practitioners and courts, also helping to provide uniformity, transparency and predictability and contributing to greater coordination in cross-border insolvency cases.

16. His country supported the proposal to acknowledge the contribution of Justice Paul Heath.

17. The United States strongly supported the proposal to update the text in consultation with experts to ensure that the materials stayed abreast of Working Group V's most recent work and of the emerging body of case law and decisions. His country also supported the neutral approach taken to the cases cited. The Secretariat should not change the context or scope of the text and should submit proposed updates to the Commission for its approval.

18. **Mr. D'Allaire** (Canada) said that his country was in favour of the adoption of the draft judicial materials,

which represented a positive contribution to judicial collaboration in cross-border insolvency proceedings. During extensive consultations in Canada, both practitioners and the judiciary had expressed widespread support for the materials, which would be particularly useful as his country had recently adopted the Model Law and did not have a specialized insolvency or bankruptcy court.

19. He supported the proposal to update the text regularly and encouraged the Secretariat to report to the Commission on any deficiencies or proposed amendments.

20. His country also supported the proposal to acknowledge the contribution of Justice Paul Heath.

21. **Mr. Lara Cabrera** (Mexico) said that his country was in favour of adoption of the draft judicial materials, which would provide valuable guidance on the application of the Model Law. His country would welcome a flexible mechanism whereby the Secretariat might update the text in consultation with experts.

22. **Ms. Clift** (Secretariat), addressing the points raised by the representative of Argentina, said that the important issue of fraud and abuse had been discussed in Working Group V, as reflected in document A/CN.9/715 in paragraph 26 and below regarding public policy, and in paragraph 42 about the impact of fraud on factors to be considered in determining a debtor's centre of main interest (COMI). As noted in paragraph 43, the Working Group had agreed that the issue required further consideration. As a result, no view was reflected in the judicial materials, which could subsequently be updated to incorporate outcomes from Working Group V.

23. Communication was addressed in various texts including the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* and the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency. The matter needed to be taken into account insofar as the current work of Working Group V was connected with those texts. Approaches to communication in cross-border cooperation were frequently discussed in judicial colloquiums and meetings with judges, and the Secretariat was open to a specific proposal on that subject for inclusion in the judicial materials.

24. **Mr. González** (Argentina) said that the text could be modified to reflect his country's requirements when it was next updated.

25. **The Chairperson** took it that the Commission wished to adopt the draft judicial materials contained in documents A/CN.9/732 and Add.1-3, with an acknowledgement in the preface of the substantial contribution of Justice Paul Heath.

*It was so decided.*

26. **The Chairperson** invited the Commission to consider the draft decision contained in document A/CN.9/XLIV/CRP.3

27. **Mr. González** (Argentina), recalling the comment made by him during the discussion on the adoption of the UNCITRAL Model Law on Public Procurement,<sup>4</sup> said that he was pleased that at least in operative paragraph 5 of the draft resolution now under discussion the word “consider” was used.

28. **Mr. Redmond** (United States of America) expressed support for adoption of the draft decision without the square brackets around the words “and revisions adopted by” in operative paragraph 1.

29. **Mr. D’Allaire** (Canada), supported by **Mr. Redmond** (United States of America), suggested the deletion from operative paragraph 1 of document A/CN.9/XLIV/CRP.3 the words “and revisions adopted by” as he understood that the text of A/CN.9/732 and addenda had not been amended by the Commission.

30. **Ms. Clift** (Secretariat) said that the Commission had adopted no revisions to the UNCITRAL Model Law on Cross-Border Insolvency.

*Document A/CN.9/XLIV/CRP.3 was adopted without the bracketed phrase “[and revisions adopted by]”*

#### **Insolvency law: progress report of Working Group V (A/CN.9/715)**

31. **Ms. Clift** (Secretariat), introducing the item, said that the Commission had before it, in document A/CN.9/715, a report on the thirty-ninth session of Working Group V. The Group had discussed selected concepts in the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI) and the duties of directors and officers in insolvency and pre-insolvency cases. As the session had been the first dealing with the two topics, there had been a significant amount of preliminary discussion on the

policy issues raised. The Group could now decide how to proceed.

32. Referring to the Ninth Judicial Colloquium, organized by UNCITRAL, the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International), together with the UNCITRAL Secretariat and the World Bank and held in Singapore in March 2011, she said that some 80 judges from about 40 States had attended. The topics discussed had included questions arising in the insolvency of enterprise groups. Two panels had discussed how the various issues relating to two hypothetical insolvency scenarios, one domestic and one cross-border, would be handled in the different jurisdictions represented. Also, the Colloquium participants had also considered the draft text of the judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency. A report on the Colloquium was available on the UNCITRAL website. The Tenth Judicial Colloquium was planned to be held in The Hague in 2013.

33. She expressed hope that the Commission would endorse the UNCITRAL Secretariat’s continued sponsorship of and active participation in INSOL International’s Judicials Colloquiums.

34. Regarding part three of the UNCITRAL Legislative Guide on Insolvency Law, adopted by the Commission in 2010, she said that she understood that Colombia had been the first State to pass legislation responding to the recommendations made in it, and she would welcome information on that enactment.

35. On 6 June 2011, the Committee on Legal Affairs of the European Parliament had released a draft report with recommendations to the Commission regarding insolvency proceedings in the context of European Union company law. One of the recommendations was that, a set of rules based on part three of the UNCITRAL Legislative Guide on Insolvency Law be drawn up to promote cooperation between the courts and insolvency representatives in cases of insolvency of enterprise groups. The draft report was available on the UNCITRAL website.

36. **Mr. Redmond** (United States of America) said that the two representatives of developing countries in particular had welcomed the fact that the topic of the duties of directors and officers in insolvency and pre-insolvency cases had been taken up by Working Group V. It had become clear early in the Group’s thirty-

<sup>4</sup> See document A/CN.9/SR.932, para. 62.

ninth session that States stood ready to address the topic of COMI despite its complexity.

37. His country looked forward to further consideration of both topics.

38. **Mr. D’Allaire** (Canada) said that his country was satisfied with the progress made so far in the consideration of the two topics.

39. As regards concepts in the UNCITRAL Model Law on Cross-Border Insolvency relating to COMI, the difficulties lay not in the wording of the Model Law but in the fact that it took time for judicial decisions that could provide guidance to accumulate. His country welcomed the issues identified by the Secretariat, which should be fully explored.

40. As regards the duties of directors and officers in insolvency and pre-insolvency cases, a number of jurisdictions provided for remedies for breach of duty in such cases, but, in the event that proceeds were realized, they did not necessarily flow to all creditors. The Secretariat and Working Group V should consider the possibility of situations where the claimant was entitled to a security interest.

41. **The Chairperson** said — following comments by **Mr. D’Allaire** (Canada), **Mr. González** (Argentina) and **Mr. Sorieul** (Secretariat) — that the Secretariat had planned Working Group V sessions for November 2011 and February 2012, which allowed only limited time for the preparation of materials, but there was little flexibility with regard to the dates available.

42. He proposed that the Commission take up such matters under agenda item 21 — Date and place of future meetings.

43. **Mr. Mokal** (World Bank) said that the Insolvency Task Force of the World Bank had recently discussed the issue of establishing best practice standards for the treatment of natural persons in insolvency cases.

44. The patterns of financial intermediation had changed significantly since the Insolvency and Creditor Rights Standard had been formulated. There had been a significant growth in consumer credit, so that, in the wake of the recent financial crisis, problems in the consumer sector had resulted in a systemic risk to the economy as a whole in many jurisdictions. The World Bank, together with its international partners, had had to advise Governments on how to deal with such problems in situations that were unprecedented in its experience, and it had realized how useful it would be to have best practice standards for the treatment of natural persons in insolvency cases formulated with input from all relevant stakeholders, including client Governments.

45. The World Bank would like UNICITRAL to participate in their formulation.

46. **Mr. Redmond** (United States of America) said that UNCITRAL had cooperated with the World Bank and the International Monetary Fund on insolvency issues, and his country would like to see it participating in the formulation of best practice standards for the treatment of natural persons in insolvency cases.

47. **The Chairperson** took note of the World Bank’s wish that UNCITRAL participate in their formulation and of the support expressed by the representative of the United States of America.

*The meeting rose at 3.10 p.m.*

**Summary record of the 935th meeting, held at the Vienna International Centre,  
Vienna, on Monday, 4 July 2011, at 9.30 a.m.**

[A/CN.9/SR.935]

*Chairperson: Mr. Moollan (Mauritius)*

*The meeting was called to order at 10.05 a.m.*

**Arbitration and conciliation**

**(a) Progress reports of Working Group II**  
(A/CN.9/712 and 717)

1. **Ms. Montineri** (Secretariat), introducing the reports of Working Group II on its fifty-third and fifty-fourth sessions, said that the Working Group, in preparing a legal standard on transparency in treaty-based investor-State arbitration, had considered the content and form of that standard and its applicability to both future and existing investment treaties. During its deliberations, the question had been raised as to whether the Working Group might also address the issue of the possible intervention of a non-disputing State party to an investment treaty in an arbitration. The Working Group would like to have the Commission's guidance as to whether that issue could be addressed by the Working Group in the context of its current work.

2. **The Chairperson**, clarifying, said that the intervention of a non-disputing State party to an investment treaty in an arbitration might be desirable as a means of helping to resolve the dispute by, for example, preventing one-sided interpretation of the treaty. There were precedents for such intervention: under the North American Free Trade Agreement (NAFTA), for example, States were entitled to make points of law in arbitral proceedings — but not to make submissions of fact.

3. It was not yet clear whether a right of intervention would be granted under the legal standard on transparency. For the time being, however, the Commission was simply being asked to clarify whether the issue could be addressed by the Working Group within the framework of its current work.

4. **Ms. Sabo** (Canada) said that the issue should not be addressed by the Working Group since the intervention of a non-disputing State in arbitral proceedings at the invitation of a tribunal was already provided for in, for example, amicus curiae arrangements, although there was no provision for the

right of such States to intervene. Moreover, transparency and other issues were already presenting the Working Group with a heavy workload and a further task might delay the achievement of results with respect to those issues.

5. **The Chairperson** said that the question had been raised precisely because there were differing views as to whether the intervention of a non-disputing State party to an investment treaty was already provided for in amicus curiae arrangements.

6. **Ms. Sabo** (Canada), clarifying her delegation's position, said that, if the intervention of such a State as a third party was not provided for, provision should be made for the tribunal to invite that State to intervene if it felt that such intervention was desirable.

7. **Mr. Loken** (United States of America) said that it was appropriate for the Working Group to address the issue of the intervention of States parties to an investment treaty in arbitral proceedings within the general context of amicus curiae arrangements. However, the question of whether to provide for the right of such States to intervene should be left to States to resolve when negotiating bilateral investment agreements.

8. It would be useful for the Commission to reaffirm the mandate of the Working Group with regard to transparency in investor-State arbitration and also to reaffirm the establishment of a standard in that connection as a desirable objective.

9. **Ms. Nesdam** (Norway) expressed support for the inclusion of the issue in the mandate of the Working Group.

10. **Mr. Jezewski** (Poland) said that, while the issue might be a good subject for discussion within the Working Group, its inclusion in the mandate of the Working Group was not necessarily the best way of dealing with it. The mandate of the Working Group was concerned with the participation of civil society in arbitral proceedings, whereas the intervention in such



proceedings of a non-disputing State of which the investor was a national was an entirely separate matter.

11. **The Chairperson** said that some members of the Working Group had felt that, if States were treated in the same way as other *amici curiae*, situations might arise in which non-disputing States parties to a treaty presented detailed factual submissions, such situations potentially raising issues of diplomatic protection. The fact that there was disagreement as to whether the intervention of third-party States could be addressed in the provisions of the standard relating to *amici curiae* or was a separate issue highlighted the need for debate and the identification of possible solutions within the Working Group.

12. However, the question was one more of procedure than of substance. If the Working Group was not mandated to address the issue, it would not be possible to present a solution in the standard on transparency.

13. **Ms. Jamschon MacGarry** (Argentina), while expressing support for the inclusion of the issue in the mandate of the Working Group, said that it was important to determine the scope, modalities and conditions of the intervention of non-disputing States parties to an investment treaty in arbitral proceedings before deciding whether the intervention of such third parties as *amici curiae* was appropriate.

14. Her delegation did not consider that such intervention would raise any problems with regard to diplomatic protection.

15. **The Chairperson** said that he did not envisage diplomatic protection being taken up as an additional issue.

16. **Mr. Bellenger** (France) said that the Commission should avoid being distracted by the issue of diplomatic protection, although that issue might have to be taken up if the Working Group's mandate was expanded in order to incorporate the issue of the intervention of non-disputing States parties to a treaty in arbitral proceedings. In his view, however, the latter issue was already covered by the Working Group's mandate, which did not need to be expanded as the Working Group could address it within the context of *amicus curiae* participation.

17. Expansion of the Working Group's mandate would give the issue disproportionate importance. However, if the majority of Commission members concluded that

such expansion was necessary in order for the issue to be addressed properly, his delegation would accept that conclusion.

18. **The Chairperson** said that the question for the Commission to answer concerned clarification rather than expansion of the mandate of the Working Group. In his view, the Commission would not be attributing undue importance to the issue by requesting the Working Group to address it.

19. **Mr. Lara Cabrera** (Mexico) said that the issue should be referred to the Working Group and that the Commission should decide how best to guide the Working Group in its consideration of the issue, possibly by determining the scope, modalities and conditions of the intervention of non-disputing States parties to an investment treaty in arbitral proceedings as suggested by the representative of Argentina.

20. **Mr. Maradiaga Maradiaga** (Honduras) said that, in his view, the Working Group could address the issue within the framework of its present mandate.

21. **Ms. Kubota** (Japan) said that her delegation was in favour of the inclusion of the issue in the mandate of the Working Group with a view to improvement of the quality of investor-State arbitration.

22. **The Chairperson** said that there appeared to be consensus that the mandate of the Working Group included consideration of the situation of States not parties to arbitral proceedings and their participation in such proceedings. The positions stated by some delegations raised substantive issues that should be dealt with at the Working Group level.

23. Recalling that the Commission had reaffirmed the mandate of the Working Group in 2008 and again in 2010, he took it that the Commission wished to reaffirm transparency in investor-State arbitration as a desirable objective as had been suggested by the representative of the United States of America.

24. **Ms. Montineri** (Secretariat) recalled, in connection with the Working Group's current and possible future work in the area of arbitration and conciliation, that the Commission, at its thirty-ninth session and at subsequent sessions, had decided that further work by the Working Group was required in the area of arbitrability. The Secretariat had considered the issue of confidentiality in arbitral proceedings, and it had been suggested that that issue merited a preliminary

study based on the various decisions taken by tribunals to date.

25. The current work carried out by the Secretariat in the area of arbitration included the development of a guide to enactment of the Model Law on International Commercial Arbitration and the preparation of a digest of UNCITRAL texts relating to arbitration, which would include comments submitted by various countries regarding the interpretation and implementation of the Model Law and would be completed by the end of 2011. Also, the Secretariat was preparing recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the revised UNCITRAL Arbitration Rules in accordance with the decision of the Commission at its forty-third session.

26. Feedback had been received from a number of users regarding revision of the UNCITRAL Notes on Organizing Arbitral Proceedings of 1996. She proposed that the Secretariat consider ways in which to update the Notes on the basis of, *inter alia*, proposals made by the Commission.

27. **The Chairperson** said that the UNCITRAL Notes on Organizing Arbitral Proceedings had been extremely useful during the past 15 years and that it would be a good idea to request the Secretariat to update them.

28. **Ms. Sabo** (Canada) said that, while the Notes were clearly useful, the question of priorities and resources should be addressed. As the Secretariat was being entrusted with a number of worthwhile projects in the area of arbitration, it would be helpful to provide it with an indication of the order of priority of those projects.

29. In that regard, it might be practical for the Working Group to complete its revision of the Notes on Organizing Arbitral Proceedings before concluding other tasks, since that task did not depend on other projects and could easily be concluded in the coming year, possibly with a view to adoption of the Notes by the Commission at its next session.

30. **Mr. Sorieul** (Secretary of the Commission) said that the resources available to the Secretariat for work on arbitration in the coming year were limited. The Secretariat was prepared to revise the UNCITRAL Notes on Organizing Arbitral Proceedings and to draft updated recommendations on implementing the UNCITRAL Arbitration Rules, although it could not promise that either project would be completed by the forty-fifth session of the Commission. However, there was no

direct competition for resources between, on one hand, those two projects and, on the other, the work on preparing a guide to enactment of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) as that involved outside experts besides the Secretariat and drafting was not scheduled to begin in the near future.

31. **Mr. Olivencia Ruiz** (Spain), supported by **Ms. Escobar de Amaya** (El Salvador), said that it was important to establish an order of priority for future work. The highest priority should be assigned to the work on the recommendations for implementing the Arbitration Rules, followed by the work on a guide to enactment of the New York Convention and the work on the Notes on Organizing Arbitral Proceedings.

32. **Ms. Montineri** (Secretariat) recalled that the Commission had, at its forty-first session, instructed the Secretariat to embark on the New York Convention project, which had two components. Firstly, the Secretariat was publishing, via the Internet, Member States' responses to a questionnaire on the implementation of the Convention. Secondly, two teams led by arbitration experts of international renown were researching the implementation of the Convention in different jurisdictions. Work on preparing the guide on the New York Convention would start early in 2012, and a first draft would be submitted to the Commission in 2014.

33. **Ms. Escobar de Amaya** (El Salvador) said that for a long time little information had been disseminated on the implementation of the New York Convention. For its part, her country had submitted such information.

34. **The Chairperson**, summing up the discussion, said that slightly different preferences had been expressed as regards the priorities for work on arbitration.

35. It had been stated that the core aspects of the Secretariat's work on arbitration were the New York Convention and the revised Arbitration Rules. There was no competition for resources between the two projects in question as the work on the New York Convention was longer-term and had been outsourced. He therefore took it that the Commission wished the Secretariat to continue working as before in the same priority areas.

36. There had been a strong request that the Notes on Organizing Arbitral Proceedings be updated by 2012 if

at all possible, so that the updated Notes were not issued too long after the new Arbitration Rules.

**(b) Mediation in the context of settlement of investor-State disputes (A/CN.9/734)**

37. **Ms. Gross** (Secretariat), introducing the sub-item, said that the United Nations Conference on Trade and Development (UNCTAD) had recently conducted studies on mediation as a method for settling investor-State disputes.

38. The Commission had adopted the UNCITRAL Conciliation Rules in 1980 and the UNCITRAL Model Law on International Commercial Conciliation in 2002.

39. Following consultations between the Secretariats of UNCITRAL and UNCTAD, the UNCITRAL Secretariat had received a proposal from UNCTAD regarding the use of mediation in the context of the settlement of investor-State disputes; the proposal was reproduced in the annex to document A/CN.9/734.

40. **Ms. Türk** (Observer for UNCTAD) said that her organization welcomed the opportunity to attend the forty-fourth session of the Commission and to present information on alternative methods of preventing and managing investor-State disputes, with a view to facilitating discussions about steps that might need to be taken to foster the use of mediation in the context of investor-State dispute settlement.

41. By way of background information, she said that UNCTAD was the United Nations focal point on issues related to investment and sustainable development. As recognized at its Second World Investment Forum, held in 2010, UNCTAD was also the centre of gravity for multilateral consensus-building with regard to investment for sustainable development. Its Division on Investment and Enterprise had more than 30 years of experience of dealing with issues related to investment and development.

42. In its work on international investment law, UNCTAD pursued the objective of harnessing foreign investment as a tool for sustainable development. In that context, UNCTAD was a stakeholder in the field of treaty-based investor-State dispute settlement.

43. In the note contained in the annex to document A/CN.9/734, UNCTAD offered some thoughts about options for settling investment disputes through means other than adjudication.

44. International arbitration had long been seen as the best way of settling or addressing disputes between investors and States. It had been thought to depoliticize investment disputes and ensure adjudicative neutrality, and to be swift, cheap and flexible. Over time, however, a number of disadvantages had come to light. For example, recent experience had shown that sometimes investors challenged actions taken by States pursuant to public policy relating to matters such as environmental protection, public health or safety; sometimes, the cost of mounting a defence against challenges and financing compensation drew heavily on public funds; and the long-term relationship between an investor and a State could be damaged by a legal dispute.

45. Besides such disadvantages, concerns had been expressed about the legitimacy of investor-State disputes and there had been calls for greater transparency.

46. Consequently, there were benefits in avoiding escalation into a formal dispute, and that had led to growing interest in alternative methods of preventing and managing investor-State disputes, including — as stated in the annex to document A/CN.9/734 — “direct negotiation between investors and States, the use of an ombuds-office or lead government agencies, mediation, formalized conciliation, dispute resolution boards, early neutral evaluation, or fact-finding”. UNCTAD had published a study of such methods and countries’ experiences of applying them in 2000.

47. The benefits of effective recourse to such alternative methods included greater efficiency, more flexibility, lower costs, less expenditure of time and the possibility of amicable settlement.

48. The use of alternative methods to settle investor-State disputes also presented challenges; for example, mediation was generally not binding and could be perceived as a waste of time. Also, alternative methods might not be suitable for all types of disputes; for example, a Government’s flexibility might be limited by laws and regulations. However, alternative methods were well worth exploring.

49. UNCITRAL was a suitable forum for initiating an exploration of alternative methods for settling investor-State disputes because it dealt with rules for investor-State dispute settlement and had developed rules on conciliation. Exploring from those two perspectives might reveal important synergies.

50. **The Chairperson** invited comments regarding cooperation between UNCITRAL and UNCTAD, possibly in the areas of arbitrability and confidentiality, as the Secretariat would like to have formal approval from the Commission for a continuation of its close cooperation with UNCTAD.

51. **Ms. Sabo** (Canada) said that her country was in favour of continued cooperation between UNCITRAL and UNCTAD as long as it was not resource-intensive.

52. **Mr. Cachapuz de Medeiros** (Brazil), expressing support for continued cooperation, said that UNCITRAL and UNCTAD could together play an important role in the area of dispute settlement using alternative methods.

53. **Mr. Bellenger** (France) said that his country was not opposed to continued cooperation, particularly in connection with alternative dispute settlement methods. However, mediation could not replace arbitration, which remained indispensable.

54. **The Chairperson** said that mediation, which had perhaps been somewhat neglected in the past, was being considered as a complement to arbitration.

55. **Mr. Maradiaga Maradiaga** (Honduras), expressing support for continued cooperation, said that it would help to promote confidence in international investment.

56. **Mr. Seweha Boles** (Egypt), expressing support for continued cooperation, said that the mediation was a useful precursor to arbitration. In his country, mediation was always tried before financial disputes were taken to the courts. When it succeeded, the parties to the dispute maintained good relations and the solutions were easily implemented.

57. **Mr. Loken** (United States of America), expressing support for continued cooperation, said that it would benefit both UNCTAD and UNCITRAL and that mediation and other alternative methods of dispute resolution would be an interesting topic to focus on. However, the Secretariat should bear in mind the general resource constraints.

58. **The Chairperson** took it that the Commission wished to place on record its desire for further cooperation with UNCTAD, with the proviso that not all the work could be done by the UNCITRAL Secretariat, and its belief that alternative methods of dispute resolution could be a fruitful topic, in addition to arbitrability and confidentiality.

### International commercial arbitration moot competitions

59. **Ms. Gross** (Secretariat) said that the Association for the Organisation and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Eighteenth Annual Moot, which, like previous annual moots, had been co-sponsored by the Commission. The legal issues dealt with by the teams of students participating in it had been based on the United Nations Convention on the International Sale of Goods and the Arbitration Rules of the Chamber of Arbitration of Milan. A total of 254 teams from law schools in 63 countries had participated in the oral arguments phase, which had taken place in Vienna from 15 to 21 April 2011, the best team being that of the University of Ottawa. The oral arguments of the Nineteenth Annual Moot would be presented, in Vienna, from 30 March to 5 April 2012.

60. The Eighth Willem C. Vis (East) International Commercial Arbitration Moot, organized by the Vis East Moot Foundation together with the Chartered Institute of Arbitrators and also co-sponsored by the Commission, had been held in the Hong Kong Special Administrative Region of China in April, with the participation of 85 teams from 19 countries. The winning team in the oral arguments had been from Bond University, Australia. The Ninth (East) Moot would be held, again in the Hong Kong Special Administrative Region of China, from 19 to 25 March 2012.

61. In addition, the Carlos III University of Madrid had organized the Third International Commercial Arbitration Competition, held (in Spanish) from 20 to 25 June 2011 and also co-sponsored by the Commission. A total of nine teams from five countries had participated in the competition, the best team being from the University of Versailles, France.

62. **Mr. Sorieul** (Secretary of the Commission) said that projects similar to the Willem C. Vis International Commercial Arbitration Moot were under way at two universities, in Berlin and in Texas. The focus was on insolvency, with the aim of bringing about a better understanding of the UNCITRAL Model Law on Cross-Border Insolvency. If the projects evolved as planned, they would probably feature on the Commission's agenda in 2012.

63. **Ms. Sabo** (Canada) said that a useful topic for such moots would be security, dealt with on the basis of

the UNCITRAL Legislative Guide on Secured Transactions.

64. **Mr. Sánchez-Mejorada y Velasco** (Mexico), supported by **Mr. Maradiaga Maradiaga** (Honduras) and **Ms. Escobar de Amaya** (El Salvador), said that a moot on insolvency would undoubtedly enjoy wide support. He hoped that the Commission would be able to provide the necessary resources.

65. **The Chairperson** took it that the Commission welcomed the support of moots being provided by the Secretariat and would like the Secretariat team directly involved to consider including security issues in its remit.

*The meeting was suspended at 11.35 a.m. and resumed at 11.55 a.m.*

#### **Online dispute resolution: progress reports of Working Group III (A/CN.9/716 and A/CN.9/721)**

66. **Mr. Lemay** (Secretariat), introducing the reports of Working Group III on its twenty-second and twenty-third sessions, said that, at its twenty-second session, the Working Group had requested the Secretariat to prepare draft generic procedural rules for online dispute resolution (ODR), taking into account the types of transaction with which ODR would deal (business-to-business and business-to-consumer cross-border low-value, high-volume transactions).

67. At its twenty-third session, the Working Group had considered the draft rules prepared by the Secretariat, which had also been considered at a meeting of experts with the Secretariat, where there had been broad agreement that consumer-to-consumer transactions also fell within the remit of the Working Group, the reasons being the difficulty of distinguishing a consumer from a business and the growth in the volume of consumer-to-consumer transactions, which generally conformed to the low-value, high-volume pattern. The Commission might thus wish to reconsider the Working Group's mandate.

68. **Mr. Bellenger** (France) said that his delegation was concerned at the direction that the Working Group seemed to be taking. The question of consumer-to-consumer transactions was connected with that of consumer rights, and the Working Group should approach it very carefully, assessing — for example — the compatibility of arbitration with consumer

legislation. His delegation hoped that the Secretariat was supervising the Working Group effectively.

69. **Ms. Sabo** (Canada), concurring with the representative of France, said that the Working Group should be rigorous in prioritizing its work. It had rightly begun with rules of procedure, best practices and enforcement, and only when it had completed its work on those subjects should it move on to applicable law.

70. Her delegation was concerned about the possibility of the Working Group's incorporating consumer-to-consumer transactions into its remit. True, it was sometimes difficult to distinguish between consumers and businesses, but the Working Group might get bogged down in its efforts to arrive at a consensus.

71. **The Chairperson** said that the key question was what was feasible. In his view, the Working Group could accommodate the question of consumer-to-consumer transactions.

72. **Mr. Lara Cabrera** (Mexico) said that, where the volume of transactions was large, a flexible ODR system was necessary. Mexico had found that the Hoyanet, a web portal linking consumers and businesses, provided a flexible and economical method for resolving disputes.

73. The work of the Working Group remained valuable, although the parameters might need to be refined. As regards the question of consumer-to-consumer transactions, his delegation considered that the Working Group should not take on an extra burden, although it did not exclude the possibility of the Group's tackling the question at some time in the future.

74. **Mr. Loken** (United States of America) said that business-to-consumer and business-to-business transactions were more important than consumer-to-consumer transactions, but the Working Group itself was the best placed to decide its priorities.

75. **Mr. Maradiaga Maradiaga** (Honduras) said that highest priority should be given to business-to-consumer transactions, although business-to-business transactions were also important. Consumer-to-consumer transactions should not be a high priority.

76. **Mr. Seweha Boles** (Egypt) said that consumer-to-consumer transactions accounted for a by no means negligible part of high-volume, low-cost transactions and that consumers dealing through the Internet needed a simple system that would protect their rights. Since it was considerably harder to establish rules for business-

to-consumer and business-to-business transactions, his delegation considered that the Working Group should also consider consumer-to-consumer transactions.

77. **Mr. Chong** (Singapore) said that his country had considerable experience of ODR. Business-to-consumer transactions accounted for the majority of disputes about high-volume, low-cost transactions. There were far fewer consumer-to-consumer transactions than business-to-consumer transactions, although it was often difficult to establish whether the other party was a business or a consumer. Any rules established by the Working Group

could, however, be useful for consumer-to-consumer transactions.

78. **The Chairperson**, summing up, said that some delegations had reservations concerning the way that the Working Group was carrying out its mandate, which, for the time being, should not include disputes over consumer-to-consumer transactions. However, that position might change with time.

*The meeting rose at 12.30 p.m.*

**Summary record of the 936th meeting, held at the Vienna International Centre,  
Vienna, on Monday, 4 July 2011, at 2 p.m.**

[A/CN.9/SR.936]

*Chairperson:* Mr. Moollan (Mauritius)

*The meeting was called to order at 2.20 p.m.*

**Online dispute resolution: progress reports of  
Working Group III (A/CN.9/716 and A/CN.9/721)**  
(continued)

1. **The Chairperson** said that, on the question of whether the mandate of Working Group III should include consumer-to-consumer transactions, it was important to avoid procedural arguments about the precise scope of the Working Group's mandate. He therefore suggested that the Group be instructed to discuss consumer-to-consumer transactions on a non-priority basis while continuing to focus primarily on the two topics already within its mandate. The Working Group should be requested to report on the issue of consumer-to-consumer transactions separately. Also, the Working Group should be requested to consider carefully how the regime that it was developing would interact with existing consumer protection regimes and with public policy, so as to address the concerns expressed by some delegations in that regard. In addition, the Commission might wish to express its appreciation for the Group's work.

2. **Mr. Loken** (United States of America) said that his delegation supported the solution just suggested by the Chairperson. Consumer-to-consumer transactions should not be the main focus of the Working Group's efforts; however, it would not be desirable to allow controversy regarding the Working Group's mandate to detract from the consideration of business-to-consumer issues.

3. **Mr. Bellenger** (France) said that his delegation also supported the solution suggested by the Chairperson. However, the instructions to the Working Group should specify that consumer protection was to be taken into account not only in the context of consumer-to-consumer transactions but also in that of business-to-consumer transactions. In addition, the Secretariat should, in the interests of transparency, ensure proper follow-up to the Working Group's activities.

4. **The Chairperson** took it that the Commission wished to instruct the Working Group to proceed along the lines he had suggested, with account taken of what had just been said by the representative of France regarding consumer protection.

5. *It was so decided.*

**Security interests: progress reports of Working  
Group VI (A/CN.9/714 and A/CN.9/719)**

6. **Mr. Bazinas** (Secretariat), introducing the reports of Working Group VI on the work done at its eighteenth and nineteenth sessions (A/CN.9/714 and A/CN.9/719), said that, at its eighteenth session, the Group had considered the first draft of a text, prepared by the Secretariat, on the registration of security rights in moveable assets. It had made the working assumption that the final text would be a guide, with commentary and possibly with recommendations for model regulations. It had been agreed that the guide should be consistent with the UNCITRAL Legislative Guide on Secured Transactions.

7. The Working Group had also considered issues relating to electronic registries, in order to ensure that the guide would be consistent with the UNCITRAL texts on electronic communications.

8. At its nineteenth session, some delegations had expressed the view that the guide should be a stand-alone document, and that it should include material from the Legislative Guide on Secured Transactions so as to explain how a security rights registry would fit in with the secured transactions law recommended in the Legislative Guide. Others had felt that the emphasis in the guide should be on model regulations with commentary. Further discussion of that issue had been deferred.

9. Differing views had also been expressed as to whether the text currently formulated as model regulations should instead take the form of recommendations, since model regulations might

presuppose the existence of a model law on secured transactions.

10. The Working Group had completed the first reading of the draft security rights registry guide and the draft model regulations and had requested the Secretariat to prepare a new version for the next session.

11. Some delegations had expressed the view that the Working Group would be able to complete its work within two further sessions, while others had expressed the view that more time would be needed. In the latter case, the text would not be ready for submission to the Commission until 2013.

12. After the provisional agenda for the Commission's current session (A/CN.9/711) had been issued, two further topics had been suggested for Working Group VI's consideration; the Commission might wish to take them into account in its consideration of the reports of the Working Group.

13. The first topic, proposed by the World Bank, was the development of a set of secured transactions principles based on the UNCITRAL Legislative Guide on Secured Transactions, along the lines of the work previously done to incorporate the UNCITRAL Legislative Guide on Insolvency Law into the World Bank's set of principles on insolvency and creditor rights. The Commission, which could be justly proud that the Legislative Guide on Secured Transactions had become the common reference tool for many countries that were currently reviewing their secured transaction legislation, might wish to mandate the Secretariat to conduct consultations with the World Bank with a view to preparing a first draft of a set of principles for the Commission's consideration.

14. The second topic was the law applicable to third-party effectiveness and the priority of competing claims in assigned receivables, which was addressed in the United Nations Convention on the Assignment of Receivables in International Trade (the United Nations Assignment Convention) and the UNCITRAL Legislative Guide on Secured Transactions, but not in the European Union's Rome I Regulation on the law applicable to contractual obligations. The European Commission had tasked the British Institute of International and Comparative Law with preparing a study on the issue and would conduct consultations on it once it had been published.

15. UNCITRAL might wish to take note of those developments and renew the mandate that it had given the Secretariat to coordinate with the European Commission with a view to ensuring a consistent approach to the issue.

16. UNCITRAL might also wish to note that it would make sense for a single law to apply to disputes relating to international receivables financing, irrespective of whether or not the court hearing the case was in a European Union member State.

17. The European Commission had expressed its willingness to coordinate with UNCITRAL on the issue. UNCITRAL might therefore wish to call on the European Commission not only to engage in such coordination but also to consider issuing a statement to the effect that European Union member States were free to ratify the United Nations Assignment Convention for matters relating to international receivables that were not covered by European Union regulations, particularly disputes brought before a court outside the European Union in which the applicable law might be either the Convention or the national law of the country in question.

18. In the interests of harmonious relations, the Commission might wish to note that the United Nations Assignment Convention could not hamper the application of a European Union instrument and that a European Union instrument could not stand in the way of a United Nations convention.

19. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat would do its best to ensure that Working Group VI had a text to be submitted to the Commission for adoption in 2012. The envisaged cooperation with the World Bank and the European Commission did not appear to require the involvement of the Working Group at the present stage. When the UNCITRAL Legislative Guide on Insolvency Law had been incorporated into the World Bank's documentation, detailed follow-up by the Secretariat — but no Working Group meetings — had been needed. He hoped that that precedent could be followed in the present case, especially as no additional resources had been requested by the Secretariat for its work with the World Bank on insolvency.

20. **The Chairperson** asked whether the issue of promoting ratification of the United Nations Assignment



Convention had been discussed with the European Commission.

21. **Mr. Bazinas** (Secretariat) said that in the report on the fortieth session of UNCITRAL (A/62/17) it was stated that the European Commission shared the Secretariat's concerns regarding the need for a coordinated approach and took the view that a lack of coordination would undermine the certainty achieved at the international level on the law applicable to third-party effects of assignments. It was also stated that UNCITRAL had noted with appreciation the European Commission's willingness to cooperate closely with the UNCITRAL Secretariat in order to ensure coherence between the United Nations Assignment Convention and any instrument developed by the European Union and to facilitate ratification of the Convention by European Union member States.

22. Recent consultations had made it clear that the European Commission could not take a more specific position on the issue until a first draft of an instrument had been prepared and consultations had been conducted with member States.

23. **Mr. Lara Cabrera** (Mexico) said that security rights registries should be established in electronic form, although paper versions ought not to be ruled out, and care should be taken to ensure consistency with the UNCITRAL Legislative Guide on Secured Transactions. The Model Inter-American Law on Secured Transactions could provide useful guidance.

24. The success of the electronic security rights registry recently launched in Mexico underlined the relevance of the Commission's work in that area.

25. His delegation was in favour of the Secretariat's cooperating with the World Bank and the European Commission on the two topics mentioned.

26. **Ms. Sabo** (Canada) said that, since the UNCITRAL Legislative Guide on Secured Transactions had proved to be so successful, the content of the security rights registry guide should be similar — namely, commentary and recommendations. Drafting model regulations with commentary thereon was premature and possibly unwise: model regulations would be too rigid and would entail the risk of departures from the Legislative Guide.

27. She expressed support for further cooperation with the Bank on the topic of secured transactions. She also

expressed support for coordination with the European Commission with regard to the law applicable to third-party effects of assignments, since that issue required a global solution, and urged the Secretariat to encourage the European Commission to ensure that European Union member States could ratify the United Nations Assignment Convention if they so wished.

28. Consideration of the future work of the Working Group should be deferred until work on the draft registry guide had been completed.

29. **Mr. Loken** (United States of America) expressed support for the Secretariat's cooperating with the European Commission and the World Bank without the Working Group's involvement at the current stage.

30. He hoped that the Working Group would have a text ready for adoption at the Commission's next session; in the meantime, it would be premature to assign further work to the Group. However, at an appropriate time the Working Group might begin to consider converting the Legislative Guide into a model law.

31. **Ms. Nesdam** (Norway), expressing support for the comments made by the representative of Canada regarding the content of the draft security rights registry guide, said that the Commission should provide some guidance to the Working Group in that connection.

32. **Ms. Sabo** (Canada) said she hoped that the comments made in the Commission, which would be reflected in the report on the current session, would be taken as guidance by the Working Group.

33. **The Chairperson** said that it might be difficult for the Commission to give guidance to the Working Group without the benefit of input from the relevant experts.

34. **Mr. Bellenger** (France) said that the Working Group should not pre-empt a decision on the content of the draft registry guide; one of the documents considered by the Working Group already resembled model regulations. The draft registry guide should rather take the form of recommendations, in line with the Legislative Guide on Secured Transactions, on which it was based.

35. His delegation, which considered that the Secretariat should cooperate with the World Bank and the European Commission on the issues mentioned, agreed that it would be premature to debate the future

activities of the Working Group before its current work was complete.

36. **Mr. Loken** (United States of America), supported by **Mr. Lara Cabrera** (Mexico), said it was his understanding that the existing mandate of the Working Group permitted it to determine the type of instrument that would ultimately result from its deliberations. His delegation saw no need to alter that mandate at the present stage. The Group should continue its work in the normal way and request guidance from the Commission at a later stage if necessary.

37. **The Chairperson** took it that the Commission did not wish to instruct the Working Group as to the content of the draft security rights registry guide at the present stage and that it wished the Working Group to continue its work in line with its existing mandate. The Working Group would report back to the Commission, which would, of course, take the final decision on any text proposed by the Working Group.

38. He also took it that the Commission wished the Secretariat to cooperate with the World Bank and the European Union along the lines discussed.

39. *It was so decided.*

40. **Mr. Bazinas** (Secretariat), referring to the concern that the decision on the final form of the draft security rights registry guide had been pre-empted, said that, in the next version of the text, the draft model regulations would be set out both as model regulations and as recommendations, so that both options remained open for a decision by the Working Group.

41. Two hard-copy editions of the UNCITRAL Legislative Guide had been published; one was available in all six official languages and the other in all except French.

42. **Mr. Sorieul** (Secretary of the Commission) said that, in future, most UNCITRAL texts would be published in electronic form only, owing to budgetary constraints. However, the Secretariat was considering the possibility of printing small numbers of copies on demand in exceptional cases.

43. **Mr. Olivencia Ruiz** (Spain) said it was regrettable that one of the hard-copy editions of the Legislative Guide was not available in all six official languages.

#### **Current and possible future work in the area of electronic commerce (A/CN.9/728 and Add.1)**

44. **Mr. Castellani** (Secretariat), introducing the report on present and possible future work on electronic commerce (A/CN.9/728 and Add.1), said that the document reported on the colloquium held on that subject in February 2011.

45. The Working Group on Electronic Commerce (Working Group IV) had not been active for some time, but the Secretariat had been working on a number of issues, in particular electronic single window facilities, with various partners, including the World Customs Organization (WCO). Since electronic commerce was relevant to the work of other working groups, the Secretariat had made efforts to ensure coordination among them and consistency with the standards existing in that field. Also, the Secretariat regularly received requests for expert input on electronic commerce from bodies such as the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT); some of those requests might be more appropriately addressed to the Commission.

46. At the colloquium, concern had been expressed that, if the Working Group on Electronic Commerce continued not to meet for a prolonged period, the Commission's position as the core legal body for the establishment of global standards for electronic commerce might be at risk.

47. **Mr. Loken** (United States of America) called for the reconvening of Working Group IV, which should focus in particular on electronic transferable records and associated issues relating to single window facilities, identity management and mobile payments, in cooperation with WCO and UN/CEFACT.

48. If the Working Group were reconvened, it should consider the recent UN/CEFACT recommendation on digital evidence certification, which raised issues directly linked to the UNCITRAL model laws on electronic commerce.

49. **Mr. Olivencia Ruiz** (Spain) called for the reconvening of the Working Group on Electronic Commerce. His delegation had already submitted a proposal for the future work of the Group (A/CN.9/682) at the Commission's forty-second session.

50. For centuries, legal regimes for the exercise of various rights had been paper-based. A fundamental link

had long been established between ownership of a right and the physical document attesting that ownership; the right was transferred by transferring ownership of the document. Although the paper-based transfer of rights had long been governed by uniform rules, no such legal framework applied to the electronic equivalent, despite its growing importance. Many countries were developing laws in that area, with a particular emphasis on registries. In the interests of harmonization, the Commission should develop new standards in that area, focusing in particular on electronic transferable records.

51. **Mr. Maradiaga Maradiaga** (Honduras), expressing support for the comments made by the representatives of the United States of America and Spain, said that many of the participants in the colloquium held in February 2011 had agreed on the need for Working Group IV to reconvene with a view to developing a legal instrument that would address all the changes in trade arising from technological development. For its part, his delegation was particularly interested in the proposal to use electronic single windows.

52. **Ms. Aigner** (Observer for the World Customs Organization) said that UNCITRAL texts were widely used by WCO member States. However, many of those States were struggling to implement electronic single windows and required legal guidance in that regard. Many of the instruments currently available were not specific enough for the needs of customs administrations.

53. Working Group IV should be reconvened as soon as possible so that it could begin deliberating the matters raised at the recent colloquium, in particular dematerialization, identity management and mobile devices.

54. **Mr. Chong** (Singapore) said that his delegation was in favour of reconvening Working Group IV, as there had been important developments in the field of electronic commerce since the Group had last met, in 2004.

55. He expressed support for the Commission's work on online dispute resolution, which was linked to electronic commerce. Of the topics proposed for referral to Working Group IV, his delegation was particularly interested in electronic transferable records and identity management.

56. Singapore had been the first country to enact legislation based on the UNCITRAL Model Law on Electronic Commerce and the first to incorporate the United Nations Convention on the Use of Electronic Communications in International Contracts into its legislation. It had participated in the work of Working Group IV in the past and would be happy to participate again if the Group were reconvened.

57. **Ms. Sabo** (Canada), said that, although UNCITRAL had a long history of work on electronic commerce and had prepared important instruments in that area, her delegation did not support the reconvening of the Working Group at the present stage, since none of the envisaged topics was yet ripe for referral to a working group.

58. Her delegation welcomed the cooperation between the Secretariat and WCO on the issue of single window facilities, which should continue outside the context of a working group for the time being.

59. The topic of identity management raised a number of interesting issues, but none of them was sufficiently well defined for a working group to address. Also, her delegation was not convinced that the existing legal framework for mobile commerce was inadequate. Moreover, many of the envisaged topics raised privacy and data protection issues that fell outside the Commission's remit. In addition, it would not be advisable to give the Working Group an open mandate, as experience had shown that to be an inefficient approach.

60. Lastly, it was not appropriate to reconvene the Working Group at a time of budget cuts. She proposed that the Commission wait a year before reconsidering the issue.

61. **Mr. Bellenger** (France) said that his delegation agreed with the views expressed by the representative of Canada. Among the many envisaged topics, it was difficult to identify one that was sufficiently well defined and important to justify reconvening of the Working Group. The topic of electronic transferable records had already been addressed unsuccessfully on a number of occasions in the past. The topic of electronic single windows was an important one, but it was more relevant to the remit of WCO than to that of UNCITRAL. There were some specific questions relating to that topic that could be put to a working group, but they were of secondary importance. The use

of mobile devices in electronic commerce was a worthwhile topic for discussion but should be approached with great care, as it was directly linked to consumer rights. Identity management was a topic already being addressed in a number of countries, and his delegation would not be opposed to its being considered by a working group. However, since it related to personal data and the protection of privacy, it was politically sensitive. It should therefore be addressed only within strictly defined boundaries.

*The meeting was suspended at 3.55 p.m. and resumed at 4.30 p.m.*

62. **The Chairperson** said that there seemed to be broad support in principle for reconvening the Working Group provided that it was given a sufficiently specific mandate. Further discussion was required in order to identify a suitable topic for the Group to consider and to determine the allocation of resources for its work.

63. **Mr. Sorieul** (Secretary of the Commission) said that the Working Group on Electronic Commerce would need to be given clear priorities and goals; bearing in mind the shortage of resources in the Secretariat, an open mandate could not be justified. At the February 2011 colloquium, progress had been made in identifying suitable topics for discussion.

64. The strongest support had been expressed for the topic of electronic transferable records, which had been discussed in the past — most recently in the context of the Rotterdam Rules — but without a conclusive outcome. Unsuccessful attempts had been made in the maritime transport sector to establish a system of electronic bills of lading. Some States had enacted new legislation or were attempting to address the issue in other ways; those efforts could be a starting point for discussing the establishment of a global regime for electronic transferable records.

65. Discussion of such a regime would touch on other issues, including identity management, which was perhaps the most relevant in the context of establishing a legal regime for electronic commerce. In its existing texts on electronic commerce, the Commission had attempted to establish the equivalence of electronic and paper documents but had taken a cautious approach to all issues relating to data protection. Identity management was therefore one element that could be considered in the establishment of a regime for electronic transferable records.

66. The issue of mobile commerce was not directly linked to that of electronic transferable records, but some aspects of the latter might be relevant in connection with mobile commerce. Generally speaking, the issues associated with mobile commerce were not fundamentally different from those associated with traditional electronic commerce. The Commission might need to reflect on the legal regime provided for in the UNCITRAL Model Law on International Credit Transfers, which could be applied in a number of new ways in the context of electronic transferable records and mobile commerce.

67. The Secretariat was currently working on the cross-cutting subject of electronic single windows in response to a request from WCO. If the Working Group on Electronic Commerce were reconvened, it would be better placed to respond to that request, once WCO had determined more precisely the subjects on which it required the Commission's expertise.

68. One option for the Working Group would be to consider all the topics envisaged but to focus on seeking definitive solutions to the problems of electronic transferable records. An effective and widely applied regime for the latter could be a useful complement to the Rotterdam Rules.

69. In the past, UNCITRAL had led the way in establishing legal regimes for new technologies. However, it might cease to lead the way if the Working Group remained inactive any longer.

70. **The Chairperson** said it was his understanding that the topic of electronic single windows was not yet ripe for consideration by the Working Group, although the Group could address the issues raised in that regard by WCO.

71. Regarding the concerns expressed about giving the Group an overly broad mandate, electronic transferable records seemed to have been identified as a key topic that was sufficiently well defined to be referred to the Group. If, in a year's time, the Group felt that it had made enough progress on that topic to request a broader mandate, the Commission could decide to refer to it the topic of identity management or that of mobile commerce.

72. **Mr. Loken** (United States of America), **Mr. Chong** (Singapore) and **Mr. Maradiaga Maradiaga** (Honduras) expressed support for the course of action suggested by the Chairperson.

73. **Mr. Tornado** (Observer for the International Air Transport Association) said that his delegation was in favour of reconvening the Working Group on Electronic Commerce even if its mandate was limited to electronic transferable records. The aviation industry would particularly appreciate guidance as to how the Rotterdam Rules might apply to air waybills and other transportation documents. Also, his delegation would welcome the inclusion of the topic of electronic single windows in the Working Group's mandate.

74. **Ms. Escobar** (El Salvador) said that her delegation was happy to proceed along the lines suggested by the Chairperson. Work on electronic transferable records could be beneficial in terms of legal certainty.

75. **Mr. Olivencia Ruiz** (Spain) said that his delegation was in favour of reconvening the Working Group. Work on the topic of electronic single windows was well advanced and could be completed by the Group within a short period of time.

76. The transfer of electronic records implied the transfer of the rights referred to in such records. Previous attempts to address the issue had produced only partial solutions, although the Rotterdam Rules could be a good starting point for discussions. A more comprehensive approach to the issue within the Working Group would be welcome.

77. **The Chairperson** took it that the Commission wished to reconvene the Working Group on Electronic Commerce and to mandate it to consider the topic of electronic transferable records. If the consideration of that topic raised other issues, such as identity management or mobile commerce, the Group would have to seek the Commission's guidance as to how to proceed.

78. *It was so decided.*

*The meeting rose at 4.55 p.m.*

**Summary record of the 937th meeting, held at the Vienna International Centre,  
Vienna, on Tuesday, 5 July 2011, at 9.30 a.m.**

[A/CN.9/SR.937]

*Chairperson:* Mr. Moollan (Mauritius)

*The meeting was called to order at 9.45 p.m.*

**Possible future work in the area of microfinance**  
(A/CN.9/727)

1. **Mr. Lemay** (Secretariat), introducing the agenda item, said that, in addition to the activities referred to in document A/CN.9/727, the Secretariat had been participating in the work of a United Nations inter-agency group established recently to coordinate United Nations efforts in the area of microfinance. The United Nations Development Programme (UNDP) and the Secretary-General's Special Advocate for Inclusive Finance for Development were among the members of that group. UNCITRAL was the only agency in the group whose work focused on legal and regulatory aspects of microfinance. The Commission was invited to consider whether it would be useful for the Secretariat to continue participating in the work of the group.

2. **The Chairperson** invited comments as to whether UNCITRAL should, given its available resources, pursue work in the area of microfinance and, if so, what form that work should take.

3. **Ms. Sabo** (Canada) said that, although further work was needed in the important area of microfinance, the Commission had not yet identified particular issues that warranted in-depth study by it. The Secretariat should therefore continue, together with other United Nations agencies and other organizations active in the area of development, endeavouring to identify such issues, work on which should not involve duplication of the work being done by other organizations.

4. She hoped that the Secretariat would be able to present the Commission with a proposal in 2012.

5. **Mr. Gandhi** (India), expressing support for the way forward envisaged by the delegation of Canada, said that in his country, a number of bills relating to microfinance, submitted by the central Government and by the governments of individual States, were pending before Parliament and that a working group had been established by the Ministry of Finance to develop a

regulatory framework for microfinance. His delegation therefore considered it very important that the regulation of microfinance form part of the Commission's future work programme.

6. **Ms. Laborte-Cuevas** (Philippines), expressing support for a continuation of the Secretariat's work in the area of microfinance, said that the establishment of a legal framework for microfinance would benefit legislators and policymakers all around the world, and particularly in developing countries.

7. **Mr. Obi** (Nigeria), expressing support for the comments made by the representatives of India and the Philippines, said that even in countries where legal and regulatory frameworks for microfinance had been established there remained gaps that the Commission could fill.

8. In Nigeria, community banking had been used as a form of microfinance until 2005, when the inadequacies of such banking had given rise to the establishment of a policy framework for microfinance covering, inter alia, deposit insurance and prudential guidelines. However, the policy had not been reviewed until April 2011.

9. In most countries, including Nigeria, there were no robust regulatory frameworks for microfinance, which was covered only loosely by the provisions of general law. The issues referred to in paragraph 56 of document A/CN.9/727 reflected the gaps identified in his own country. Rather than waiting until its next session, the Commission should immediately select those issues on which the Secretariat should focus, subject to availability of resources, thereby contributing to poverty alleviation.

10. **Ms. Escobar** (El Salvador), expressing support for the comments made by the representative of Canada, said that it was important to prioritize the issues on which the Secretariat should focus, particularly in view of UNCITRAL's very limited resources available. In that connection, she wondered which working group might be entrusted with future work in the area of microfinance.

11. **Ms. Nesdam** (Norway) said that, while her delegation considered microfinance to be important, it was flexible as to whether the Commission should engage in work in that area. At all events, the Commission should bear in mind the many good initiatives undertaken by other organizations in the area of microfinance and focus on issues regarding which it could create added value, namely those indicated in document A/CN.9/727 in subparagraphs 56 (e) (“Over-collateralisation and use of collateral with no economic value”), 56 (i) (“Electronic money, including its status as savings; whether “issuers” of e-money are engaged in banking and hence what type of regulation they are subject to; and the coverage of such funds by deposit insurance schemes”), 56 (m) (“Provision for fair, rapid, transparent and inexpensive processes for the resolution of disputes arising from microfinance transactions”) and 56 (n) (“Facilitating the use of, and ensuring transparency in, secured lending, in particular to micro-enterprises and SMEs”), the last-mentioned issue being of particular interest to her country.

12. **Mr. Olivencia Ruiz** (Spain), endorsing the comments made by the representative of Canada, said that UNCITRAL, acting within its mandate and available resources, should play a part in combating poverty provided that it clearly identified ways in which it could make a meaningful contribution. One way in which it could do so was by promoting microfinance.

13. Cooperation with other organizations and participation in relevant forums would help the Commission to identify not only the issues that it might address but also the type of legal and regulatory assistance that it might offer.

14. His delegation would like the Secretariat to develop a proposal for future work in the area of microfinance, so that the Commission might decide how that work might be carried out.

15. **The Chairperson** requested delegations to indicate whether they were in favour of the way forward envisaged by the delegation of Canada, with the Secretariat submitting a proposal to the Commission in 2012, or of the immediate selection of issues as envisaged by the delegation of Nigeria.

16. **Mr. Loken** (United States of America), having welcomed the work of the Secretariat to date in the area of microfinance and expressed strong support for a continuation of that work in the context of financial

inclusion, said that the Commission, when considering possible issues for the future, should bear in mind its mandate and the work being done by other organizations and endeavour to avoid duplication of effort. In that regard, his delegation was in favour of the way forward envisaged by the delegation of Canada.

17. **Mr. Maradiaga Maradiaga** (Honduras), expressing support for the way forward envisaged by the delegation of Canada, said that microfinance was of particular importance to countries such as Honduras, which in 2007 had adopted a law designed to support SMEs and microenterprises as a means of combating poverty and unemployment.

18. **Mr. León Vargas** (Mexico) said that his delegation, which was in favour of the way forward envisaged by the delegation of Canada, shared the view that the Commission’s work in the area of microfinance should be clearly delimited in order — *inter alia* — to avoid duplication of effort.

19. **Mr. Seweha Boles** (Egypt) said that microfinance could, by empowering the poorest population sectors, serve as an engine for economic development. One of the problems relating to microfinance, however, was the burdensome conditions all too often imposed by credit institutions on borrowers, such as high interest rates. Egypt was therefore drawing up legislation that would enable SMEs and microenterprises to obtain loans under fair conditions. In doing so, it had encountered problems due to possible conflicts with the provisions of civil law, particularly as regards the committing of assets as security. It would like the Secretariat to conduct a study of how such problems had been overcome in other countries.

20. **Mr. Okoth** (Kenya) said that microfinance institutions were playing an important role in his country’s economic development and accounted for a significant proportion of the informal banking sector.

21. **The Chairperson** said that there seemed to be broad support for a continuation of work in the area of microfinance and for continued cooperation between the Secretariat and other organizations in that regard. He suggested that the Commission request the Secretariat to prepare a short questionnaire, to be sent to all States, inviting them to share their experience and indicate areas of concern, in particular with regard to establishing legal and regulatory frameworks for microfinance. The Secretariat could present a summary

of the information received at the Commission's next session.

*It was so decided.*

22. **The Chairperson** further suggested that the Commission decide which of the possible issues for consideration listed in paragraph 56 of document A/CN.9/727 were to be the Secretariat's areas of focus; the representative of Norway had highlighted items (e), (i), (m) and (n).

23. **Mr. Obi** (Nigeria) said that, there were restrictions on the participation of microfinance in Nigerian institutions in certain areas of banking that were traditionally the preserve of conventional banks, such as foreign exchange transactions, both domestically and abroad. To his knowledge, the same was true of certain other countries. Item (g) was therefore currently of lesser importance, although it might become more important in the future.

24. He agreed with the delegation of Norway that item (e) was important, since overcollateralization ran counter to the very essence of microfinance.

25. Work should proceed on items (i), (m) and (n). However, the main goal of the Commission's work on microfinance was to improve the legal and regulatory environment. Item (a) ("The nature and quality of the regulatory environment, including which institutions are regulated, by which regulator(s), and whether regulation should be according to activity type (e.g. microcredit) or according to the type of entity regulated") was therefore of paramount importance.

26. **Mr. Galindo Cruz** (Mexico) expressed support for the proposal made by the representative of Norway.

27. **Mr. Loken** (United States of America) said that his delegation had no objection to consideration of the items identified by the representative of Norway, since they bore some relation to the work typically carried out by UNCITRAL in other areas. However, he was concerned that the wording of item (a) was rather broad, since it touched on questions of banking regulation that fell within the remit of other organizations. He therefore advised caution in that regard.

28. **The Chairperson** said that item (a) was indeed a broad topic, but he had understood the representative of Nigeria to mean that development of the regulatory environment was the broad objective underlying the

Commission's work on microfinance; item (a) need not be taken up per se. There was surely agreement that the Commission should not discuss issues of commercial banking.

29. **Mr. Lemay** (Secretariat) said it had always been clear to the Secretariat that there should be no overlap between the work of UNCITRAL and that of organizations working in the field of banking regulation. Most microfinance institutions were small and non-deposit-taking and therefore did not fall within the purview of normal banking regulation.

30. **Mr. Obi** (Nigeria) said that the Nigerian courts recognized different categories of banks and that credit-only non-deposit-taking institutions were not currently regulated by the Central Bank of Nigeria; the Commission's work would therefore be particularly pertinent to that type of institution.

31. **The Chairperson** said he took it that the Commission wished to request the Secretariat to focus on items (e), (i), (m) and (n) from the list set out in paragraph 56 of document A/CN.9/727, bearing in mind that the Commission's overall aim was to help establish a legal and regulatory framework, as set out in item (a).

*It was so decided.*

**Endorsement of texts of other organizations:  
2010 revision of the Uniform Rules for Demand  
Guarantees published by the International  
Chamber of Commerce**

32. **Mr. Sorieul** (Secretary of the Commission) said that the Commission had received a request from the International Chamber of Commerce (ICC) to endorse the 2010 revision of its Uniform Rules for Demand Guarantees (URDG 758). He recalled that the Commission had endorsed the previous version of the Rules and drew attention to the interoperability between the Rules and the 1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. The Rules were non-binding but were nonetheless important in terms of the codification of international trade.

33. **Ms. Hauptmann** (Observer for the International Chamber of Commerce (ICC)) said that, although there had been various efforts since the 1980s to standardize international law regarding guarantees, most were still handled under local law. Therefore, when disputes arose, the parties involved faced different laws and



unknown local requirements. Emerging markets in particular suffered from inexperience in the field of international guarantees. The Uniform Rules for Demand Guarantees (URDG) had been developed in order to level the playing field and ensure fairness among guarantee parties regardless of the legal, economic or social system in which they operated.

34. URDG 458 had reflected market practice in the early 1980s, but the world had changed completely since then. Views reported to the ICC Task Force on Guarantees by URDG 458 users worldwide had provided the necessary basis for a revision.

35. The revised URDG — URDG 758 — had been accepted by the ICC Banking Commission and the ICC Commission on Commercial Law and Practice in November 2009 by nearly unanimous voting, had been adopted by the ICC Executive Board in December 2009 and had entered into force on 1 July 2010.

36. There had been a positive reaction to their entry into force. The percentage of guarantees subject to URDG 758 — compared with the percentage subject to URDG 458 or to no rules at all — had been increasing at a very satisfactory rate, and in countries that had displayed reluctance with regard to URDG 458 the increase had been particularly large.

37. URDG 758 built on the balanced approach that characterized URDG 458. At the same time, imprecise concepts such as “reasonable time” and “reasonable care” had as far as possible been excluded from URDG 758, which, in addition, were more comprehensive than URDG 458, covering important practices that had not been covered by them. Moreover, URDG 758 featured a number of innovations dictated by — inter alia — the need to avoid unnecessary disputes.

38. URDG 758 had already been translated from English into over 20 other languages, and they were to be translated into a few more.

39. At well over a hundred seminars conducted in over 40 countries, thousands of participants had been trained in the use of URDG 758, and they all agreed that URDG 758 represented a significant improvement as regards both scope and content.

40. In the wake of the most severe crisis that had ever hit trade finance, there was a need for certainty,

predictability and transparency. URDG 758 met that need.

41. **Mr. Sorieul** (Secretary of the Commission) read out the following decision for adoption:

*“The United Nations Commission on International Trade Law,*

*“Expressing its appreciation to the International Chamber of Commerce for transmitting to it the revised text of ‘Uniform Rules for Demand Guarantees’, which was approved by the Executive Board of the International Chamber of Commerce on 3 December 2009, with effect from 1 July 2010,*

*“Congratulating the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by making its rules on demand guarantees clearer, more precise and more comprehensive while including innovative features reflecting recent practices,*

*“Noting that ‘Uniform Rules for Demand Guarantees’ constitutes a valuable contribution to the facilitation of international trade,*

*“Commends the use of the 2010 revision of the ‘Uniform Rules for Demand Guarantees’, as appropriate, in transactions involving demand guarantees.”*

*The decision was adopted.*

#### **Technical assistance to law reform** (A/CN.9/722 and 724)

42. **Mr. Sorieul** (Secretary of the Commission), introducing the agenda item, said that a factor important for the future of the Commission was its ability to implement technical assistance programmes aimed at ensuring that States were familiar with and effectively implemented more of its texts.

43. The Commission now needed, as a matter of urgency, to take stock of the rather limited results achieved to date in that regard.

44. When texts were being drafted, work was intense, with the very active involvement of States, but there was considerable slackening-off at the implementation stage. That was partly because the persons and institutions participating in UNCITRAL negotiations were different from those involved in legislative reform in States.

45. In the context of the Secretariat's efforts to involve States more in the implementation of UNCITRAL texts, the report contained in document A/CN.9/724 included information on the possibility of setting up UNCITRAL regional centres.

46. **Mr. Castellani** (Secretariat), introducing document A/CN.9/724, said that the Secretariat's reports on technical cooperation and assistance activities had in recent years reflected a shift from a reactive to a proactive approach on the part of the Secretariat.

47. Sharing lessons learned and best practices had had a positive impact in areas such as arbitration and electronic commerce, where the number of legislative enactments of UNCITRAL texts had increased significantly.

48. There were four stages in the establishment of a global legislative standard. First, the Commission identified a topic. Then a text was drafted by a working group and the Commission. During the third stage, the text was adopted in different jurisdictions and implemented. The fourth stage involved monitoring the interpretation of the text, where the system for collecting and disseminating information on court decisions and arbitral awards — Case Law on UNCITRAL Texts (CLOUT) — had proved very helpful.

49. The report in document A/CN.9/724 described a strategic framework for technical assistance activities. The Secretariat would welcome guidance from the Commission on how to improve the strategic framework.

50. An important aspect of the strategic framework was a strong focus on regional activities, as it was more cost-effective to organize seminars and workshops at the regional level than at the national level.

51. A potential area of Secretariat activity was promotion of the universal adoption of certain UNCITRAL texts. The universal adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the United Nations Convention on Contracts for the International Sale of Goods in particular could be important to the future of the Commission.

52. With regard to the adoption of recent texts, the Secretariat was endeavouring to broaden the audience

and to explain the benefits of timely adoption of those texts.

53. Recently, the Secretariat had coordinated activities aimed at raising awareness of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, the rules embodied in which are known as the Rotterdam Rules. The International Maritime Committee (CMI) had in a letter to the Commission, stressed the importance of timely worldwide ratification of the Rotterdam Rules, which addressed all the maritime transport issues that were key for all players involved in international trade. Without worldwide ratification of the Rules, international commercial transport would be guided only by diverse and even conflicting rules, leading to friction and higher costs. The CMI offered to support the Secretariat's awareness-raising activities.

54. The Secretariat, which stood ready to help States with the adoption and implementation of any UNCITRAL text, was, at a time of severe resource limitations, making more and more use of the UNCITRAL website for the dissemination of information.

55. As regards financial matters, Indonesia had made a contribution to the UNCITRAL Trust Fund for Symposia, and significant resources for trade law reform activities were available from various sources. In the latter connection, the Secretariat was of the view that its involvement in law reform at an earlier stage would be helpful, and it would welcome suggestions for improving coordination to that end between it and the development aid agencies, which were increasingly appreciating the benefits for economic development of trade law reform.

56. **The Chairperson** expressed gratitude to Indonesia for its contribution to the UNCITRAL Trust Fund for Symposia.

57. **Mr. Bellenger** (France) said that, in his delegation's view, the Secretariat's analysis of the problems associated with promoting trade law reform was accurate.

58. He proposed that the Secretariat approach Permanent Missions in Vienna with requests for funding for technical cooperation and assistance activities, which were important for the development of the rule of law.

59. **The Chairperson** said that, in addition, members of the Commission and of its working groups should help to promote UNCITRAL texts by liaising with ministries.

60. **Mr. Sorieul** (Secretariat), responding to a point raised by **Ms. Sabo** (Canada), said that, as the organization of meetings was funded through the regular budget while technical cooperation and assistance was largely supported by extrabudgetary funds, there was no competition for resources between the two areas of activity.

61. He expressed appreciation for the proposal made by the representative of France, which the Secretariat would act upon.

62. In that connection, it was important that the Commission's members and the Secretariat identify the right communication partners in States and organizations. Members of the Commission had frequently asked the Secretariat to establish more effective communication mechanisms for inviting them to meetings as the diplomatic channels, which should be used, were often ineffective, and it was even more difficult to make contact with the authorities dealing with legislative reform in States not generally represented on the Commission.

63. **Mr. Maradiaga Maradiaga** (Honduras), having commended the Secretariat on the report contained in document A/CN.9/724, referred to paragraph 46, where it was stated that the United Nations Convention on the Use of Electronic Communications in International Contracts had, in the relevant time period, received the ratifications of Honduras and Singapore — only two countries. He urged that more be done by the Commission and the Secretariat to promote the Convention and that countries support the Commission and the Secretariat in their promotion efforts.

64. **The Chairperson**, expressing appreciation for the proposal made by the representative of France, said that the Secretariat should perhaps submit requests both through the official channels and through Commission members.

65. The problems relating to the implementation of UNCITRAL texts were not solely due to a lack of awareness. Legislators had to consider how such texts would interact with their countries' legal frameworks, an issue that could be resolved only through dialogue with the Secretariat. That needed to be borne in mind when one was assessing the success of the Secretariat's awareness-raising activities.

*The meeting rose at 12.30 p.m.*

**Summary record of the 938th meeting, held at the Vienna International Centre,  
Vienna, on Tuesday, 5 July 2011, at 2 p.m.**

[A/CN.9/SR.938]

*Chairperson:* Mr. Moollan (Mauritius)

*The meeting was called to order at 2.10 p.m.*

**Technical assistance to law reform** (*continued*)  
(A/CN.9/722 and 724)

1. **Mr. Galindo Cruz** (Mexico) asked about the extent to which United Nations structures such as information centres could be used to facilitate technical cooperation and assistance activities aimed at promoting UNCITRAL texts.

2. Regarding the CLOUT (Case Law on UNCITRAL Texts) system, he asked what role national correspondents could play in such technical cooperation and assistance activities.

3. **Mr. Sorieul** (Secretary of the Commission) said that there were many United Nations mechanisms that disseminated UNCITRAL-related information, but further means of doing so should be found.

4. The network of national correspondents of the CLOUT system had been working effectively for many years, often in tandem with universities and academic institutions that were involved in data collection and decision-making.

5. Despite the achievements of the CLOUT system, the only multilingual system of its kind, the financial resources available for it were declining. That problem would be on the agenda for an upcoming meeting with national correspondents.

6. **Mr. Lebedev** (Russian Federation) said that some UNCITRAL texts had been extensively discussed, while some had been largely neglected, so that there was little awareness of them including the Electronic Communications Convention.

7. National experts should be supported in their efforts to promote the highly sophisticated texts developed by UNCITRAL, and workshops and seminars on the texts not yet widely adopted should be organized with the Secretariat's assistance.

8. Besides the Internet and other modern media, use should be made of "old-fashioned" means of disseminating information such as specialized journals.

9. It was particularly regrettable that the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), although signed by 23 States, had so far been ratified only by Spain.

10. **Mr. Olivencia Ruiz** (Spain), referring to developments in his country, said that Spanish arbitration law had recently been reformed, in line with the provisions of the 2003 UNCITRAL Model Law, in areas such as legal support for arbitration, the jurisdiction of the courts and the arbitration provisions formally enshrined in company statutes.

11. As to the Rotterdam Rules, besides ratifying them Spain had held special events to disseminate their provisions.

12. **Mr. Jezewski** (Poland) suggested that professional bodies such as bar associations be asked to help increase the awareness of UNCITRAL texts and that UNCITRAL texts be used in the training of judges and other legal professionals. In Poland, UNCITRAL texts could be cited before the courts.

13. Also, it would be beneficial for law students to be taught about UNCITRAL and its role in international trade law.

14. **The Chairperson** said that the Secretariat should take note of the views expressed concerning national experts, bar associations and law students.

15. One way to further raise awareness of UNCITRAL texts would be to continue the process of regionalization of the work of UNCITRAL initiated by the Secretariat, with regard to which the Republic of Korea was likely to play a prominent role.

16. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat, which attached great importance to the establishment of regional offices, had sent notes verbales to all States encouraging them to host or

finance such an office. Expressions of interest had so far been received from Latin America (the Dominican Republic and El Salvador), Asia (Malaysia and Singapore, in addition to the Republic of Korea) and Africa (Kenya). Discussions were most advanced with the Republic of Korea, which had offered 100 per cent of the funding required for the establishment and operation of a regional centre there.

17. Regional centres, with their understanding of regional conditions, could prove useful for promoting technical cooperation and assistance in support of the implementation of UNCITRAL texts. They could also prove useful by channelling information from their regions to UNCITRAL. Two-way communication was the objective.

18. The Secretariat, which had no experience of establishing regional centres, was seeking advice from bodies with such experience.

19. The regional centres ultimately established would operate for as long as the necessary funding was provided, and employment at them would be temporary.

20. The contractual arrangements would be made in New York.

21. **Ms. Sabo** (Canada) said that her delegation, while recognizing the need for regional centres, considered it crucial that their establishment and operation not have an impact on UNCITRAL's regular budget and on the staff travel costs of the Secretariat.

22. **Mr. Sorieul** (Secretary of the Commission) said that no impact on the regular budget was expected and that the budgetary provision for Secretariat staff travel in 2012-2013 had been reduced relative to the 2010-2011 provision.

23. **Ms. Jamschon MacGarry** (Argentina) said that her country was interested in hosting a regional centre for Latin America and the Caribbean and would welcome information and guidance from the Secretariat.

24. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat would be happy to provide information and guidance.

25. **Mr. Rha** (Republic of Korea) said that his country's offer relating to the hosting of a regional centre was set out in conference room paper A/CN.9/XLIV/CRP.4 (paragraph 6) and that his

Government would provide financial support also for seminars and other events held at the regional centre.

26. **The Chairperson** said he hoped that the UNCITRAL regional centre in the Republic of Korea would be the first of many such centres, and not just in the Asia and Pacific region.

27. **Mr. Loken** (United States of America), expressing appreciation to the Government of the Republic of Korea, said that regional centres could be highly beneficial. However, his delegation shared the concerns of the Canadian delegation about funding and would like the Secretariat to report annually to the Commission on the operation of the regional centres established.

28. **The Chairperson** took it that the Commission wished to receive annual reports by the Secretariat on the operation, including the funding situation, of the regional centres established.

29. *It was so decided.*

30. **Mr. Phua** (Singapore) said that UNCITRAL regional centres would be particularly beneficial for developing countries.

31. His Government, which greatly appreciated the offer of the Republic of Korea to host such a centre, was holding discussions with the Secretariat about the establishment of one in Singapore.

32. **Ms. Sabo** (Canada) said that her delegation welcomed the assurance given by the Secretary of the Commission to the effect that the establishment and operation of regional centres would not have an impact on UNCITRAL's regular budget. However, it was concerned that supporting the activities of such centres would require time and energy from the Secretariat staff in Vienna.

33. The Commission should exercise caution, as a proliferation of regional centres could be detrimental to the overall work of UNCITRAL.

34. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat welcomed the interest of the Government of Singapore in hosting a regional centre.

35. Regarding the points raised by the representative of Canada, the establishment of regional centres would require follow-up by the Secretariat staff in order to ensure that the persons working at them were properly trained, but the training would take place mainly in Vienna.

36. The funds necessary for administrative activities of the Secretariat connected with the establishment of regional centres would be provided by donor countries such as the Republic of Korea.

37. Although Secretariat staff would have to devote time and energy to the training of colleagues who would be working at the regional centre to be established in the Republic of Korea, that would be a worthwhile investment, as the regional centre would greatly assist the Secretariat in promoting the use of UNCITRAL texts through regional workshops and similar events.

38. Regarding Secretariat staff travel costs, the budgetary provisions for them would have been reduced by almost a half in five years by 2013. If the Secretariat was to continue with its coordination activities and with promotion of the use of UNCITRAL texts, travel funds would have to be provided in some other way. Offers by countries to assist in funding Secretariat staff travel would be very welcome.

39. **Mr. Galindo Cruz** (Mexico) said that his country could not afford to fund the establishment of a regional centre in Mexico, but it would welcome an UNCITRAL presence of some sort there.

40. **Mr. Sorieul** (Secretary of the Commission) said in response that various alternatives to the establishment of regional centres were being explored, such as videoteleconferencing.

41. **Mr. Piedra** (Observer for Ecuador) said that, despite its current financial difficulties, his country intended to continue working with UNCITRAL, which was to be commended for identifying ways to better communicate with developing countries on international trade law issues.

42. Financial mechanisms must be created for funding regional centres, which could be important for raising awareness of the texts developed by UNCITRAL.

43. Ecuador looked forward to the establishment of a regional centre for Latin America and the Caribbean, and it stood ready to assist in that regard.

44. **Mr. Maradiaga Maradiaga** (Honduras) said that a regional centre for Latin America and the Caribbean could greatly assist his country with the drafting of trade legislation.

45. **The Chairperson** said that there was clearly strong support for the establishment of regional centres.

However, the regional centres established would have to be wholly self-sustainable, and the Commission should be kept informed about the financial aspects of their operations.

46. Regarding the offer from the Republic of Korea, it was clearly welcomed by the Commission, meaning that the United Nations Office of Legal Affairs could go ahead with the arrangements for establishment of a regional centre in that country.

#### **Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts (A/CN.9/726)**

47. **Mr. Lemay** (Secretariat) introduced document A/CN.9/726, containing — inter alia — information about the present status of the CLOUT (Case Law on UNCITRAL Texts) system.

48. **The Chairperson** said that there was a need for the Commission to decide on how to move forward with the CLOUT system.

49. Ensuring a uniform interpretation and application of UNCITRAL texts against a background of jurisprudential developments presupposed that the decisions based on those texts were both made accessible and analysed in digests of case law. Regrettably, there had been delays in the compilation of such digests which should be compiled on a yearly basis if the CLOUT system was to be really useful.

50. He proposed that consideration be given to the establishment of a “CLOUT fund” for the compilation of case law digests to which States might contribute.

*The meeting was suspended at 3.40 p.m. and resumed at 4.10 p.m.*

#### **Status and promotion of UNCITRAL legal texts (A/CN.9/723 and A/CN.9/722)**

51. **Mr. Emery** (Secretariat), introducing document A/CN.9/723, said that information on the status of conventions that were the outcome of work done by UNCITRAL and on the enactment of legislation based on UNCITRAL model laws was one indicator of the impact of UNCITRAL texts.

52. In addition to the information in document A/CN.9/723 on the adoption of legislation, the Commission might wish to note the adoption of legislation based on the Model Law on International

Commercial Arbitration by Malaysia in 2005 and the adoption of legislation based on the Model Law on International Commercial Conciliation by Montenegro in 2005.

53. Concerns had been expressed about the implementation of UNCITRAL texts. Recently, however, there had been quite a large number of adoptions of legislation based on the UNCITRAL model laws relating to arbitration and conciliation and to electronic commerce.

54. The Secretariat greatly appreciated up-to-date information from States on the adoption by them of legislation based on UNCITRAL texts, and it would welcome suggestions for monitoring the influence of such texts.

55. Drawing attention to the “Chronological table of actions in respect of conventions” in document A/CN.9/723, he suggested that, in the interest of conciseness, such a table not be included in successor documents.

56. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat would like all States to inform it whenever their legislation was modified on the basis of UNCITRAL texts in order for the modifications to be fully or partially reflected in future texts developed by UNCITRAL.

### **Coordination and cooperation**

#### **(a) General (A/CN.9/725)**

57. **Mr. Lemay** (Secretariat), introducing document A/CN.9/725, said that it provided information on cooperation between UNCITRAL and other organizations active in the field of international trade law, including the International Institute for the Unification of Private Law (Unidroit) and the Hague Conference on Private International Law. The document also provided information on the Secretariat’s involvement in the work of — inter alia — the World Intellectual Property Organization, the Organization for Economic Cooperation and Development, the World Bank, the European Union, the International Development Law Organization and the Organization for Security and Cooperation in Europe.

#### **(b) Coordination in the field of security interests (A/CN.9/720)**

58. **Mr. Bazinas** (Secretariat), introducing document A/CN.9/720, said that in 2008 the Commission had requested the Secretariat to cooperate with the Permanent Bureau of the Hague Conference on Private International Law and the secretariat of Unidroit in preparing a paper to explain the interrelationship between the texts of UNCITRAL, the Hague Conference and Unidroit in the field of security interests, which overlapped to some extent; that mandate had been renewed in 2009. Document A/CN.9/720 contained that paper, which made it clear that States could adopt all the texts without creating conflicts of law.

59. The Secretariat hoped that the Commission would approve the paper for publication as a United Nations sales publication.

60. **Mr. Loken** (United States of America), having welcomed the paper contained in document A/CN.9/720, said he understood that there might be an overlap between the Unidroit Model Law on Leasing and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment and between the Unidroit Convention on International Financial Leasing and the Unidroit Model Law on Leasing.

61. Regarding the Unidroit Convention on Substantive Rules for Intermediated Securities, the “Transactions or issues covered” column on page 11 of document A/CN.9/720 contained references only to “intermediated securities”, whereas he understood that the Convention also covered transactions/issues involving non-intermediated securities.

62. **Mr. Estrella Faria** (Observer for the International Institute for the Unification of Private Law (Unidroit)), responding to the first comment made by the representative of the United States of America, pointed out that the “Principal exclusions and limitations” column on page 9 of document A/CN.9/720 contained a reference to “Large aircraft equipment, unless parties agree to be subject to law”.

63. Regarding the second comment, about non-intermediated securities, the point raised was a technical one that he was prepared to discuss with the UNCITRAL Secretariat. At all events, it was not his understanding that the Unidroit Convention in question

also covered transactions/issues involving non-intermediated securities. It might be just a question of terminology.

64. He hoped that further such papers, based on collaborative efforts, would be produced in due course.

65. **Ms. Sabo** (Canada), welcoming the paper, said that it was the result of the kind of collaboration that the Commission had been encouraging. Her delegation hoped that any outstanding issues would be resolved and the paper published soon.

66. It also hoped that further such papers, based on collaborative efforts, would be produced in due course.

67. **Mr. Sorieul** (Secretary of the Commission), responding to the final comments made by the observer for Unidroit and the representative of Canada, said that there would not necessarily be further papers like the one now under consideration, the purpose of which was to eliminate uncertainties arising out of the existence of texts produced by different organizations working in similar fields. However, the Secretariat hoped to continue cooperating with other organizations, and not just for the purpose of eliminating such uncertainties.

68. **The Chairperson** suggested that the Commission approve the paper for publication, subject to clarification of the issues that had been raised by the representative of the United States of America.

69. *It was so decided.*

#### (c) Reports of other international organizations

70. **Mr. Sorieul** (Secretary of the Commission) recalled that reports had already been presented by the Observer for UNCTAD and the Observer for the International Maritime Committee.

71. **Mr. Estrella Faria** (Observer for the International Institute for the Unification of Private Law (Unidroit)), drawing attention to subsection II.A.1 of document A/CN.9/725, which described various recent activities of Unidroit, said that in 2012 Unidroit would seek UNCITRAL's endorsement of the third edition of the Principles of International Commercial Contracts.

72. Referring to the work on the preparation of a draft protocol to the Convention in International Interests in Mobile Equipment (the Cape Town Convention) on matters specific to space assets, he said that a diplomatic

conference for adoption of the protocol would take place in Berlin from 27 February to 9 March 2012.

73. Since the first meeting of its Committee on Emerging Markets Issues, Unidroit had begun to prepare a legislative guide on principles and rules for trading in securities in emerging markets. It hoped that the second meeting of the Committee on Emerging Markets Issues would take place on 28 and 29 March 2012 in one of the emerging-market member States of Unidroit.

74. Regarding the development of a model law on the netting of financial instruments, a high priority for Unidroit, the first meeting of a group of experts from central banks, regulatory bodies, academia and financial institutions had taken place in April 2011 in Rome. A second meeting was due to take place in September 2011, and he hoped that the UNCITRAL Secretariat would be represented at it given the cooperation between Unidroit and UNCITRAL in matters relating to insolvency.

75. From consultations between Unidroit and FAO it would appear that Unidroit could contribute to the preparation of guidelines on the legal aspects of long-term contracts for investment in agricultural production, and from consultations between Unidroit and the International Fund for Agricultural Development it would appear that Unidroit could contribute to the development of policies and of legislative or contractual guidelines aimed at facilitating the insertion of farmers in developing countries into inclusive value chains. Unidroit intended to organize a colloquium in November 2011, in Rome, on — inter alia — promoting: investment in agriculture in developing countries; the insertion of small-holder farmers into inclusive value chains; and capital mobilization for the financing of agricultural production.

76. Also, consultations with FAO had highlighted the potential for a Unidroit-UNCITRAL project relating to large-scale agricultural projects in developing countries.

77. Unidroit was exploring the possibility of embarking on work in the area of third-party liability for malfunctions of global navigation satellite systems and was hoping to hold consultations on that matter in November.

78. Unidroit, which stood ready to cooperate further with UNCITRAL, attached great importance to



cooperation between the two organizations, particularly at a time of severe resource constraints.

79. **Mr. Tata** (Observer for the World Bank) said that the World Bank was grateful to UNCITRAL for collaborating with it in areas such as the establishment of legal frameworks relating to public procurement, arbitration and conciliation, cross-border insolvency, and microfinance.

80. The World Bank greatly appreciated the cooperation of UNCITRAL in its efforts to develop effective secured transactions regimes and UNCITRAL's support for its Insolvency and Creditor/Debtor Regimes Task Force.

81. The World Bank also greatly appreciated the readiness of the Secretariat to identify and marshal the expertise necessary for supporting the implementation of UNCITRAL texts.

**(d) International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups**

82. **Mr. Sorieul** (Secretary of the Commission) said, with regard to the inviting of non-governmental organizations (NGOs), that a password-protected section had been set up on the UNCITRAL website that could be accessed only by the authorized permanent missions and that contained the details of all NGOs currently attending working group sessions and was regularly updated.

83. Since the Commission's 2010 session, the following NGOs had been added to the list of NGOs to be invited to sessions of UNCITRAL and its working groups: the Tehran Regional Arbitration Centre (one of

the arbitration centres established under the auspices of the Asian-African Legal Consultative Organization (AALCO)), the National Centre for Technology and Dispute Resolution (NCTDR), the International Technology Law Association, the Civil Law Initiative (Fondation pour le droit continental), the International Federation of Purchasing and Supply Management (IFPSM) and the Association Droit & Méditerranée (Jurimed).

84. **The Chairperson**, inviting comments on the additions just mentioned, said that they would be considered to be accepted if no objections were made.

85. **Mr. Bellenger** (France) said that he had not been aware of the password-protected section on the UNCITRAL website and asked for further information regarding it.

86. His delegation, which would like to be informed before working group sessions about NGOs invited to attend, had been surprised that the UNCITRAL website did not offer a document on the mechanism for informing States about the issuing of invitations to NGOs, which had taken three years to develop.

87. **Mr. Sorieul** (Secretary of the Commission) said that the document on that mechanism was accessible on the UNCITRAL website.

88. In that connection, he drew attention to paragraph 9 and 10 in Annex III to the report of UNCITRAL on its forty-third session (document A/65/17).

*The meeting rose at 5 p.m.*

**Summary record of the 939th meeting, held at the Vienna International Centre,  
Vienna, on Wednesday, 6 July 2011, at 9.30 a.m.**

[A/CN.9/SR.939]

*Chairperson:* Mr. Moollan (Mauritius)

*The meeting was called to order at 10 a.m.*

**Election of officers (resumed)**

1. **Mr. Rha** (Republic of Korea), speaking on behalf of the Asian Group, nominated Mr. Chong (Singapore) to serve as Rapporteur.
2. **Mr. Watanabe** (Japan) and **Ms. Manglatanakul** (Thailand) seconded the nomination.
3. *Mr. Chong (Singapore) was elected Rapporteur by acclamation.*

**Other business**

4. **Mr. Hwang** (Republic of Korea), expressing appreciation for the Commission's decision to establish an UNCITRAL regional centre for Asia and the Pacific in the Republic of Korea, said that the regional centre would assist the countries of the region with the adoption, implementation and uniform interpretation of UNCITRAL rules.
5. The Republic of Korea, which had been transformed from a very poor country into a major world trading partner and a donor State within a short period of time, was committed to helping to increase global prosperity by sharing its experience with other countries, and the UNCITRAL regional centre would be ideal for that purpose.
6. His Government would help the UNCITRAL regional centre for Asia and the Pacific to become a model for future regional centres elsewhere.

**Coordination and cooperation (resumed)**

**(d) International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups (resumed)**

7. **The Chairperson**, recalling the discussion during the previous meeting, said that the Secretariat would be reissuing all Member States with the password to the password-protected section of the UNCITRAL website containing the details of all non-governmental

organizations (NGOs) currently invited to attend sessions.

8. Also, the Secretariat would put on the UNCITRAL website documents related to the working methods of the Commission.

9. An issue still to be resolved concerned paragraph 10 in Annex III to the report of the Commission on its forty-third session (document A/65/17), which set out the procedure for the participation of NGOs in working group sessions. Some delegations believed that the provision in question required the Secretariat to inform Member States beforehand of the participation of NGOs in a given working group session. A compromise — perhaps not always feasible — might be to require the Secretariat to inform Member States which NGOs were to attend a working group session beginning work on a new project. In any case, delegations should be informed of the inclusion of new NGOs on the list kept by the Secretariat. Member States could then raise objections, which, coupled with the real-time information provided on the website, would fulfil the requirement established by that paragraph.

10. A remaining question was whether information on NGO participation should be circulated prior to the convening of working groups or whether it would be sufficient for the Commission to receive such information once a year.

11. **Mr. Sorieul** (Secretary of the Commission) said that a website containing a list of the NGOs attending working group sessions had been created at the Commission's request in response to paragraph 10, and it was updated in real time. Member States could also be sent notes verbales if the Commission so wished, although that would not necessarily be a more reliable way of keeping them informed. The Commission should avoid initiating a consultation process before an invitation was issued to an NGO, as that would make it impossible for the NGO, if it had expressed a desire to participate in a working group session only a short time before the start of the session, to actually participate.

Naturally, the Commission or a working group could always object to the presence of the NGO, whereupon the invitation would be withdrawn.

12. **The Chairperson** urged the Commission to bear in mind the possibility of losing the participation of legal specialists from NGOs because of lengthy approval procedures.

13. **Mr. Bellenger** (France) said that the procedure proposed by the Secretariat left much to be desired as to transparency. It would create an impractical situation whereby delegations would be compelled to consult the list of the approximately 250 NGOs that had been invited to working group sessions in the past and then deduce which ones could usefully participate in specific forthcoming working group sessions.

14. He proposed that the names of the NGOs invited to participate be circulated to all interested parties on a contact list via e-mail. His delegation's reading of paragraph 10 was that information on the participation of NGOs had to be communicated to Member States prior to sessions; indeed, how could a Member State object to the participation of an NGO if it had not been informed of its participation beforehand?

15. **The Chairperson** proposed that the list of NGOs on the website be broken down according to the assigned working group.

16. **Mr. Bellenger** (France) said that his delegation's reading of paragraph 9 in Annex III to document A/65/17, clearly did not correspond to the Chairperson's, particularly with regard to the provision that the Commission should draw up "a list of other international organizations and of non-governmental organizations with which UNCITRAL entertains a long-standing co-operation ...". His delegation had taken it that the list would contain only those organizations which had been involved with UNCITRAL over a long period, and not the currently involved NGOs. However, if most Commission members interpreted the provision differently, he would accept that.

17. **The Chairperson** said he understood paragraph 9 to refer to organizations that would support UNCITRAL as they had done in the past.

18. **Ms. Sabo** (Canada), expressing support for the comments made by the representative of France, said that her delegation had been unaware of the list until the current session of the Commission; that clearly indicated

a communication problem. If updates of the list were communicated electronically to individual delegates responsible for the work of UNCITRAL within the Governments of Member States in advance of each working group session or the establishment of a new working group, Member States would be able to access the UNCITRAL website and respond appropriately.

19. **Mr. Sorieul** (Secretary of the Commission) asked whether Member States could accept the option of checking possible changes to the list online, with the NGOs broken down by working group. That arrangement would comply with the Secretariat's obligation to inform States of the participation of NGOs.

20. The Secretariat had concerns about ignoring diplomatic channels, although notes verbales sent to permanent missions could in some cases take months to reach delegations. It had e-mail contact lists for some delegates and experts; however, those lists were subject to frequent change and, if the Secretariat were to send an e-mail to an incorrect or defunct address, problems could arise. Notes verbales were a reliable means of communication and also complied with the requirement regarding official notification.

21. **The Chairperson** urged the Commission to opt either for the approach proposed by the Secretariat, taking into account the proposal made by the delegation of France, or for the approach proposed by the delegations of France and Canada.

22. **Mr. Loken** (United States of America) said that his delegation could support the approach proposed by the Secretariat if account was taken of the proposal made by the delegation of France.

23. **Mr. Maradiaga Maradiaga** (Honduras), expressing support for the approach proposed by the Secretariat, said that the Commission should always bear in mind the core mission of UNCITRAL.

24. **Mr. Adensamer** (Austria) said that, for his delegation, the website as described by the Secretary of the Commission would be sufficient. However, for the benefit of States that wanted more information, perhaps the note verbale sent out before each working group session could include a reference to the organizations that had been invited to participate as observers, together with the procedure for any objections.

25. **The Chairperson** took it that the Commission wished to accept the excellent suggestion made by the representative of Austria.

26. *It was so decided.*

27. **Ms. Escobar** (El Salvador), pointing out that Annex III to document A/65/17 dealt also with the working methods of the Secretariat, said that the information on its working methods, which was currently scattered over several documents, should be consolidated in a single document published in hard copy and also made available via the Internet.

#### **Role of UNCITRAL in promoting the rule of law at the national and international levels**

28. **Ms. Musayeva** (UNCITRAL Secretariat) said that since 2007 the Commission had been transmitting comments on its role in promoting the rule of law in annual reports to the General Assembly. The comments were considered by the Sixth Committee and by the various units of the United Nations Secretariat responsible for preparing the Secretary-General's reports on various aspects of the rule of law.

29. In 2008, the Commission had reported on its role in promoting the rule of law in international economic relations and — in that context — the orderly development of international trade and good governance. In 2009, reporting on its role in the promotion of the rule of law at the international level, the Commission had highlighted: its work in promoting adherence to international trade law instruments and their effective implementation and uniform interpretation; its contribution to the peaceful and independent adjudication of trade and investment disputes through the strengthening of non-judicial mechanisms such as arbitration and conciliation; and its work on coordinating the activities of other international institutions active in the field of international commercial law in order to avoid conflicting rules and interpretations.

30. In 2010, the Sixth Committee had focused on the topic "Laws and practices of Member States in implementing international law", and in that context the Commission had organized a panel discussion on the sub-topic "Laws and practices of Member States in implementing UNCITRAL texts". During the panel discussion, the Deputy Secretary-General had stated that she was concerned about the fragmented approach to

United Nations rule of law activities and had called for the closer integration of UNCITRAL's efforts in promoting the rule of law in commercial relations into those activities.

31. In paragraph 12 of resolution A/RES/65/21, on the report of UNCITRAL on the work of its forty-third session, the General Assembly had — inter alia — endorsed the Commission's conviction "that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels".

32. In paragraph 10 of resolution A/RES/65/32, entitled "The rule of law at the national and international levels", the General Assembly had invited the Commission to continue to comment, in its reports to the General Assembly, on its current role in promoting the rule of law.

33. In paragraph 14 of that resolution, the General Assembly had decided to include in the provisional agenda of its sixty-sixth session the item entitled "The rule of law at the national and international levels" and had invited Members States to focus their comments in the upcoming Sixth Committee debate on the sub-topic "Rule of law and transitional justice in conflict and post-conflict situations". The Commission might therefore wish to highlight, in its report to the General Assembly, the relevance to post-conflict reconstruction of its work in the fields of arbitration, conciliation and public procurement and its possible future work in the field of microfinance.

34. In paragraph 13 of the same resolution, the General Assembly had decided to convene "a high-level meeting of the General Assembly on the rule of law at the national and international levels during the high-level segment of its sixty-seventh session". The Commission might wish to consider, at its next session, ways of ensuring that relevant aspects of UNCITRAL's work were duly reflected at the high-level meeting.

35. **Mr. Galindo Cruz** (Mexico) said that it was crucial that the Commission be provided with sufficient resources to assist in providing the rule of law in conflict and post-conflict situations.

36. **Mr. Al-Arwy** (Observer for Yemen), concurring with the representative of Mexico, said that UNCITRAL could make a significant contribution to promotion of

the rule of law at both the national and the international level.

37. **The Chairperson** said he assumed that the Commission wished to take note of the statement just made by the representative of the Secretariat.

38. *It was so decided.*

*The meeting was suspended at 11 a.m. and resumed at 11.20 a.m.*

#### **Other business (resumed)**

39. **Mr. Karbuczky** (Chief, UNOV Conference Management Service) said that the Secretary-General had recently requested further efficiency savings, and the UNOV Conference Management Service (CMS), which had been experiencing a substantial increase in the demand for its services, especially in the area of documentation, had managed to absorb about 20 per cent of the increase through automation and multitasking. However, no further economies could be made in those ways.

40. One way to narrow the gap between demand and available resources would be to reduce the volume of documentation, by reducing either the length or the number of documents and in that connection the CMS was looking into the possibility of replacing summary records by some alternative.

41. The Commission was entitled to summary records, and any decision on whether to retain them would be its own to take. In 1997, however, the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) had waived its entitlement to summary records and had started to receive instead unedited transcripts of its meetings in the six official languages of the United Nations. Earlier in the current year, it had gone one step further and had decided to do without such transcripts; for a trial period, until 2015, it would be provided only with digital recordings that were searchable, accompanied by a log and put on its website together with useful additional material. COPUOS would be saving about US\$ 80,000 a year in that way.

42. If the Commission followed COPUOS's example, an initial one-time investment of about US\$ 40,000 would be required, but the subsequent system maintenance costs would be negligible.

43. One page of summary record in six languages cost US\$ 1,300, and each year the Commission generated 15-20 summary records with an average length of 6-8 pages. Moreover, it could take several months for the summary records to be issued in all six official languages. Digital recordings, on the other hand, were available immediately, so that they brought not only cost advantages.

44. The Commission did not need to take an immediate decision, but he would welcome feedback from Commission members.

45. **The Chairperson** said that, if he understood correctly, the Commission spent about US\$ 150,000 a year on summary records and, if they were replaced by unedited transcripts, the cost would be halved.

46. **Mr. Karbuczky** (Chief, UNOV Conference Management Service) said that unedited transcripts might well be less than half as expensive as summary records. Digital recordings, which were being introduced in any case for archival purposes, would be even cheaper.

47. **Ms. Sabo** (Canada) asked in what way the digital recordings would be searchable. Mr. Karbuczky had mentioned their being accompanied by a log, so she assumed that searches would be based on the name of a speaker or a country, not on keywords or the subject matter.

48. **Mr. Karbuczky** (Chief, UNOV Conference Management Service) said that her assumption was correct. The technology was developing fast, however, and searches based on keywords would probably become possible in due course.

49. **Mr. González** (Argentina) said that the Commission should be provided with a written report on the matter, perhaps in the form of a conference paper. Meanwhile, it should continue to be provided with summary records.

50. **The Chairperson** said that the Commission could clearly not yet give the UNOV Conference Management Service any guidance.

51. **Ms. Keyte** (United Kingdom) said that she was looking forward to a discussion, on Friday, about how to use the time of delegations and the Secretariat's time more efficiently and, of course, save money.

52. **Mr. Lebedev** (Russian Federation), expressing support for what had been said by the representative of Argentina, said that delegations should wait for a Secretariat document, with detailed information, before embarking on consideration of the substance of the issue. They should not act hastily.

53. **The Chairman** said that it would be necessary to deal with procedure before deciding whether it was worth taking up matters of substance.

54. He understood that the Secretariat would be able to prepare a document setting out the various options.

55. The Commission would revert to the issue on Friday.

#### Relevant General Assembly resolutions

56. **Ms. Musayeva** (Secretariat) drew attention to General Assembly resolutions A/RES/65/21 (Report of the United Nations Commission on International Trade Law on the work of its forty-third session), A/RES/65/22 (UNCITRAL Arbitration Rules as revised in 2010), A/RES/65/23 (UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property) and A/RES/65/24 (Part three of the UNCITRAL Legislative Guide on Insolvency Law).

57. In resolution A/RES/65/21, the General Assembly had, inter alia: commended the Commission for the finalization and adoption of three new international commercial law standards; welcomed the adoption by the Commission of a summary of conclusions on the topic of the Commission's rules of procedure and methods of work; requested the Secretary-General to explore options to facilitate the timely publication of UNCITRAL's Yearbook, to continue providing summary records of the meetings of the Commission, and to bear in mind the particular characteristics of the mandate and work of the Commission in implementing page limits with respect to the documentation of the Commission; and endorsed the efforts and initiatives of the Commission in the area of technical assistance.

58. In resolution A/RES/65/22, the General Assembly had, inter alia, recommended the use of the UNCITRAL Arbitration Rules as revised in 2010 in the settlement of disputes arising in the context of international commercial relations and requested the Secretary-General to make all efforts to ensure that the revised Arbitration Rules became generally known and available.

59. In resolution A/RES/65/23, the General Assembly had, inter alia: requested the Secretary-General to disseminate broadly, including through electronic means, the text of the Supplement on Security Rights in Intellectual Property and to transmit it to Governments and other interested bodies; recommended that all States utilize the Supplement to assess the economic efficiency of their intellectual property financing and give favourable consideration to the Supplement when revising or adopting their relevant legislation, and invited States that had done so to advise the Commission accordingly; and recommended that all States continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade and implementing the recommendations contained in the *UNCITRAL Legislative Guide on Secured Transactions*.

60. In resolution A/RES/65/24, the General Assembly had, inter alia: requested the Secretary-General to transmit the text of part three of the *UNCITRAL Legislative Guide on Insolvency Law* to Governments and other interested bodies; recommended that all Governments utilize the *UNCITRAL Legislative Guide on Insolvency Law* to assess the economic efficiency of their insolvency law regimes and give favourable consideration to the *Guide* when revising or adopting legislation relevant to insolvency, and invited States that had used the *Guide* to advise the Commission accordingly; and recommended that all States continue to consider implementation of the *UNCITRAL Model Law on Cross-Border Insolvency* and that the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* continue to be given due consideration by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings.

#### Other business (resumed)

61. **Ms. Musayeva** (Secretariat), reporting on the Secretariat's internship programme, said that it was designed to give law students an opportunity to become familiar with the work of UNCITRAL and to increase their knowledge in the field of international trade law. Internships were unpaid.

62. The Secretariat selected interns from the Interns Roster maintained by UNOV. When a sufficient pool of qualified candidates was available, the Secretariat tried to ensure a balanced gender representation and a balanced representation of the various geographical regions, having particular regard to the needs of

developing countries and of countries with their economies in transition.

63. During the period since July of the previous year, 17 persons had benefited from internships in the Secretariat — 11 of them females and 12 of them from developing countries and countries with their economies in transition.

64. During that period, the Secretariat had encountered difficulties in finding, in the UNOV Interns Roster, eligible candidates from African and Latin American and Caribbean States and candidates with Arabic language skills.

65. **Mr. Sorieul** (Secretary of the Commission), reporting on a Secretariat performance evaluation exercise that had been under way for some years, said that a numerical rating of performance had been required for budget preparation purposes. The rating was on a scale from one to five, one being the worst and five the best rating.

66. Evaluation sheets had been sent to Commission members, and six had been returned in 2010. The average rating had been 4.65.

#### **Date and place of future meetings**

67. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat had been instructed to make savings during the 2012-2013 biennium. One option was to axe the travel budget earmarked for sending personnel to New York to service UNCITRAL meetings there, effectively discontinuing the practice of holding sessions of the Commission and its working groups alternately in Vienna and New York. That would produce a saving of US\$ 130,000-140,000 annually.

68. The holding of sessions only in Vienna would present no problems for the Secretariat, but some countries maintained permanent missions only in New York, so that participation in sessions could be broader there; also, some NGOs found it easier to be represented at meetings held in New York than at meetings held in Vienna. Furthermore, some units and parts of the United Nations relevant to the work of UNCITRAL, such as those that dealt with the promotion of the rule of law, were based in New York — not in Vienna.

69. Initially, it had been envisaged that the Commission would hold sessions in five regions, to reflect its role in helping to promote international trade worldwide, and the current practice of alternating

between New York and Vienna already represented a compromise in the interests of cutting costs.

70. UNCITRAL's draft budget for 2012-2013 represented a drastic reduction, but the Secretary-General had asked the Commission to make further cuts of 3 per cent. In addition to the proposed cuts to the Secretariat's budget for travel to meetings in New York, reductions were being proposed to other travel budgets, the budgets for consultants and experts and the budgets for the library and the printing of documents.

71. The Commission had just heard an oral presentation relating to the waiving of its entitlement to summary records. Another way of achieving savings might be to reduce the number of working group sessions. A week-long working group session costs US\$ 130,000-140,000, an amount on a par with the Secretariat's budget for travel to New York.

72. Also, the Commission should perhaps consider accepting a cut from three weeks to two weeks annually in the entitlement to services for its sessions.

73. The Secretariat, which could not influence the decision that would ultimately be taken in New York, would learn what that decision was only in December 2011, so that the time available to prepare for meetings in 2012 would be short. The Secretariat would nevertheless do its best to minimize the resulting inconvenience by drawing up an action plan based on a worst-case scenario.

74. **The Chairperson** said that the practice of holding sessions of the Commission and its working groups alternately in Vienna and New York helped to ensure a high profile for UNCITRAL in both locations and broader participation in the sessions. If the Commission wanted to maintain that practice, it needed to agree on ways of reducing its budget other than the holding of sessions only in Vienna.

75. **Mr. Maradiaga Maradiaga** (Honduras) said that if the sessions were held only in Vienna, some developing countries that could only afford to maintain permanent missions in New York would be marginalized. All Commission members should therefore present the case for maintaining the practice of holding the sessions alternately in the two locations to their representatives to the United Nations in New York.

*The meeting rose at 12.30 p.m.*

**Summary record of the 940th meeting, held at the Vienna International Centre,  
Vienna, on Wednesday, 6 July 2011, at 2 p.m.**

[A/CN.9/SR.940]

*Chairperson:* Mr. Moollan (Mauritius)

*The meeting was called to order at 2.15 p.m.*

**Election of officers** (*resumed*)

1. **The Chairperson** invited the Group of Eastern European States to submit a nomination for the office of Vice-Chairperson of the Commission.

2. **Mr. Lebedev** (Russian Federation), speaking on behalf of the Group of Eastern European States, nominated Mr. Jezewski (Poland) for the office of Vice-Chairperson of the Commission.

3. *Mr. Jezewski (Poland) was elected Vice-Chairperson by acclamation.*

**Date and place of future meetings** (*resumed*)

4. **The Chairperson**, referring to the Secretary-General's proposal that the Commission no longer hold any of its sessions in New York, said that one possible response would be to indicate that, while Commission members understood the budgetary constraints faced by the United Nations, they were unanimously opposed to the discontinuation of meetings in New York. Such a step would make it more difficult to ensure the full representation of States at both plenary and working group sessions, which would be detrimental to the Commission's central function of harmonizing trade law. It would also damage the perception of the Commission and its work.

5. However, in recognition of the need to cut costs, the Commission might wish to make an alternative proposal — to reduce its total meeting time from 15 weeks a year to 14, which would result in a saving of \$130,000 a year, an amount similar to the projected saving to be made from discontinuing meetings in New York. If the Commission were to agree to such a proposal, it should be presented to the Fifth Committee as an alternative to the discontinuation of New York meetings and not as an additional measure; it would be regrettable if the Commission were to lose a week of meeting time on top of the loss of its travel budget.

6. **Ms. Sabo** (Canada) said that her delegation supported efforts within the United Nations to reduce costs and recognized the need, however unwelcome, for a reduction in the budgets both of the International Trade Law Division and of UNCITRAL. Its support for the statement that the Commission was unanimously opposed to the discontinuation of New York meetings was therefore entirely contingent on savings being made elsewhere.

7. She welcomed the proposal to reduce the Commission's meeting time; one way to achieve that aim would be to reduce the frequency of working group sessions. If the Working Group on Security Interests completed its current project in 2012, further sessions of the Group could be postponed for a year. In addition, it might be advisable not to start new projects at a time of budget constraints.

8. Another way of reducing costs would be to reduce the number of Secretariat staff members sent to New York for sessions. Over a two-year period, the cost of sending one member of the Secretariat staff to New York was about \$16,600. However, it was important to ensure that working groups had adequate Secretariat support. In most cases, an appropriate number of staff members for a working group session would be two: one senior legal officer acting as Secretary and one less experienced legal officer. It was not generally necessary to have more than two staff members present.

9. **The Chairperson** said that reducing the number of working group sessions was certainly one way to reduce the Commission's overall meeting time. However, a more general proposal to cut one week of meeting time from the total would allow the Commission greater flexibility in deciding how to use its remaining time. For example, if in a given year the Commission did not need a full three-week session, it could decide to use part of the time for working group meetings instead.

10. **Mr. Sorieul** (Secretary of the Commission) said that, even if the Commission were allowed to keep its travel budget for sessions in New York, it would still be



necessary to reduce costs by sending fewer Secretariat staff members to those sessions. In recent years, exchange rate changes had increased the cost of paying for travel from Vienna, and that trend was likely to continue. The Secretariat was already attempting to reduce staff travel costs, for example by arranging two working group sessions back to back, and it would continue its efforts in that regard. However, a degree of flexibility should be retained, so that, for example, where it was necessary to send three staff members to a session instead of two, such a requirement could be accommodated.

11. **The Chairperson** said that the Commission could undertake to consider further ways of reducing costs for every working group session held in New York. However, it was difficult to quantify the potential cost savings in advance, since the workload could vary greatly from one session to another. For the same reason, flexibility as to staffing levels should be maintained.

12. **Mr. González** (Argentina) said there was a tendency in certain quarters to forget that UNCITRAL was an intergovernmental body and that, as such, it was concerned not merely with technical issues but also with issues of a political and financial nature. The proposal under discussion would have a significant impact on its work, and it was therefore regrettable that no working document containing detailed information and figures had been produced to support its deliberations. Instead, the Commission was being forced to base its discussion on information provided orally. There was no clear argument for departing from the practice of alternating sessions between New York and Vienna. His delegation therefore endorsed the proposal that the Commission's unanimous support for maintaining that practice should be conveyed to the Secretary-General.

13. His delegation agreed that, in its response to the Secretary-General, the Commission should propose to reduce its meeting time from 15 weeks to 14 weeks a year. However, such a step on its own would not be sufficient to address the broader concern about the funding of the Commission's work. The response to the Secretary-General's proposal should therefore include a number of other points.

14. First, the current session had shown that most of the Commission's work could be accomplished in much less time than the three weeks normally allocated to a plenary session. The Commission should therefore take an immediate decision to reduce the standard length of

its plenary sessions to two weeks, and could even consider scheduling a session of one week or one and a half weeks on a trial basis.

15. Second, a review should be carried out of the Commission's practice of holding two sessions of each working group every year. For the working groups with a clear mandate, two sessions a year were warranted, but for others that number was not justified. The number of sessions required by each working group should be determined year by year.

16. Third, it was surprising that only a partial appraisal of the working groups' activities had been carried out at the current session. A broader analysis, with inclusion of the issue of funding, should be conducted so as to establish a coherent strategy for the Commission's future work. For example, if the Commission wished to task a working group with considering the issue of microfinance, another working group should be wound down. Projects should have clear deadlines, so that work on them did not continue for years without producing results. The Commission should undertake to begin a strategic discussion along those lines at its next session with a view to reducing the number of working group meetings.

17. Lastly, the present number of Secretariat staff members was appropriate. It should not be reduced, since all of the staff members already had full workloads. Moreover, as indicated by the Chairperson, it was difficult to determine in advance how many staff members would be needed for each session. Micromanagement of staffing levels was therefore unacceptable.

18. **The Chairperson** said that the Commission might wish to make a distinction between the immediate requirement to save \$130,000 a year and the idea of a strategic review aimed at identifying further savings possibilities. Such a review was naturally desirable and necessary, but it should be an internal matter for the Commission. An offer to conduct such a review at the present stage might create an expectation that further substantial savings possibilities would be quickly identified.

19. **Mr. González Lozano** (Mexico) said that the practice of holding alternate sessions in New York and Vienna should be maintained. At the same time, UNCITRAL needed to play its part in the budget reduction efforts of the United Nations. In that context,

his delegation supported the proposal to reduce the Commission's meeting time from 15 weeks a year to 14. It also supported the proposal made by the representative of Argentina for a wide-ranging review focused on strategy and not merely on cost-cutting. Colleagues in the Fifth and Sixth Committees should be kept informed of the issues under discussion.

20. Also, the Commission could consider asking the working groups to take a more in-depth look at the organization of their work. In some cases, informal consultations might be an appropriate way forward.

21. With regard to the number of Secretariat staff members attending meetings in New York, his delegation welcomed the efforts being made to accommodate the needs of the working groups in a more efficient and effective manner, as outlined by the Secretary.

22. **Mr. Loken** (United States of America) said that his delegation welcomed the efforts being made within the United Nations to increase efficiency and reduce costs. However, the proposal to change the historical practice of holding alternate UNCITRAL sessions in New York and Vienna raised important policy questions, and alternative ways of making savings should be sought.

23. The proposed reduction of the Commission's meeting time from 15 weeks a year to 14 might present a problem in that, under the United Nations accounting system, the resulting saving might not be properly credited to the Commission's budget.

24. **Mr. Olivencia Ruiz** (Spain) said that, at a time of budgetary difficulties, it was necessary to reassess priorities. However, the "dual headquarters" arrangement for UNCITRAL was based on a long-established and politically important principle that should not be undermined by the budget situation. It was therefore necessary to find savings elsewhere, for example by reducing the amount of meeting time or documentation or by cutting travel costs. Also, the Commission should focus on improving its methods of work and making more efficient use of its time, so as to achieve the maximum results with the minimum resources.

25. **Ms. Keyte** (United Kingdom), having expressed agreement with the comments made by the representative of Spain, said that the United Nations system as a whole had been asked to achieve a budget

reduction of 3 per cent. However, it was not clear what percentage was being suggested for UNCITRAL specifically, since no report or breakdown of figures had been prepared for the current agenda item. Her delegation agreed with the proposal to reduce the Commission's meeting time from 15 weeks to 14 weeks a year. Further reductions might be possible through simple measures aimed at increasing efficiency, such as starting meetings promptly, using all the time available, and ensuring that meeting agendas were well focused. As the Chairperson had indicated, the Commission did not need to commit itself to further cuts at the present stage, but it should commit itself to seeking further savings possibilities in the future.

26. It was vital to work closely with colleagues in the Sixth and Fifth Committees and to keep them informed of the Commission's efforts to increase efficiency. In the immediate future, the Commission should consider whether further savings could be made on travel costs, staff attendance at meetings and documentation. Staff time and printing costs could be saved by producing shorter reports on working group meetings, for example. Such measures might not produce very large savings, but they would demonstrate to colleagues in New York that the Commission was serious in its efforts to increase efficiency.

27. Lastly, she agreed that the Commission should conduct a broad review of its strategy for the future. It should be proactive in considering how its aims could be achieved with maximum efficiency, rather than simply reacting to requests to make cuts.

28. **Mr. Phua** (Singapore) said that his delegation supported the current practice of holding alternate sessions in New York and Vienna, particularly as Singapore did not have a mission in Vienna. In addition, the "dual headquarters" arrangement gave the Commission's work a higher profile. Nonetheless, it was important for the United Nations, including UNCITRAL, to seek ways of achieving the same results with fewer resources or achieving greater results with the same resources. His delegation would welcome a thorough analysis of options for the future and their implications.

29. **The Chairperson** asked the Secretariat how a report on the Commission's future strategy might be prepared.

30. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat stood ready to prepare a document with a view to facilitating discussion of the streamlining of the Commission's work at the next session. However, budget decisions were taken in New York and not by the Commission, and it would be too late at that point to influence the budget for the 2012-2013 biennium.

31. The UNCITRAL Secretariat did not have direct access to the budget discussions in the Fifth Committee, but it had received from colleagues in New York copies of budget documents that indicated that the proposed cut to the Commission's budget was 63.5 per cent. That was the extent of the savings that would be achieved by discontinuing meetings of the Commission and its working groups in New York.

32. Cuts had also been proposed in the budget for non-post expenditures of the International Trade Law Division: the amount allocated for the recruitment of consultants was \$60,000 over two years, a reduction of 23.6 per cent; \$180,000 had been allocated for the recruitment of experts, a cut of almost 18 per cent; the general travel budget was \$94,000, a cut of 20 per cent; the amount allocated for contractual services such as computer maintenance had been cut by 6.5 per cent to \$99,000; and the budget for office supplies had been reduced by 45 per cent. That left little room for manoeuvre; it would be difficult to achieve further savings without cutting posts. While the budget reduction requested by the Secretary-General for the United Nations as a whole was 3 per cent, the budgets proposed for the International Trade Law Division and UNCITRAL represented a cut of more than 5 per cent.

33. **The Chairperson** said that, while the Commission had no power to make budget decisions, the fact that it was being consulted about the proposed cuts was welcome. However, in order to respond to the proposals made, it needed appropriate information contained in a formal report and not simply conveyed orally. Moreover, such a report should focus not only on making cuts but also on the broader issue of increasing efficiency. It was important, for example, to start meetings on time so as to avoid wasting conference room resources.

34. **Mr. González** (Argentina), recalling the comments made by the United States representative, said that the Commission should point out, in its response to New York, that the proposed reduction in meeting time should be accounted for correctly. Also, Commission members should convey their concerns to colleagues in

the Fifth and Sixth Committees so that they might support the Commission's position.

35. The Commission's response should not be overly specific about where cuts would be made; an assurance that the Commission would continue considering the issue should suffice.

36. Although decisions on the Commission's budget were taken in New York, it was vital for the Commission to provide input to the budget process based on its expertise and experience. To that end, a working document should be prepared by the Secretariat for the next session so that the Commission did not have to rely on information provided orally, and the working document should be issued well before the session so that delegations might have time to consult with their capitals. The working document should be proactive, proposing a strategy that would both benefit the Commission and lead to cost reductions.

37. **Mr. Kerma** (Egypt) said that, in the present climate of austerity, the Commission was fully aware that it would have to accept its share of cuts. His delegation supported the proposals to make savings by reducing the Commission's annual meeting time to 14 weeks and by reducing the number of documents produced. Also, the Commission should try to improve its working practices. At the current session, the establishment of a drafting group to work on the UNCITRAL Model Law on Public Procurement had saved time in the plenary meetings and paved the way for an agreement.

38. The challenge for the Commission was to achieve the objectives set out in its mandate while striving to improve its working methods at a time of shrinking budgetary resources. Improved working methods would lead to greater efficiency in the long term, but they could not be achieved without an investment of resources in the short term. An in-depth study on that issue was needed.

39. **Mr. Bellenger** (France) said that his delegation would welcome a document that provided the information necessary for the Commission's discussions and offer some possible solutions.

40. With regard to future strategy, supporting the activities of six working groups represented a heavy burden for the Secretariat; perhaps the number of working groups should be reduced. For example, the Working Group on Security Interests could be wound down in the near future, on completion of its current project.

41. **Ms. Addario Dávalos** (Paraguay) said that the “dual headquarters” arrangement for UNCITRAL should be maintained. At the same time, there was clearly a need to find ways of achieving savings.

42. Commission members should consult with their counterparts in New York and coordinate their approach to budget issues in the relevant Committees of the General Assembly.

43. **Ms. Sabo** (Canada) said that it was crucial not to contemplate cutting Secretariat posts as a means of achieving savings. The members of the Secretariat were already under considerable pressure in their efforts to fulfil all the tasks required of them by the Commission; indeed, some tasks had been outsourced and some working groups were unable to proceed with their work because the Secretariat was so thinly stretched. Moreover, cutting posts was ill-advised from the point of view of succession planning and staff development. The Secretariat should have a good mix of senior and junior staff and should be properly equipped to support the Commission in its work.

44. It was regrettable that no formal document with figures had been presented to the Commission in order to permit an informed discussion on budget reductions. Her delegation looked forward to considering, at the next session, a report that would enable the Commission to take decisions on priorities, in the light of the resources available.

45. **The Chairperson**, referring to the absence of a detailed report at the current session, said it should be borne in mind that the Secretariat was reacting to a developing situation as best it could.

46. **Mr. Gandhi** (India) said that the “dual headquarters” arrangement should be maintained, but it was nonetheless important to look for budgetary savings elsewhere. In that regard, his delegation supported the proposal to reduce the Commission’s meeting time from 15 weeks a year to 14. It looked forward to a detailed report, as Commission members needed clear facts and figures. Without them, it would be difficult to argue the Commission’s case with counterparts in the Fifth and Sixth Committees.

47. **Mr. Jezewski** (Poland) said that the Commission should seek immediate small efficiency gains that would send the right message to New York. Discussion of the budget situation should be linked with discussion of a

long-term plan for the Commission’s work and of potential savings.

48. His delegation, which would like a report to be prepared by the Secretariat, was in favour of a reduction in the Commission’s meeting time from 15 weeks a year to 14.

49. **Mr. Lebedev** (Russian Federation) said that UNCITRAL was not alone in having to contemplate budget cuts; the entire United Nations system was affected.

50. It was difficult to make specific proposals without the benefit of a supporting document; nonetheless, a number of options that would not impair the effectiveness of the Commission’s work had been identified.

51. Departing from long-established principles would be detrimental not only to the work of the Commission but also to its standing as the United Nations body concerned with the legal aspects of the international economy.

52. The proposals made by delegations were worthy of consideration. However, they should perhaps not all be mentioned in the Commission’s response to the Secretary-General’s proposal. The Secretariat should prepare a document on the basis of the Commission’s discussions that did not commit the Commission to cuts that might hamper the continued implementation of the agreed workplan.

53. **Mr. Maradiaga Maradiaga** (Honduras) said that his delegation supported the continuation of the “dual headquarters” arrangement and the proposal to reduce the Commission’s meeting time. Since some of the working groups had overlapping mandates, merging them might help to increase efficiency. The Secretariat could advise on the practicalities of such a step.

54. **Mr. Piedra** (Observer for Ecuador) said that it was important to emphasize, when the Commission’s views were presented to the General Assembly, that the proposal to discontinue meetings in New York would hamper the ability of some States to participate fully in the Commission’s work, particularly those developing countries that did not have missions in Vienna.

55. In countries like Ecuador, there was little awareness of the work of UNCITRAL, which was sometimes perceived as an elite club for rich countries where the voice of the developing world was not heard.

If it were made more difficult for developing countries to participate, that perception would only be reinforced.

56. **The Chairperson** said that every effort should be made to explain the Commission's position to the General Assembly, and States should speak up in defence of the Commission's proposal to reduce its meeting time. The Commission was unanimously opposed to the proposal to discontinue meetings in New York not simply on the grounds that such a step would hinder the Commission's work and damage the perception of UNCITRAL, but also as a matter of principle: it was vital to ensure that developing countries were able to participate.

57. He took it that, in its response to the Secretary-General's proposal, the Commission wished to make it clear that it had understood the need for budget cuts and had spent considerable time debating the issue. It would state its unanimous opposition to the discontinuation of meetings in New York and propose instead a reduction in meeting time from 15 to 14 weeks a year, which would achieve an equivalent saving that should be recognized as such even if it pertained to a different part of the budget. Further, the Commission would state that it had decided to carry out a fuller analysis of its methods of work and priorities. There was no need to indicate specific actions; they would be reflected in the Commission's report on the work of the session. If the Commission's proposal were not accepted and its New York sessions were discontinued, those sessions already scheduled to take place in New York in 2012 would have to be rescheduled at short notice. The Commission might wish to indicate in its response that it was aware of that possibility and was ready to address it should the need arise.

58. *It was so decided.*

59. **Ms. Sabo** (Canada) asked whether there was any problem that needed immediate attention with regard to the scheduling of the next session of Working Group I.

60. **Mr. Sorieul** (Secretary of the Commission) noted that the Commission had agreed that Working Group I would hold only one session within the next 12 months, not two as indicated in the Commission's agenda (A/CN.9/711). From the budgetary point of view, it would be wisest to hold that session before the end of 2011. Both Working Group I and Working Group VI wished to hold their sessions as late as possible in 2011, which raised the question of how to avoid a clash in their schedules. The Secretariat would try to resolve the issue before the end of

the Commission's current session. The dates in November currently allocated to Working Group III might provide an option for rescheduling.

61. **Mr. Loken** (United States of America) noted that Working Group I was currently working on, and aiming to finalize, the draft revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement. However, his delegation believed that a working group was not, in fact, the most appropriate forum for that type of work, and it had therefore expressed support for the idea of holding only one session of Working Group I before the Commission's next session. If it were deemed important, for overriding budgetary reasons, to hold the Working Group I session in 2011, it should be scheduled as late as possible in the year in order to allow the maximum possible time for further work on the draft Guide.

62. **Mr. González** (Argentina) said that his delegation favoured holding only one session of Working Group I before the Commission's next session. If a session took place late in 2011, none should be held early in 2012. However, a decision needed to be taken as to the future of Working Group I beyond its next session.

63. **The Chairperson** said it was his understanding that there would be one session of Working Group I before the end of 2011 and no session early in 2012. The Commission would decide on the future of Working Group I at its next session. Now that there was an agreed way forward, the Secretariat would try to determine the scheduling of Working Groups I and VI before the end of the Commission's current session.

*The meeting was suspended at 3.55 p.m. and resumed at 4.05 p.m.*

#### **Role of UNCITRAL in promoting the rule of law at the national and international levels (resumed)**

64. *A panel discussion on the role of commercial law reforms in post-conflict reconstruction and the use of UNCITRAL texts in that context was held. Presentations were made by the following speakers: Ms. Judith Knieper (Deutsche Gesellschaft für Internationale Zusammenarbeit), Ms. Amanda Ashford (Organization for Security and Co-operation in Europe) and Mr. Jernej Sekolec (London Court of International Arbitration).*

*The meeting rose at 5 p.m.*

**Summary record of the 941st meeting, held at the Vienna International Centre,  
Vienna, on Friday, 8 July 2011, at 9.30 a.m.**

[A/CN.9/SR.941]

*Chairperson:* Mr. Moollan (Mauritius)

*The meeting was called to order at 9.45 a.m.*

**Adoption of the report of the Commission**

1. **The Chairperson** invited the Rapporteur, Mr. Phua (Singapore), to introduce the draft report of the Commission on the work of its forty-fourth session.

2. **Mr. Phua** (Singapore), Rapporteur, said that documents A/CN.9/XLIV/CRP.1 and addenda would together form the report of the Commission. As addenda 16, 17 and 21 were still in preparation, the Commission had before it addenda 1-15 and 18-20. He noted that in addendum 7, the chapter heading was incorrectly indicated as part VI.

3. **Mr. Sorieul** (Secretary of the Commission) said that, as usual, delegations should provide written notification of any typographical errors and other errors of form. The Secretariat would revise the report without modifying the substance, and the report would be formally edited prior to submission to the United Nations General Assembly.

*A/CN.9/XLIV/CRP.1*

4. *Document A/CN.9/XLIV/CRP.1 was adopted.*

*A/CN.9/XLIV/CRP.1/Add.1*

5. **Ms. Nicholas** (Secretariat) said that she would present comments on behalf of delegations involved in the discussions on public procurement that had already returned to their capitals.

6. With regard to the first sentence in paragraph 12, in order to address a concern that the meaning of the phrase “located with the definitions (f) and (g)” was not clear, it was proposed that it be amended to read “It was further agreed that article 2 should contain new definitions of ‘pre-qualification’ and ‘pre-selection’, which would be located with the definitions (f) and (g).”

7. It was proposed that the words “were raised” in the last sentence of paragraph 8 be moved to the beginning of the sentence, so that it read “Concerns were raised about [remainder unchanged]”.

8. It was proposed that paragraph 24 be amended to read “The Commission agreed that the guide text would discuss the risks of discrimination where specific production methods were mentioned by drawing attention to the prohibition against discriminatory treatment in article 10 (2).”

9. Regarding paragraph 40, it was proposed to add a new sentence at the end reading “After discussion, this proposal was not retained.”

10. **The Chairperson** took it that there were no objections to the proposed changes.

11. *Document A/CN.9/XLIV/CRP.1/Add.1, as orally revised, was adopted.*

*A/CN.9/XLIV/CRP.1/Add.2*

12. **Ms. Nicholas** (Secretariat) said that it was proposed that in paragraph 19 “World Bank requirements” be amended to read “MDB (Multilateral Development Bank) requirements.”

13. It was proposed that paragraph 22 be amended to read: “The Commission discussed whether to delete the reference to “low” in the provisions to avoid confusion with other provisions of the Model Law that referred to a low-value threshold, but agreed to retain the current wording, noting that the provision would be explained in the Guide.”

14. **The Chairperson** took it that there were no objections to the proposed changes.

15. **Ms. Sabo** (Canada) proposed the addition, for clarification purposes, of the following sentence at the end of paragraph 29: “After consideration, this proposal was rejected as it was believed that the subject matter of a procurement is a question of fact which cannot easily fall under a generic definition and it was therefore felt better to leave it open and to include a discussion in the Guide.”

16. *It was so decided.*

17. **Ms. Nicholas** (Secretariat), referring to paragraph 43, said that the deletion of the words “in the long term” in the fourth sentence was proposed.

18. It was proposed that paragraph 46 be expanded to read “The need to clarify confusing terminology in articles 63-68 was raised.”

19. **The Chairperson** took it that there were no objections to those proposals.

20. *Document A/CN.9/XLIV/CRP.1/Add.2, as orally revised, was adopted.*

*A/CN.9/XLIV/CRP.1/Add.3*

21. **Ms. Nicholas** (Secretariat), drawing attention to the second sentence in paragraph 15, which read “The Commission deferred its decision on the proposal to a later stage.”, said that the report would make it clear that the proposal in question had been accepted.

22. In the last sentence of paragraph 23, it was proposed to insert “[name of the independent body]” after “provide”.

23. **The Chairperson** said he took it that those proposals were acceptable.

24. *Document A/CN.9/XLIV/CRP.1/Add.3, as orally revised, was adopted.*

*A/CN.9/XLIV/CRP.1/Add.4*

25. **Ms. Nicholas** (Secretariat) said, with regard to paragraph 13, that it was proposed that the following sentence be added at the end: “The alternative view was that the previous wording implied the use of the English language, which would not be appropriate, and also that the revised wording reflected modern practices such as the use of Internet-based communications.”

26. Regarding paragraph 14, it was proposed that the words “for international publication” be added to the second sentence, so that it would read: “It was also agreed that the Guide would describe the different ways in which the requirements for international publication could be fulfilled [remainder unchanged].”

27. It was proposed that the first sentence of paragraph 15 be amended to read as follows: “The Commission agreed that the Guide should (a) note that the provisions would require that the publication be made in a language that would make it in fact accessible to all potential suppliers or contractors in the context of

the procurement concerned and (b) alert enacting States that, in the WTO, [remainder unchanged]”. The final sentence would be deleted.

28. In paragraph 17, the first part of the sentence should be amended to read “The Commission agreed to replace paragraph (2) with the following wording: ‘All suppliers [remainder unchanged]’”.

29. Regarding subparagraph 40 (2), it was proposed that “an appeal” be amended to read “an application or appeal”.

30. Regarding the first sentence of paragraph 42, the insertion of “, subject to clarification of terminology” after “along the following lines” was proposed.

31. Regarding paragraph 47, the insertion of the words “appeal and” before “or appellant” was proposed.

32. In paragraph 49, the noun “reference” should be in the plural — “references”.

33. In paragraph 50, the phrase “may apply to the procuring entity” should be replaced with “may apply to the [name of independent body]”.

34. Regarding paragraph 51, it was proposed that the following phrase be added at the end: “and that the word ‘appellant’ be replaced with the word ‘applicant’”.

35. Regarding paragraph 54, it was proposed that: the phrase “that is in compliance with the provisions of this Law” in subparagraph (d bis) be deleted; and subparagraph (h) be amended to read “Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting an application or an appeal as a result of an act or decision of, or procedure followed by, the procuring entity in the procurement proceedings which is not in compliance with the provisions of this Law, and for any loss or damages suffered [, which shall be limited to costs for the preparation of the submission or the costs relating to the application, or both]”.

36. The addition of the following sentence at the end of paragraph 56 was proposed: “It also agreed to add the words ‘duly notified of the proceedings’ after the words ‘a supplier or contractor’ at the beginning of the second sentence.”

37. Regarding the first sentence of paragraph 65, it was proposed that the phrase “the view was expressed that some of its provisions” be amended to read “a view expressed was that some of its provisions”. Regarding

the second sentence, the replacement of “the point was made that” with “according to that view” was proposed.

38. **The Chairperson** took it that there were no objections to the proposed changes.

39. *Document A/CN.9/XLIV/CRP.1/Add.4, as orally revised, was adopted.*

*A/CN.9/XLIV/CRP.1/Add.5*

40. **Ms. Nicholas** (Secretariat) said it was proposed that in the first sentence of paragraph 1 “part of” be replaced with “accompaniment to”.

41. **Mr. Sorieul** (Secretary of the Commission), in response to a question from **Mr. Bellenger** (France) in relation to paragraph 2, said that the session of Working Group I scheduled for the second half of 2011 was to be cancelled and the next session would be held in New York in April 2012 or in Vienna at the end of February 2012.

42. **Ms. Nicholas** (Secretariat), describing the process for finalizing the draft Guide to Enactment through extensive consultations, said that the Secretariat would amend the draft pursuant to the instructions given by Working Group I at its twentieth session. The draft would then be circulated as widely as possible by e-mail. A series of expert group consultations would be held in the second half of 2011 so that the text submitted to Working Group I early in 2012 was as near-final as possible. If the Working Group I session took place in April, there would be only a short time in which to finalize the text for submission to the forty-fifth session of the Commission.

43. **Mr. Bellenger** (France) said that the Working Group I session should not be held too close to the forty-fifth session of the Commission. The February 2012 option was therefore preferable.

44. **The Chairperson** suggested that further discussion on the matter be deferred until the Commission dealt with the section of the draft report that dealt with the dates of meetings.

45. **Ms. Nicholas** (Secretariat) said it was proposed that in the first sentence of paragraph 9 the second “in particular” be replaced with “also”, so that the sentence read “The need for States to take a more active role in promoting the use of the 2011 Model Law and its effective implementation and uniform interpretation, in particular through States’ donor agencies, was stressed,

also given resource constraints in the Secretariat for such work.”

46. Regarding paragraph 11 it was proposed that a sentence reading as follows be added: “It was noted that this topic could include many aspects, of which public procurement was only one.”

47. **The Chairperson** took it that there were no objections to the proposed changes.

48. **Mr. Gautney** (United States of America) proposed the addition to the first sentence of paragraph 14 of the words “at its last working group session”, so that the sentence would read “At its current session, the Commission noted that Working Group V had considered at its last working group session [remainder unchanged]”.

49. **The Chairperson** took it that there were no objections to that change.

50. *Document A/CN.9/XLIV/CRP.1/Add.5, as orally revised, was adopted.*

*A/CN.9/XLIV/CRP.1/Add.6*

51. **The Chairperson** proposed the replacement of “understanding” with “commitment” in the last sentence of paragraph 3.

52. *It was so decided.*

53. **Mr. Gautney** (United States of America) proposed that, in order to record the fact that some delegations wished to make a distinction between a right accorded by the transparency rules and a right under the treaty, a sentence or the following lines be added at the end of paragraph 5: “It was noted that “amicus curiae” participation of a non-disputing State party to the investment treaty should be distinguished from situations in which a non-disputing State party participated in the arbitration pursuant to a right provided in the treaty.”

54. **The Chairperson** proposed that the Secretariat finalize the wording.

55. **Ms. Sabo** (Canada) said that, while it was normally preferable to finalize wording in the Commission, the proposed sentence could, in her view, be referred to the Secretariat.

56. **Ms. Jamschon MacGarry** (Argentina) proposed that the second sentence of paragraph 5 be reworded



along the following lines: “It was said that different approaches to the intervention of different types of “*amici curiae*” should be considered and that, in order to assess the suitability of the participation by non-disputing States parties to the treaty, the scope and modalities of such participation and the conditions under which such participation was regulated should be further considered.

57. **The Chairperson** said that two substantive issues were involved. First, the Commission should not give Working Group I the impression that it was presuming that the transparency rules should give non-disputing parties the right to participate; there was no intention of pre-empting the outcome. Secondly, the report should reflect the fact that there had been discussion as to whether the right of a non-disputing State to participate arose from the transparency rules or from a right under the treaty.

58. **Mr. Jezewski** (Poland) suggested that, in order to reflect the concerns of the United States and Argentina, which he shared, the first part of the second sentence be deleted, so that the sentence would read “The manner in which the intervention of such a State should be dealt with should be left for further consideration by the Working Group.”

59. **The Chairperson** proposed, after a further intervention by **Ms. Jamschon MacGarry** (Argentina), a formulation on the following lines: “Whether there should be such a right of intervention, and, if so, the manner, scope and modalities of such intervention, should be left for further consideration by the Working Group.”

60. *It was so decided.*

61. **The Chairperson** proposed that, in paragraph 8, the words “might need” be replaced by the word “needed”; the Commission had reached an agreement to that effect.

62. *It was so decided.*

63. **Mr. Bellenger** (France) said, with reference to the last sentence of paragraph 15, that he did not recall the Commission’s agreeing that conciliation/mediation with respect to the settlement of treaty-based investor-State disputes should be considered as a topic for future work of Working Group I.

64. **Ms. Sabo** (Canada), concurring, proposed that the words “The Commission agreed” be replaced by the words “It was suggested”.

65. *It was so decided.*

66. *Document A/CN.9/XLIV/CRP.1/Add.6, as orally revised, was adopted.*

*A/CN.9/XLIV/CRP.1/Add.7*

67. **Mr. Bellenger** (France) said, in relation to the last sentence of paragraph 9, that not only consumer protection legislation was involved. The sentence should therefore be preceded by the following phrase: “Generally, pursuant to its mandate,”.

68. *It was so decided.*

69. *Document A/CN.9/XLIV/CRP.1/Add.7, as orally revised, was adopted.*

*A/CN.9/XLIV/CRP.1/Add.8*

70. **Mr. Gautney** (United States of America) proposed that the following phrase be added at the end of the second sentence of paragraph 3: “, which would provide States that had enacted the secured transactions law recommended in the Guide with practical advice as to the issues to be addressed in the context of the establishment and operation of a general security rights registry”.

71. *It was so decided.*

72. **Mr. Gautney** (United States of America) proposed the addition of the following sentence before the penultimate sentence in paragraph 4: “There was no general discussion of the merits of that proposed approach or of alternative approaches.” If that proposal was accepted, the words “In that connection” at the beginning of the penultimate sentence should be deleted.

73. **Ms. Sabo** (Canada), supported by **Mr. Grand d’Esnon** (France), questioned the need to refer to a general discussion that had not taken place.

74. **The Chairperson** took it that the Commission wished to leave the text unchanged.

75. *It was so decided.*

76. **Mr. Tata** (Observer for the World Bank) suggested that the second sentence of paragraph 7 be reworded to read “It was noted that, based on the precedent of the coordination between the World Bank Principles and

Guidelines for Effective Insolvency and Creditor Rights Systems and the *UNCITRAL Legislative Guide on Insolvency Law*, a draft of those principles could be jointly prepared by the Secretariat in cooperation with the World Bank, through its legal vice-presidency, and outside experts within existing resources and without utilizing Working Group resources.”

77. In response to a question from **the Chairperson** concerning the need for the word “jointly”, he said that the final product would need to be used by the World Bank and integrated into a pattern that already existed. If that was understood, the word “jointly” was unnecessary.

78. *Document A/CN.9/XLIV/CRP.1/Add.8, as orally revised, was adopted.*

*A/CN.9/XLIV/CRP.1/Add.9*

79. **Mr. Gautney** (United States of America) proposed that in paragraph 5 “UNCITRAL” be inserted between the words “prevent” and “from” in the third sentence.

80. *It was so decided.*

81. **Ms. Sabo** (Canada) proposed that in the second sentence of paragraph 5 the words “Broad consensus was expressed on” be replaced by the words “The prevailing view supported”.

82. **The Chairperson** said that he saw no support for that proposal.

83. **Mr. Gautney** (United States of America), referring to paragraph 6, proposed that the following sentence be added at the end: “It was suggested that, time and resources permitting, a reconvened working group consider a recommendation pending in UN/CEFACT that raises issues under UNCITRAL instruments.”

84. *It was so decided.*

85. **Mr. Gautney** (United States of America), referring to paragraph 7, proposed that the following sentence be added at the end: “It was also noted that work regarding electronic transferable records may include certain aspects of the other topics discussed in documents A/CN.9/728 and A/CN.9/728/Add.1.”

86. **The Chairperson** took it that the Commission wished to accept that proposal.

87. *It was so decided.*

88. **Mr. Gautney** (United States of America) proposed that paragraph 11 be reworded to read “The Commission also agreed that the extension of the mandate of Working Group IV (Electronic Commerce) to other topics discussed in documents A/CN.9/728 and A/CN.9/728/Add.1 as discrete subjects (as opposed to their incidental relation to electronic transferable records) would be further considered at a future session.”

89. *It was so decided.*

90. *Document A/CN.9/XLIV/CRP.1/Add.9, as orally revised, was adopted.*

*A/CN.9/XLIV/CRP.1/Add.10*

91. **Mr. Seweha Boles** (Egypt) asked what need there was for the words “in particular” in subparagraph 4 (n). Unless the reason for their inclusion was to distinguish microenterprises and SMEs from individuals, they were redundant and should be deleted.

92. *It was so decided.*

93. **Mr. Gautney** (United States of America) proposed that at the end of the second sentence of paragraph 7 the following phrase be added: “, keeping in mind the scope of UNCITRAL’s mandate and its traditional areas of work”.

94. *It was so decided.*

95. *Document A/CN.9/XLIV/CRP.1/Add.10, as orally revised, was adopted.*

*A/CN.9/XLIV/CRP.1/Add.11 and 12*

96. *Documents A/CN.9/XLIV/CRP.1/Add.11 and 12 were adopted.*

*A/CN.9/XLIV/CRP.1/Add.13*

97. **Mr. Gautney** (United States of America) proposed that, in paragraph 13, the phrase “cost incurred by the Secretariat” be replaced by the phrase “cost associated with time spent by Secretariat personnel on such activities”.

98. *It was so decided.*

99. *Document A/CN.9/XLIV/CRP.1/Add.13, as orally revised, was adopted.*

*A/CN.9/XLIV/CRP.1/Add.14 and 15*

100. Documents *A/CN.9/XLIV/CRP.1/Add.14 and 15* were adopted.

*A/CN.9/XLIV/CRP.1/Add.18*

101. **Ms. Montineri** (Secretariat) said that one delegation had requested the addition of the following sentence at the end of paragraph 2: “Appreciation was also expressed to all institutions and experts involved in the preparation and implementation of the moot competition.”

102. *It was so decided.*

103. Document *A/CN.9/XLIV/CRP.1/Add.18*, as orally revised, was adopted.

*A/CN.9/XLIV/CRP.1/Add.19*

104. Document *A/CN.9/XLIV/CRP.1/Add.19* was adopted.

*A/CN.9/XLIV/CRP.1/Add.20*

105. **Ms. Sabo** (Canada) said that the reference in paragraph 3 to “11 female interns and 12 interns coming from developing countries” was misleading.

106. **The Chairperson** suggested that the Secretariat make the wording of the sentence in question more felicitous.

107. *It was so decided.*

108. **Ms. Sabo** (Canada) proposed that the words “and options” be inserted after the word “issues” in the last sentence of paragraph 6.

109. *It was so decided.*

110. **Mr. Sorieul** (Secretariat) proposed the reinsertion in paragraph 6, after the first sentence, of the following text: “The Commission noted that, under General Assembly resolution 49/221, it was entitled to summary records. Furthermore, the Commission noted that it had previously addressed the issue of the necessity of summary records at its thirty-seventh session. On that occasion, the Commission had been presented with the option of edited verbatim transcripts or digital sound recordings and had determined that summary records were essential for its work.” — that text to be accompanied by a footnote reference to paragraphs 129 and 130 of the report of the Commission on its thirty-seventh session (General Assembly document A/39/17).

111. **Ms. Sabo** (Canada) said that paragraph 6 should, in order to reflect the tone of the debate, indicate the Commission’s willingness to consider other options.

112. **The Chairperson** proposed that the final sentence of paragraph 6 (“After discussion, ...”) be reformulated in such a way as to indicate that the Commission was willing to consider other options.

113. *It was so decided.*

114. Document *A/CN.9/XLIV/CRP.1/Add.20*, as orally revised, was adopted.

*The meeting rose at 11.40 a.m.*

**Summary record of the 942nd meeting, held at the Vienna International Centre,  
Vienna, on Friday, 8 July 2011, at 2.30 p.m.**

[A/CN.9/SR.942]

*Chairperson:* Mr. Moollan (Mauritius)

*The meeting was called to order at 2.45 p.m.*

**Adoption of the report of the Commission (continued)**

*A/CN.9/XLIV/CRP.1/Add.16*

1. **Ms. Sabo** (Canada) suggested that, in the last sentence of paragraph 14, the words in square brackets — “[in accordance with the applicable criteria and procedure]” — and the accompanying footnote be deleted.

2. *It was so decided.*

3. **Ms. Sabo** (Canada) suggested that the last sentence of paragraph 16 be amended to read “It was agreed that the relevant information should be effectively communicated to those persons responsible for the work of UNCITRAL within the Governments of Member States.”

4. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat seldom knew who was responsible for the work of UNCITRAL within the Governments of Member States. It communicated, by means of notes verbales, with Member States through formal diplomatic channels, permanent missions, and was not responsible for problems of communication between the permanent mission of a country and the capital. It did send copies of notes verbales to organizations that it knew to be involved in UNCITRAL matters, but it could not bypass the permanent missions of Member States or take on the obligation of identifying individual persons.

5. **The Chairperson** suggested that the sentence be amended to read “It was agreed that, in addition to communication through formal diplomatic channels, the Secretariat would endeavour to circulate the relevant information to persons whom it knew to be involved with the work of UNCITRAL.”

6. **Mr. González** (Argentina), expressing support for the points made by the Secretary of the Commission, said that the sentence should not be changed. If it were changed in either of the manners suggested, permanent missions would have to be informed of all

communications addressed by the Secretariat to persons in the Member States that they represented.

7. **The Chairperson** suggested, in the light of the point made by the representative of Argentina, that the sentence be amended to read “It was agreed that, in addition to communication through formal diplomatic channels, the Secretariat would endeavour to circulate the relevant information to persons whom it knew to be involved with the work of UNCITRAL, always keeping the permanent mission informed.”

8. **Mr. Sorieul** (Secretary of the Commission) said that a formal mechanism whereby the Secretariat had to provide permanent missions with copies of all communications addressed to persons in the Member States represented by them who were known to be involved with the work of UNCITRAL would be very cumbersome.

9. **The Chairperson**, drawing attention to the words “would endeavour” in the sentence just suggested by him, said that the Secretariat would not be under an obligation.

10. **Mr. Sorieul** (Secretary of the Commission) said that an unnecessary bureaucratic burden could be avoided if in notes verbales sent to permanent missions it was stated that copies were being sent to persons in the Member States represented by them who were involved with the work of UNCITRAL.

11. **Mr. González** (Argentina) suggested that the last sentence of paragraph 16 be left as it stood and a sentence along the following lines be added at the end of the paragraph: “A number of delegations were of the view that it would be effective also to circulate the relevant information to persons whom it knew to be involved with the work of UNCITRAL.”

12. **The Chairperson** suggested that the proposed additional sentence read “A number of delegations were of the view that it would be effective also to circulate the relevant information to members of delegations to UNCITRAL.”

13. *It was so decided.*

14. **Ms. Sabo** (Canada) suggested that the last sentence of paragraph 18 be amended in such a way as to distinguish between comments made by the Secretariat and comments made by members of the Commission.

15. **Mr. Jezewski** (Poland) suggested the deletion of “certain” from the second sentence of paragraph 18.

16. **The Chairperson** took it that there were no objections to those suggestions.

17. *It was so decided.*

18. **Mr. Bellenger** (France) suggested that, in the first sentence of paragraph 20, the words “Another suggestion was to endorse the procedure followed so far by the Secretariat” be replaced by words to the effect that the Secretariat explained the procedure followed by it.

19. *It was so decided.*

20. **Mr. Bellenger** (France), supported by **Ms. Sabo** (Canada), suggested that the last sentence of paragraph 20, in order to better reflect the discussion, be amended using words to the effect that the procedure was nevertheless considered to be insufficiently transparent and efficient.

21. **The Chairperson** said that, given the tenor of the discussion, the report should state that the procedure had been considered to be good but still capable of being improved.

22. **Ms. Keyte** (United Kingdom) said that amending the sentence as suggested by the representative of France would mean contradicting the opening words of the first sentence of paragraph 21 (“While no objection was raised to that procedure”). Perhaps the last sentence of paragraph 20 should be deleted.

23. **The Chairperson** took it that there were no objections to the deletion of the last sentence of paragraph 20.

24. *It was so decided.*

25. **Ms. Sabo** suggested the deletion of the first sentence of paragraph 21 — objections had been raised to the procedure in question.

26. **Mr. Bellenger** (France), supported by **Ms. Sabo** (Canada), said that paragraph 21 should clearly indicate what procedure would be followed in the future.

27. He suggested that the paragraph be rewritten using words to the effect that, as a result of the discussion, the Commission had requested the Secretariat to inform States of the names of the non-governmental organizations that it intended to invite, in line with paragraph 10 in the Annex (UNCITRAL rules of procedure and methods of work) to document A/CN.9/697. The Secretariat should make accessible lists of the non-governmental organizations to be invited to Commission and working group sessions before the sessions.

28. **The Chairperson** recalled that the purpose of the Commission’s report was to record the decisions actually taken by the Commission — not decisions that some Commission members would have liked to see taken.

29. The issue was a sensitive one, and it was particularly important that the tenor of the discussion be accurately reflected in the Commission’s report.

30. **Mr. Jezewski** (Poland) suggested that just the phrase “While no objection was raised to that procedure,” in the first sentence of paragraph 21 be deleted.

31. He also suggested the replacement of the word “agreed” in the second and third sentences with “suggested” or “proposed”.

32. **The Chairperson** said that the phrase “While no objection was raised to that procedure,” was probably inaccurate and should perhaps therefore be deleted.

33. As to the word “agreed”, his recollection was that there had indeed been agreement in the Commission. In his view, therefore, that word should remain in the second and third sentences.

34. **Mr. Bellenger** (France) said that he could see no difference between what his delegation had suggested and what the Chairperson seemed to be contemplating. The purpose of his delegation’s suggestion had simply been to make it clear what the Commission had concluded.

35. **The Chairperson** proposed, in order to make matters clearer, the insertion in the third sentence of a parenthetical reference to paragraph 17.

36. Apart from the delegation of Canada, no delegations seemed to be in favour of the reformulation suggested by the delegation of France. At the same time, there seemed to be no objections to the proposal regarding a reference to paragraph 17 that he had just made.

37. **The Rapporteur** said it had indeed been agreed that “referring States to the updated lists available online should be sufficient”, but the point had been made that the lists should be updated *before* Commission and working group sessions.

38. **The Chairperson** said that, in his view, the fact that the lists would be updated before Commission and working group sessions was made clear by the third sentence of paragraph 21 — “It was agreed that States should be reminded of the availability of the updated lists [parenthetical reference to paragraph 17] in the standard note verbale ...”.

39. **Mr. Bellenger** (France) said he was not sure that the third sentence of paragraph 21 made it sufficiently clear that the lists would be updated before Commission and working group sessions.

40. **Mr. Sorieul** (Secretary of the Commission) said that the issue was an important one, and it was addressed in paragraph 20 (ii) — “at the same time the invitation was extended to such organization, the relevant list of invited organizations accessible to Member States being updated;”. The Secretariat envisaged updating lists of invited organizations before the sessions in question.

41. **The Chairperson** suggested that a reference to subparagraph 20 (ii) be inserted in paragraph 21.

42. **Mr. Bellenger** (France) said that, in his delegation’s view, such cross-referencing still left matters unclear.

43. His delegation would be very vigilant in checking whether lists of invited organizations were indeed updated before the sessions in question. If they were not, it would raise the issue formally — and without waiting until the Commission’s next session.

44. **The Chairperson** took it that the Commission wished to adopt paragraph 21 with the inclusion of references to paragraph 17 and subparagraph 20 (ii).

45. *It was so decided.*

46. *Document A/CN.9/XLIV/CRP.1/Add.16, as orally revised, was adopted.*

47. *Document A/CN.9/XLIV/CRP.1/Add.17 was adopted.*

*A/CN.9/XLIV/CRP.1/Add.21*

48. **The Chairperson**, referring to the last sentence of paragraph 2, proposed the insertion of “continued or” before “increased representation”.

49. He proposed the addition of the following sentence at the end of paragraph 2: “In terms of perception, it was also important that the uniform instruments of UNCITRAL be seen to be the result of a worldwide consensus based on proper representation.”

50. **Mr. Sorieul** (Secretary of the Commission) called for the inclusion of a sentence along the following lines: “Concern was expressed that the proposed change in the pattern of meetings would contradict General Assembly resolutions A/RES/2205 of 17 December 1966 on the establishment of UNCITRAL, A/RES/2609 of 16 December 1969 and A/RES/31/140 of 16 December 1976, all of which dealt with the problem of UNCITRAL meetings.”

51. **Ms. Sabo** (Canada) proposed the insertion of the word “Unanimous” before “Support” at the beginning of the second sentence of paragraph 2.

52. Regarding the third sentence of that paragraph, her delegation could not go along with the phrase “was not acceptable”. It was of the view that, if an alternative to cutting the travel budget of Secretariat staff to service UNCITRAL meetings in New York could not be found, the Secretary-General’s proposal would have to be accepted. She proposed the deletion of the words “was not acceptable since it”.

53. Similarly, her delegation could not go along with the words “was unacceptable” in paragraph 4.

54. **Ms. Keyte** (United Kingdom) suggested that paragraph 3, which set out the background to what was stated in paragraph 2, be moved to before paragraph 2.

55. **Mr. Bellenger** (France) expressed support for the proposed deletion of the words “was not acceptable since it” in paragraph 2.

56. **The Rapporteur** said that, instead of simply deleting those words, the Commission should find a softer way of expressing its view regarding the Secretary-General’s proposal.

57. **Mr. Sorieul** (Secretary of the Commission) said that, if the Commission did not send to New York a clear message to the effect that it was not prepared to abandon the present pattern of meetings, that pattern of meetings would be abolished. The Commission needed to take a firm stand.

58. **Ms. Keyte** (United Kingdom), following up on the suggestion just made by her, proposed that paragraphs 2 and 3 be rearranged and reformulated as three paragraphs reading as follows:

“2. The Commission took note of the proposal. Unanimous support was expressed for efforts to achieve savings across the United Nations.

“3. [Paragraph 3 (a) is contained in document A/CN.9/XLIV/CRP.1/Add.21]

“3 bis. Member States attending the session unanimously considered that abolishing the alternating pattern of meetings would entail detrimental consequences on UNCITRAL’s ability to continue its work on harmonization and unification of the law of international trade. That work, it was said, presupposed the fullest possible participation of States in the sessions of the Commission and its working groups so that UNCITRAL standards achieved universal acceptability. It was emphasized that the special interest of developing countries should be taken into account to ensure their increased representation in the work of UNCITRAL. The Commission expressed its full support for continuing the current pattern of meetings of UNCITRAL.”

59. Also, she proposed the deletion of the phrase “, while the proposed abolition of the alternating pattern of meetings was unacceptable,” in paragraph 4.

60. **Mr. Jezewski** (Poland) said that his delegation, which could understand the concern of the delegation of Canada about the use of strong words like “unacceptable”, nevertheless considered it important that the Commission send a clear message to New York. It could go along with the proposal just made by the representative of the United Kingdom, but felt that a sufficiently clear message would be achieved simply by adding “Unanimous” at the beginning of the second sentence of paragraph 2 and reformulating the third sentence to read “The proposed way of saving on UNCITRAL-related costs by abolishing the alternating

pattern of meetings found no support within the Commission since it would entail ... the work of UNCITRAL.”

61. **Ms. González Lozano** (Mexico) expressed support for the proposal made by the representative of the United Kingdom.

62. **The Chairperson** said that, logically, the content of paragraph 3 should appear before that of paragraph 2. In his view, the Secretariat could be left to mesh the two paragraphs.

63. As regards the message to be sent to New York, no members of the Commission had gone along with the idea that the right way forward in reducing the administrative costs involved in servicing UNCITRAL sessions was to abolish the New York sessions.

64. **Ms. Sabo** (Canada) said that her delegation, while believing that the holding of alternate sessions in New York should continue, would, with great regret, go along with their abolition if no acceptable alternative way of reducing the administrative costs were found.

65. **Mr. Gautney** (United States of America) said that the proposal of the representative of the United Kingdom made a lot of sense.

66. His delegation’s main concern was that the Commission should send a clear message without using strong words like “unacceptable”. It would prefer words such as “ill-advised” or “undesirable”.

67. **The Chairperson** said that the Commission seemed to want to go along with the proposal made by the representative of the United Kingdom.

68. **Mr. Sorieul** (Secretary of the Commission) suggested that, for the sake of consistency with paragraph 2 as proposed, the words “full support” at the end of proposed paragraph 3 bis be replaced with the words “unanimous support”.

69. **Ms. Nesdam** (Norway) endorsed the proposal made by the representative of the United Kingdom with the amendment proposed by the Secretary of the Commission.

70. **The Chairperson** said that the Rapporteur had suggested to him the addition, at the beginning of the final sentence of proposed paragraph 3 bis, of the phrase “In view of the above,”.

71. He took it that, together with that addition and the amendment proposed by the Secretary of the Commission, the text proposed by the representative of the United Kingdom was acceptable to the Commission.

72. **Mr. Gautney** (United States of America) said that the word “unacceptable” in the first sentence of paragraph 4 should be replaced with something on the lines of “ill-advised” or “undesirable”, in order to soften the language.

73. **Ms. Sabo** (Canada) proposed that the beginning of paragraph 4 read “In view of the above, the Commission expressed its unanimous support for the continuation of the current pattern of meetings and agreed that every effort should be made to identify alternatives ...”.

74. **The Chairperson** suggested the formulation “, while the proposed abolition of the alternating pattern of meetings should be avoided,”.

75. **Ms. Keyte** (United Kingdom) said that, although the Chairperson’s suggestion was acceptable to her delegation, she had already proposed the deletion of the phrase “, while the proposed abolition of the alternating pattern of meetings was unacceptable”. However, her delegation could go along with the replacement of the word “unacceptable” with softer language.

76. Since paragraph 4 was meant to convey the Commission’s response to the Secretary-General’s request for cuts in light of the financial crisis, perhaps the first sentence could read “In response to the Secretary-General’s call for cuts and bearing in mind the current financial crisis, the Commission generally agreed that every effort should be made to identify alternatives ...”.

77. **The Chairperson** said that, in considering the paragraph, the Commission should think about how its message might be perceived at United Nations Headquarters. The paragraph indicated that the Commission had understood the need to make cuts but was reiterating its position that the way forward identified at Headquarters, without a proper understanding of how the Commission’s work was conducted, should be avoided. The Commission should simply amend the paragraph by replacing the word “unacceptable” with wording along the lines of “was not the right way forward” or “should be avoided”. He took it that the Commission could go along with such an amendment.

78. **Ms. Keyte** (United Kingdom), referring to the first sentence of paragraph 9, said that, if the emphasis of that sentence was meant to be on the greater efficiency that could be achieved through strategic planning, the phrase “, in light of the shortage of resources and budgetary cuts faced by the UNCITRAL secretariat,” should perhaps be deleted.

79. **Mr. Sorieul** (Secretary of the Commission) said that the phrase was intended to reflect the Commission’s recognition of the need for strategic planning in light of the fact that the resources available to the Commission would soon be substantially less. If that phrase was deleted, the paragraph could give the impression that the Commission had doubts about the usefulness of its activities.

80. **The Chairperson** proposed that paragraph 9 be retained as drafted.

81. **Ms. Sabo** (Canada) said that the last sentence of paragraph 10 did not properly reflect the Commission’s request that the Secretariat provide it with full financial information during the preparation of the budget for 2014-2015. She proposed that the sentence be replaced with the following text: “The Secretariat was requested to prepare a document for the next session of the Commission setting out the budget situation as of that time so that States could take decisions on the work programme and efficiencies in light of available resources.”

82. **Mr. Sorieul** (Secretary of the Commission), referring to the last sentence of paragraph 9, said that the note on strategic planning requested by the Commission would enable the Commission to decide on its work programme and efficiencies in light of available resources.

83. **Mr. González** (Argentina) said that he shared the concern of the delegation of Canada regarding paragraph 10. In light of the comment just made by the Secretary of the Commission, however, he felt that the final sentence of paragraph 10 should simply be deleted.

84. **The Chairperson** took it that the Commission wished to accept that solution.

85. **Mr. Bellenger** (France), referring to paragraph 15, said that the dates of the session of Working Group I remained unclear. His delegation continued to believe that the earlier the session was held, the better.



86. **Mr. Sorieul** (Secretary of the Commission) said that it had been explained to Commission members, following consultations with various representatives involved in Working Group I, that, while a Working Group I session could, if necessary, be held before the end of 2011 on the basis of documents already prepared, Working Group I members would not have much time to consider those documents. It had therefore been thought preferable that the next session of Working Group I take place in April 2012 in order to allow sufficient time for the preparation and consideration of documents and for consultations, and to ensure that States had an opportunity to provide inputs, particularly since Working Group I would be holding only one session between the Commission's current session and the end of 2012. The holding of a Working Group I session in February or March 2012 might be feasible, or indeed imposed, but the dates of 16-20 April 2012 were based on a request made by him following consultations with a number of experts. Those experts — and also other parties — would have to be consulted again if those dates were rejected.

87. **Mr. González** (Argentina) said it was his delegation's understanding that the Commission had decided that there would be a Working Group I session in 2011, on the basis of a swap with Working Group III or Working Group VI, and that no session would be held in 2012.

88. **Mr. Sorieul** (Secretary of the Commission), recalling that he had just said that a Working Group I session could be held before the end of 2011, said that a session of Working Group I also in 2012 would pose problems.

89. **Mr. González** (Argentina) requested clarification as to the number of sessions of Working Group I to be held before the Commission's forty-fifth session and whether resources for a session in 2012 had already been approved.

90. **Mr. Sorieul** (Secretary of the Commission) said that the Commission had decided that there would be only one session of Working Group I, either late in 2011 or early in 2012. Budgetary resources were available for the one session, and the Secretariat had reserved dates and rooms for 2012.

91. **Mr. Grand d'Esnon** (France) said holding of a Working Group I session in April 2012 would leave very little time for the outcomes of the session to be digested before the 2012 session of the Commission.

92. **Mr. González** (Argentina) said that the manner in which working group sessions were budgeted for should be reviewed.

93. **Mr. Sorieul** (Secretary of the Commission) said that the Working Group I session in April 2012 would be preceded by meetings of experts who would help the Secretariat with the preparation of decisions to be endorsed by Working Group I and submitted to the Commission for adoption.

94. *Document A/CN.9/XLIV/CRP.1/Add.21, as orally revised, was adopted.*

95. *The draft report as a whole, as orally revised, was adopted.*

96. **The Chairperson** declared the Commission's forty-fourth session closed.

*The meeting rose at 4.40 p.m.*



## **II. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO WORK OF UNCITRAL**

(A/CN.9/722)

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مبادئ تفسير اتفاقية الأمم المتحدة بشأن عقود البيع الدولي للبضائع: اتفاقية فيينا ١٩٨٠.

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[No publications recorded under this heading.]

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[No publications recorded under this heading.]

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## Annex

## Checklist 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>
CISG (1980)	United Nations Convention on Contracts for the International Sale of Goods (1980) <sup>a</sup>
Hamburg Rules (1978)	United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) <sup>b</sup>
Limitation Convention (1974/1980)	Convention on the Limitation Period in the International Sale of Goods, 1974 (New York), <sup>c</sup> and Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 1980 (Vienna) <sup>d</sup>
New York Convention (1958)	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York) <sup>e, f</sup>
Rotterdam Rules (2008)	United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (New York) <sup>g</sup>
UNCITRAL Arbitral Proceedings Notes (1996)	UNCITRAL Notes on Organizing Arbitral Proceedings (1996) <sup>h</sup>
UNCITRAL Arbitration Model Law (1985)	UNCITRAL Model Law on International Commercial Arbitration (1985) <sup>i</sup>
UNCITRAL Arbitration Model Law (as amended in 2006)	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 <sup>j</sup>
UNCITRAL Arbitration Rules (1976)	UNCITRAL Arbitration Rules (1976) <sup>k</sup>
UNCITRAL Conciliation Model Law (2002)	UNCITRAL Model Law on International Commercial Conciliation (2002) <sup>l</sup>
UNCITRAL Conciliation Rules (1980)	UNCITRAL Conciliation Rules (1980) <sup>m</sup>
UNCITRAL Credit Transfer Model Law (1992)	UNCITRAL Model Law on International Credit Transfers (1992) <sup>n</sup>
UNCITRAL Insolvency Guide (2004)	UNCITRAL Legislative Guide on Insolvency Law (2004) <sup>o</sup>
UNCITRAL Insolvency Model Law (1997)	UNCITRAL Model Law on Cross-Border Insolvency (1997) <sup>p</sup>
UNCITRAL Model Law on Electronic Commerce (1996)	UNCITRAL Model Law on Electronic Commerce (1996) <sup>q</sup>
UNCITRAL Model Law on Electronic Signatures (2001)	UNCITRAL Model Law on Electronic Signatures (2001) <sup>r</sup>
UNCITRAL Insolvency Practice Guide (2009)	UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) <sup>s</sup>
UNCITRAL Procurement Model Law (1994)	UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) <sup>t</sup>
UNCITRAL Secured Transactions Guide (2007)	UNCITRAL Legislative Guide on Secured Transactions (2007) <sup>u</sup>

<i>Short title</i>	<i>Full title</i>
United Nations Convention on Electronic Contracting (2005)	United Nations Convention on the Use of Electronic Communications in International Contracts (2005) <sup>v</sup>
United Nations Guarantee and Standby Convention (1995)	United Nations Convention on Independent Guarantees and Standby Letters of Credit (1995) <sup>w</sup>

<sup>a</sup> United Nations publication, Sales No. E.10.V.14.

<sup>b</sup> United Nations publication, Sales No. E.95.V.14.

<sup>c</sup> Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974; United Nations publication, Sales No. E.74.V.8.

<sup>d</sup> Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980; United Nations publication, Sales No. E.81.IV.3.

<sup>e</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York) was adopted prior to the establishment of the Commission, and the Commission is entrusted with the promotion and related activities regarding the Convention.

<sup>f</sup> United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.

<sup>g</sup> United Nations publication, Sales No. E.09.V.9.

<sup>h</sup> Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), part II.

<sup>i</sup> United Nations publication, Sales No. E.95.V.18.

<sup>j</sup> United Nations publication, Sales No. E.08.V.4.

<sup>k</sup> United Nations publication, Sales No. E.93.V.6.

<sup>l</sup> United Nations publication, Sales No. E.05.V.4.

<sup>m</sup> United Nations publication, Sales No. E.81.V.6.

<sup>n</sup> United Nations publication, Sales No. E.99.V.11.

<sup>o</sup> United Nations publication, Sales No. E.05.V.10.

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<sup>q</sup> United Nations publication, Sales No. E.99.V.4.

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<sup>v</sup> United Nations publication, Sales No. E.07.V.02.

<sup>w</sup> United Nations publication, Sales No. E.97.V.12.



### III. CHECK-LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
<b>A. List of documents before the Commission at its forty-fourth session</b>		
<b>1. General series</b>		
A/CN.9/711 and Corr.1	Provisional agenda, annotations thereto and scheduling of meetings of the forty-fourth session	Not reproduced
A/CN.9/712	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4-8 October 2010)	Part two, chap. I, A
A/CN.9/713	Report of Working Group I (Procurement) on the work of its nineteenth session (Vienna, 1-5 November 2010)	Part two, chap. II, A
A/CN.9/714	Report of Working Group VI (Security Interests) on the work of its eighteenth session (Vienna, 8-12 November 2010)	Part two, chap. III, A
A/CN.9/715	Report of Working Group V (Insolvency Law) on the work of its thirty-ninth session (Vienna, 6-10 December 2010)	Part two, chap. IV, A
A/CN.9/716	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 December 2010)	Part two, chap. V, A
A/CN.9/717	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (New York, 7-11 February 2011)	Part two, chap. I, D
A/CN.9/718	Report of Working Group I (Procurement) on the work of its twentieth session (New York, 14-18 March 2011)	Part two, chap. II, C
A/CN.9/719	Report of Working Group VI (Security Interests) on the work of its nineteenth session (New York, 11-15 April 2011)	Part two, chap. II, C
A/CN.9/720	Comparison and analysis of major features of international instruments relating to secured transactions	Not reproduced

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
A/CN.9/721	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23-27 May 2011)	Part two, chap. V, C
A/CN.9/722	Bibliography of recent writings related to the work of UNCITRAL	Part three, chap. II
A/CN.9/723	Status of conventions and model laws	Part two, chap. IX
A/CN.9/724	Note by the Secretariat on technical cooperation and assistance	Part two, chap. VIII
A/CN.9/725	Note by the Secretariat on coordination activities	Part two, chap. X
A/CN.9/726	Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts	Not reproduced
A/CN.9/727	Legal and regulatory issues surrounding microfinance	Not reproduced
A/CN.9/728 and Add.1	Present and possible future work on electronic commerce	Part two, chap. VI, A
A/CN.9/729 and Add.1-8	Note by the Secretariat on the draft revised text of the Model Law	Part two, chap. II, E
A/CN.9/730 and Add.1-2	Finalization and adoption of the UNCITRAL Model Law on Public Procurement - Compilation of comments by Governments and international organizations on the draft Model Law on Public Procurement	Part two, chap. II, F
A/CN.9/731 and Add.1-9	Note by the Secretariat on revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement	Part two, chap. II, G
A/CN.9/732 and Add.1-3	Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency	Not reproduced
A/CN.9/733 and Add.1	Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency: Compilation of comments by Governments	Part two, chap. IV, E
A/CN.9/734	Note by the Secretariat - Annex - Proposal by the United Nations Conference on Trade and Development (UNCTAD)	Not reproduced

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
<b>2. Restricted series</b>		
A/CN.9/XLIV/CRP.1 and Add.1-21	Draft report of the United Nations Commission on International Trade Law on the work of its forty-fourth session	Not reproduced
A/CN.9/XLIV/CRP.2	Finalization and adoption of the UNCITRAL Model Law on Public Procurement	Not reproduced
A/CN.9/XLIV/CRP.3	Finalization and adoption of judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency	Not reproduced
A/CN.9/XLIV/CRP.4	Establishing a regional presence of UNCITRAL	Not reproduced
<b>3. Information series</b>		
A/CN.9/XLIV/INF.1/Rev.1	List of participants	Not reproduced
<b>B. List of documents before the Working Group on Arbitration and Conciliation at its fifty-third session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.II/WP.158	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II /WP.159 and Add. 1-4	Note by the Secretariat on settlement of commercial disputes: Transparency in treaty-based investor-State arbitration - Compilation of comments by Governments, submitted to the Working Group on Arbitration and Conciliation at its fifty-third session	Part two, chap. I, B
A/CN.9/WG.II /WP.160 and Add. 1	C. Note by the Secretariat on settlement of commercial disputes: Preparation of rules of uniform law on transparency in treaty-based investor-State dispute settlement, submitted to the Working Group on Arbitration and Conciliation at its fifty-third session	Part two, chap. I, C
<b>2. Restricted series</b>		
A/CN.9/WG.II/LIII/CRP.1 and Add.1-4	Draft report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session	Not reproduced
A/CN.9/WG.II/LIII/CRP.2	Comments received from Mexico on transparency in treaty-based investor-State arbitration	Not reproduced

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
<b>3. Information series</b>		
A/CN.9/WG.II/LIII/INF.1	List of participants	Not reproduced
<b>C. List of documents before the Working Group on Arbitration and Conciliation at its fifty-fourth session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.II/WP.161	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.162 and Add.1	Note by the Secretariat on settlement of commercial disputes: Preparation of a legal standard on transparency in treaty-based investor-State arbitration, submitted to the Working Group on Arbitration and Conciliation at its fifty-fourth session	Part two, chap. I, E
A/CN.9/WG.II/WP.163	Note by the Secretariat on settlement of commercial disputes: Transparency in treaty-based investor-State arbitration - Comments of the Governments of Canada and of the United States of America on transparency in treaty-based investor-State arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA), submitted to the Working Group on Arbitration and Conciliation at its fifty-fourth session	Part two, chap. I, F
A/CN.9/WG.II/WP.164	G. Note by the Secretariat on settlement of commercial disputes: Transparency in treaty-based investor-State arbitration - Proposals by Governments and International Organizations, submitted to the Working Group on Arbitration and Conciliation at its fifty-fourth session	Part two, chap. I, G
<b>2. Restricted series</b>		
A/CN.9/WG.II/LIV/CRP.1 and Add. 1-4	Draft report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.II/LIV/INF.1	List of participants	Not reproduced

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
<b>D. List of documents before the Working Group on Procurement at its nineteenth session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.I/WP.74	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.75 and Add. 1-8	B. Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services - a revised text of the Model Law, submitted to the Working Group on Procurement at its nineteenth session	Part two, chap. II, B
<b>2. Restricted series</b>		
A/CN.9/WG.I/XIX/ CRP.1 and Add. 1-4	Draft report of the Working Group on Procurement at its nineteenth session.	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.I/XIX/INF.1	List of participants	Not reproduced
<b>E. List of documents before the Working Group on Procurement at its twentieth session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.I/WP.76	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.77/ and Add.1-9	Note by the Secretariat on revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twentieth session	Part two, chap. II, D
<b>2. Restricted series</b>		
A/CN.9/WG.I/XX/ CRP.1 and Add. 1-4	Draft report of the Working Group on Procurement at its twentieth session.	Not reproduced
A/CN.9/WG.I/XX/ CRP.2	Consideration of proposals for a Guide to Enactment of the UNCITRAL Model Law on Public Procurement. Proposal by the United States	Not reproduced
A/CN.9/WG.I/XX/ CRP.3	Consideration of proposals for a Guide to Enactment of the UNCITRAL Model Law on Public Procurement. Proposal by the United States	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.I/XX/INF.1	List of participants	Not reproduced

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
<b>F. List of documents before the Working Group on Security Interests at its eighteenth session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.VI/WP.43	Annotated provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.44 and Add.1-2	Note by the Secretariat on registration of security rights in movable assets, submitted to the Working Group on Security Interests at its eighteenth session	Part two, chap. III, B
<b>2. Restricted series</b>		
A/CN.9/WG.VI/XVIII/CRP.1 and Add.1-4	Draft report of Working Group VI (Security Interests) on the work of its eighteenth session	Not reproduced
A/CN.9/WG.VI/XVIII/CRP.2	Note by the Secretariat on registration for security rights in movable assets	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.VI/XVIII/INF.1	List of participants	Not reproduced
<b>G. List of documents before the Working Group on Security Interests at its nineteenth session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.VI/WP.45	Annotated provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.46 and Add. 1-3	Note by the Secretariat on registration of security rights in movable assets, submitted to the Working Group on Security Interests at its nineteenth session	Part two, chap. III, D
<b>2. Restricted series</b>		
A/CN.9/WG.VI/XIX/CRP.1 and Add.1-4	Draft report of Working Group VI (Security Interests) on the work of its nineteenth session	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.VI/XIX/INF.1	List of participants	Not reproduced
<b>H. List of documents before the Working Group on Insolvency Law at its thirty-ninth session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.V/WP.94	Annotated provisional agenda	Not reproduced

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
A/CN.9/WG.V/WP.95 and Add.1	Note by the Secretariat on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI), submitted to the Working Group on Insolvency Law on the work of its thirty-ninth session	Part two, chap. IV, B
A/CN.9/WG.V/WP.96 and Add.1	Note by the Secretariat on directors' responsibilities and liabilities in insolvency and pre-insolvency cases, submitted to the Working Group on Insolvency Law on the work of its thirty-ninth session	Part two, chap. IV, C
A/CN.9/WG.V/WP.97 and Add.1-2	Note by the Secretariat on judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency, submitted to the Working Group on Insolvency Law on the work of its thirty-ninth session	Part two, chap. IV, D
<b>2. Restricted series</b>		
A/CN.9/WG.V/XXXIX/CRP.1 and Add.1-4	Draft report of Working Group V (Insolvency Law) on the work of its thirty-ninth session	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.V/XXXIX/INF.1	List of participants	Not reproduced
<b>I. List of documents before the Working Group on Online Dispute Resolution at its twenty-second session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.III/WP. 104	Annotated provisional agenda	Not reproduced
A/CN.9/WG.III/WP.105 and Corr.1	Note by the Secretariat on Online dispute resolution for cross-border electronic commerce transactions, submitted to the Working Group on Online Dispute Resolution on the work of its twenty-second session	Part two, chap. V, B
<b>2. Restricted series</b>		
A/CN.9/WG.III/XXII/ CRP.1 and Add. 1-4	Draft report of the Working Group on Online dispute resolution at its twenty-second	Not reproduced

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<b>3. Information series</b>		
A/CN.9/WG.III/XXII/INF.1	List of participants	Not reproduced
<b>G. List of documents before the Working Group on Online Dispute Resolution at its twenty-third session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.III/WP. 106	Annotated provisional agenda	Not reproduced
A/CN.9/WG.III/WP. 107	Note by the Secretariat on Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, submitted to the Working Group on Online Dispute Resolution on the work of its twenty-third session	Part two, chap. V, D
<b>2. Restricted series</b>		
A/CN.9/WG.III/XXIII/CRP.1 and Add. 1-4	Draft report of the Working Group on Online dispute resolution at its twenty-third	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.III/XXIII/INF.1	List of participants	Not reproduced



#### **IV. LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW REPRODUCED IN PREVIOUS VOLUMES OF THE *YEARBOOK***

The present list indicates the particular volume, year, part, chapter and page where documents relating to the work of the United Nations Commission on International Trade Law were reproduced in previous volumes of the *Yearbook*; documents that do not appear in the list 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), (1969 to 1971); Privately Financed Infrastructure Projects (2001 to 2003); Procurement (as of 2004)
  - (b) Working Group II:  
International Sale of Goods (1968 to 1978); International Contract Practices (1981 to 2000);  
International Commercial Arbitration and Conciliation (as of 2000)
  - (c) Working Group III:  
International Legislation on Shipping (1970 to 1975); Transport Law (as of 2002)\*\*
  - (d) Working Group IV:  
International Negotiable Instruments (1973 to 1987); International Payments (1988 to 1992);  
Electronic Data Interchange (1992 to 1996); Electronic Commerce (as of 1997)
  - (e) Working Group V:  
New International Economic Order (1981 to 1994); Insolvency Law (1995 to 1999);  
Insolvency Law (as of 2001)\*

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\* For its 23rd session (Vienna, 11-22 December 2000), this Working Group was named Working Group on International Contract Practices (see the report of the Commission on its 33rd session A/55/17, para.186).

(f) Working Group VI:  
Security Interests (as of 2002)\*\*

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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\*\* At its 35th session, the Commission adopted one-week sessions, creating six working groups.

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
<b>1. Reports on the annual sessions of the Commission</b>		
A/7216 (first session)	Volume I: 1968-1970	Part two, I, A
A/7618 (second session)	Volume I: 1968-1970	Part two, II, A
A/8017 (third session)	Volume I: 1968-1970	Part two, III, A
A/8417 (fourth session)	Volume II: 1971	Part one, II, A
A/8717 (fifth session)	Volume III: 1972	Part one, II, A
A/9017 (sixth session)	Volume IV: 1973	Part one, II, A
A/9617 (seventh session)	Volume V: 1974	Part one, II, A
A/10017 (eighth session)	Volume VI: 1975	Part one, II, A
A/31/17 (ninth session)	Volume VII: 1976	Part one, II, A
A/32/17 (tenth session)	Volume VIII: 1977	Part one, II, A
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A/34/17 (twelfth session)	Volume X: 1979	Part one, II, A
A/35/17 (thirteenth session)	Volume XI: 1980	Part one, II, A
A/36/17 (fourteenth session)	Volume XII: 1981	Part one, A
A/37/17 and Corr.1 (fifteenth session)	Volume XIII: 1982	Part one, A
A/38/17 (sixteenth session)	Volume XIV: 1983	Part one, A
A/39/17 (seventeenth session)	Volume XV: 1984	Part one, A
A/40/17 (eighteenth session)	Volume XVI: 1985	Part one, A
A/41/17 (nineteenth session)	Volume XVII: 1986	Part one, A
A/42/17 (twentieth session)	Volume XVIII: 1987	Part one, A
A/43/17 (twenty-first session)	Volume XIX: 1988	Part one, A
A/44/17 (twenty-second session)	Volume XX: 1989	Part one, A
A/45/17 (twenty-third session)	Volume XXI: 1990	Part one, A
A/46/17 (twenty-fourth session)	Volume XXII: 1991	Part one, A
A/47/17 (twenty-fifth session)	Volume XXIII: 1992	Part one, A
A/48/17 (twenty-sixth session)	Volume XXIV: 1993	Part one, A
A/49/17 (twenty-seventh session)	Volume XXV: 1994	Part one, A
A/50/17 (twenty-eighth session)	Volume XXVI: 1995	Part one, A
A/51/17 (twenty-ninth session)	Volume XXVII: 1996	Part one, A
A/52/17 (thirtieth session)	Volume XXVIII: 1997	Part one, A

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
A/53/17 (thirty-first session)	Volume XXIX: 1998	Part one, A
A/54/17 (thirty-second session)	Volume XXX: 1999	Part one, A
A/55/17 (thirty-third session)	Volume XXXI: 2000	Part one, A
A/56/17 (thirty-fourth session)	Volume XXXII: 2001	Part one, A
A/57/17 (thirty-fifth session)	Volume XXXIII: 2002	Part one, A
A/58/17 (thirty-sixth session)	Volume XXXIV: 2003	Part one, A
A/59/17 (thirty-seventh session)	Volume XXXV: 2004	Part one, A
A/60/17 (thirty-eighth session)	Volume XXXVI: 2005	Part one, A
A/61/17 (thirty-ninth session)	Volume XXXVII: 2006	Part one, A
A/62/17 (fortieth session)	Volume XXXVIII: 2007	Part one, A
A/63/17 (fortieth-first session)	Volume XXXIX: 2008	Part one, A
A/64/17 (fortieth-second session)	Volume XL: 2009	Part one, A

## 2. Resolutions of the General Assembly

2102 (XX)	Volume I: 1968-1970	Part one, II, A
2205 (XXI)	Volume I: 1968-1970	Part one, II, E
2421 (XXIII)	Volume I: 1968-1970	Part two, I, B, 3
2502 (XXIV)	Volume I: 1968-1970	Part two, II, B, 3
2635 (XXV)	Volume II: 1971	Part one, I, C
2766 (XXVI)	Volume III: 1972	Part one, I, C
2928 (XXVII)	Volume IV: 1973	Part one, I, C
2929 (XXVII)	Volume IV: 1973	Part one, I, C
3104 (XXVIII)	Volume V: 1974	Part one, I, C
3108 (XXVIII)	Volume V: 1974	Part one, I, C
3316 (XXIX)	Volume VI: 1975	Part one, I, C
3317 (XXIX)	Volume VI: 1975	Part three, I, B
3494 (XXX)	Volume VII: 1976	Part one, I, C
31/98	Volume VIII: 1977	Part one, I, C
31/99	Volume VIII: 1977	Part one, I, C
31/100	Volume XIII: 1977	Part one, I, C
32/145	Volume IX: 1978	Part one, I, C
32/438	Volume IX: 1978	Part one, I, C
33/92	Volume X: 1979	Part one, I, B

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33/93	Volume X: 1979	Part one, I, C
34/143	Volume XI: 1980	Part one, I, C
34/150	Volume XI: 1980	Part three, III
35/166	Volume XI: 1980	Part three, III
35/51	Volume XI: 1980	Part one, II, D
35/52	Volume XI: 1980	Part one, II, D
36/32	Volume XII: 1981	Part one, D
36/107	Volume XII: 1981	Part three, I
36/111	Volume XII: 1981	Part three, II
37/103	Volume XIII: 1982	Part three, III
37/106	Volume XIII: 1982	Part one, D
37/107	Volume XIII: 1982	Part one, D
38/128	Volume XIV: 1983	Part three, III
38/134	Volume XIV: 1983	Part one, D
38/135	Volume XIV: 1983	Part one, D
39/82	Volume XV: 1984	Part one, D
40/71	Volume XVI: 1985	Part one, D
40/72	Volume XVI: 1985	Part one, D
41/77	Volume XVII: 1986	Part one, D
42/152	Volume XVIII: 1987	Part one, D
42/153	Volume XVIII: 1987	Part one, E
43/165 and annex	Volume XIX: 1988	Part one, D
43/166	Volume XIX: 1988	Part one, E
44/33	Volume XX: 1989	Part one, E
45/42	Volume XXI: 1990	Part one, D
46/56	Volume XXII: 1991	Part one, D
47/34	Volume XXIII: 1992	Part one, D
48/32	Volume XXIV: 1993	Part one, D
48/33	Volume XXIV: 1993	Part one, D
48/34	Volume XXIV: 1993	Part one, D
49/54	Volume XXV: 1994	Part one, D
49/55	Volume XXV: 1994	Part one, D

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51/161	Volume XXVII: 1996	Part one, D
51/162	Volume XXVII: 1996	Part one, D
52/157	Volume XXVIII: 1997	Part one, D
52/158	Volume XXVIII: 1997	Part one, D
53/103	Volume XXIX: 1998	Part one, D
54/103	Volume XXX: 1999	Part one, D
55/151	Volume XXXI: 2000	Part one, D
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64/112	Volume XL: 2009	Part one, D
64/116	Volume XL: 2009	Part one, D
62/21	Volume XLI: 2010	Part one, D

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62/22	Volume XLI: 2010	Part one, D
62/23	Volume XLI: 2010	Part one, D
62/24	Volume XLI: 2010	Part one, D
62/32	Volume XLI: 2010	Part one, D
<b>3. Reports of the Sixth Committee</b>		
A/5728	Volume I: 1968-1970	Part one, I, A
A/6396	Volume I: 1968-1970	Part one, II, B
A/6594	Volume I: 1968-1970	Part one, II, D
A/7408	Volume I: 1968-1970	Part two, I, B, 2
A/7747	Volume I: 1968-1970	Part two, II, B, 2
A/8146	Volume II: 1971	Part one, I, B
A/8506	Volume III: 1972	Part one, I, B
A/8896	Volume IV: 1973	Part one, I, B
A/9408	Volume V: 1974	Part one, I, B
A/9920	Volume VI: 1975	Part one, I, B
A/9711	Volume VI: 1975	Part three, I, A
A/10420	Volume VII: 1976	Part one, I, B
A/31/390	Volume VIII: 1977	Part one, I, B
A/32/402	Volume IX: 1978	Part one, I, B
A/33/349	Volume X: 1979	Part one, I, B
A/34/780	Volume XI: 1980	Part one, I, B
A/35/627	Volume XI: 1980	Part one, II, C
A/36/669	Volume XII: 1981	Part one, C
A/37/620	Volume XIII: 1982	Part one, C
A/38/667	Volume XIV: 1983	Part one, C
A/39/698	Volume XV: 1984	Part one, C
A/40/935	Volume XVI: 1985	Part one, C
A/41/861	Volume XVII: 1986	Part one, C
A/42/836	Volume XVIII: 1987	Part one, C
A/43/820	Volume XIX: 1988	Part one, C
A/C.6/43/L.2	Volume XIX: 1988	Part three, II, A
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A/44/453 and Add.1	Volume XX: 1989	Part one, C
A/44/723	Volume XX: 1989	Part one, D
A/45/736	Volume XXI: 1990	Part one, C
A/46/688	Volume XXII: 1991	Part one, C
A/47/586	Volume XXIII: 1992	Part one, C
A/48/613	Volume XXIV: 1993	Part one, C
A/49/739	Volume XXV: 1994	Part one, C
A/50/640	Volume XXVI: 1995	Part one, C
A/51/628	Volume XXVII: 1996	Part one, C
A/52/649	Volume XXVIII: 1997	Part one, C
A/53/632	Volume XXIX: 1998	Part one, C
A/54/611	Volume XXX: 1999	Part one, C
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A/58/513	Volume XXXIV: 2003	Part one, C
A/59/509	Volume XXXV: 2004	Part one, C
A/60/515	Volume XXXVI: 2005	Part one, C
A/61/453	Volume XXXVII: 2006	Part one, C
A/62/449	Volume XXXVIII: 2007	Part one, C
A/63/438	Volume XXXIX: 2008	Part one, C
A/64/447	Volume XL: 2009	Part one, C
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**4. Extracts from the reports of the Trade and Development Board of the  
United Nations Conference on Trade and Development**

A/7214	Volume I: 1968-1970	Part two, I, B, 1
A/7616	Volume I: 1968-1970	Part two, II, B, 1
A/8015/Rev.1	Volume II: 1971	Part one, I, A
TD/B/C.4/86, annex I	Volume II: 1971	Part two, IV
A/8415/Rev.1	Volume III: 1972	Part one, I, A
A/8715/Rev.1	Volume IV: 1973	Part one, I, A
A/9015/Rev.1	Volume V: 1974	Part one, I, A



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A/9615/Rev.1	Volume VI: 1975	Part one, I, A
A/10015/Rev.1	Volume VII: 1976	Part one, I, A
TD/B/617	Volume VIII: 1977	Part one, I, A
TD/B/664	Volume IX: 1978	Part one, I, A
A/33/15/Vol.II	Volume X: 1979	Part one, I, A
A/34/15/Vol.II	Volume XI: 1980	Part one, I, A
A/35/15/Vol.II	Volume XI: 1980	Part one, II, B
A/36/15/Vol.II	Volume XII: 1981	Part one, B
TD/B/930	Volume XIII: 1982	Part one, B
TD/B/973	Volume XIV: 1983	Part one, B
TD/B/1026	Volume XV: 1984	Part one, B
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A/42/15	Volume XVIII: 1987	Part one, B
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TD/B/1234/Vol.II	Volume XX: 1989	Part one, B
TD/B/1277/Vol.II	Volume XXI: 1990	Part one, B
TD/B/1309/Vol.II	Volume XXII: 1991	Part one, B
TD/B/39(1)/15	Volume XXIII: 1992	Part one, B
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TD/B/41(1)/14 (Vol.I)	Volume XXV: 1994	Part one, B
TD/B/42(1)19(Vol.I)	Volume XXVI: 1995	Part one, B
TD/B/43/12 (Vol.I)	Volume XXVII: 1996	Part one, B
TD/B/44/19 (Vol.I)	Volume XXVIII: 1997	Part one, B
TD/B/45/13 (Vol.I)	Volume XXIX: 1998	Part one, B
TD/B/46/15 (Vol.I)	Volume XXX: 1999	Part one, B
TD/B/47/11 (Vol.I)	Volume XXXI: 2000	Part one, B
TD/B/48/18 (Vol.I)	Volume XXXII: 2001	Part one, B
TD/B/49/15 (Vol.I)	Volume XXXIII: 2002	Part one, B
TD/B/50/14 (Vol.I)	Volume XXXIV: 2003	Part one, B
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**5. Documents submitted to the Commission,  
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## 6. Documents submitted to Working Groups

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A/CN.9/WG.II/WP.53	Volume XVI: 1985	Part two, IV, B, 3
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A/CN.9/WG.II/WP.56	Volume XVII: 1986	Part two, III, B, 2
A/CN.9/WG.II/WP.58	Volume XVIII: 1987	Part two, III, B
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A/CN.9/WG.II/WP.131	Volume XXXVI: 2005	Part two, III, B
A/CN.9/WG.II/WP.132	Volume XXXVI: 2005	Part two, III, C
A/CN.9/WG.II/WP.134	Volume XXXVI: 2005	Part two, III, E
A/CN.9/WG.II/WP.136	Volume XXXVII: 2006	Part two, II, B

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
A/CN.9/WG.II/WP.137 and Add.1	Volume XXXVII: 2006	Part two, II, C
A/CN.9/WG.II/WP.138	Volume XXXVII: 2006	Part two, II, D
A/CN.9/WG.II/WP.139	Volume XXXVII: 2006	Part two, II, F
A/CN.9/WG.II/WP.141	Volume XXXVII: 2006	Part two, II, G
A/CN.9/WG.II/WP.145 and Add.1	Volume XXXVIII: 2007	Part two, III, D
A/CN.9/WG.II/WP.147 and Add.1	Volume XXXIX: 2008	Part two, III, B
A/CN.9/WG.II/WP.149	Volume XXXIX: 2008	Part two, III, D
A/CN.9/WG.II/WP.151 and Add.1	Volume XL: 2009	Part two, II, B
A/CN.9/WG.II/WP.152	Volume XL: 2009	Part two, II, C
A/CN.9/WG.II/WP.154	Volume XL: 2009	Part two, II, E
A/CN.9/WG.II/WP.154/Add.1	Volume XLI: 2010	Part two, I, B
A/CN.9/WG.II/WP.157 and Add.1-2	Volume XLI: 2010	Part two, I, D

**(c) Working Group III**

*(i) International Legislation on Shipping*

A/CN.9/WG.III/WP.6	Volume IV: 1973	Part two, IV, 2
A/CN.9/WG.III/WP.7	Volume IV: 1973	Part two, IV, 3
A/CN.9/WG.III/WP.11	Volume V: 1974	Part two, III, 3

*(ii) Transport Law*

A/CN.9/WG.III/WP.21 and Add.1	Volume XXXIII: 2002	Part two, VI, B
A/CN.9/WG.III/WP.23	Volume XXXIV: 2003	Part two, IV, B
A/CN.9/WG.III/WP.25	Volume XXXIV: 2003	Part two, IV, D
A/CN.9/WG.III/WP.26	Volume XXXIV: 2003	Part two, IV, E
A/CN.9/WG.III/WP.27	Volume XXXIV: 2003	Part two, IV, F
A/CN.9/WG.III/WP.28	Volume XXXIV: 2003	Part two, IV, G
A/CN.9/WG.III/WP.29	Volume XXXIV: 2003	Part two, IV, H
A/CN.9/WG.III/WP.30	Volume XXXIV: 2003	Part two, IV, I
A/CN.9/WG.III/WP.28/Add.1	Volume XXXV: 2004	Part two, III, B
A/CN.9/WG.III/WP.32	Volume XXXV: 2004	Part two, III, C
A/CN.9/WG.III/WP.33	Volume XXXV: 2004	Part two, III, D
A/CN.9/WG.III/WP.34	Volume XXXV: 2004	Part two, III, E
A/CN.9/WG.III/WP.36	Volume XXXV: 2004	Part two, III, G
A/CN.9/WG.III/WP.37	Volume XXXV: 2004	Part two, III, H

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
A/CN.9/WG.III/WP.39	Volume XXXVI: 2005	Part two, IV, B
A/CN.9/WG.III/WP.40	Volume XXXVI: 2005	Part two, IV, C
A/CN.9/WG.III/WP.41	Volume XXXVI: 2005	Part two, IV, D
A/CN.9/WG.III/WP.42	Volume XXXVI: 2005	Part two, IV, E
A/CN.9/WG.III/WP.44	Volume XXXVI: 2005	Part two, IV, G
A/CN.9/WG.III/WP.45	Volume XXXVI: 2005	Part two, IV, H
A/CN.9/WG.III/WP.46	Volume XXXVI: 2005	Part two, IV, I
A/CN.9/WG.III/WP.47	Volume XXXVI: 2005	Part two, IV, J
A/CN.9/WG.III/WP.49	Volume XXXVII: 2006	Part two, IV, B
A/CN.9/WG.III/WP.50/Rev.1	Volume XXXVII: 2006	Part two, IV, C
A/CN.9/WG.III/WP.51	Volume XXXVII: 2006	Part two, IV, D
A/CN.9/WG.III/WP.52	Volume XXXVII: 2006	Part two, IV, E
A/CN.9/WG.III/WP.53	Volume XXXVII: 2006	Part two, IV, F
A/CN.9/WG.III/WP.54	Volume XXXVII: 2006	Part two, IV, G
A/CN.9/WG.III/WP.55	Volume XXXVII: 2006	Part two, IV, H
A/CN.9/WG.III/WP.56	Volume XXXVII: 2006	Part two, IV, I
A/CN.9/WG.III/WP.57	Volume XXXVII: 2006	Part two, IV, J
A/CN.9/WG.III/WP.58	Volume XXXVII: 2006	Part two, IV, K
A/CN.9/WG.III/WP.59	Volume XXXVII: 2006	Part two, IV, L
A/CN.9/WG.III/WP.61	Volume XXXVII: 2006	Part two, IV, N
A/CN.9/WG.III/WP.62	Volume XXXVII: 2006	Part two, IV, O
A/CN.9/WG.III/WP.63	Volume XXXVII: 2006	Part two, IV, P
A/CN.9/WG.III/WP.64	Volume XXXVII: 2006	Part two, IV, Q
A/CN.9/WG.III/WP.65	Volume XXXVII: 2006	Part two, IV, R
A/CN.9/WG.III/WP.66	Volume XXXVII: 2006	Part two, IV, S
A/CN.9/WG.III/WP.67	Volume XXXVII: 2006	Part two, IV, T
A/CN.9/WG.III/WP.68	Volume XXXVII: 2006	Part two, IV, U
A/CN.9/WG.III/WP.69	Volume XXXVII: 2006	Part two, IV, V
A/CN.9/WG.III/WP.70	Volume XXXVII: 2006	Part two, IV, V
A/CN.9/WG.III/WP.72	Volume XXXVIII: 2007	Part two, IV, B
A/CN.9/WG.III/WP.73	Volume XXXVIII: 2007	Part two, IV, C
A/CN.9/WG.III/WP.74	Volume XXXVIII: 2007	Part two, IV, D



<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
A/CN.9/WG.III/WP.75	Volume XXXVIII: 2007	Part two, IV, E
A/CN.9/WG.III/WP.76	Volume XXXVIII: 2007	Part two, IV, F
A/CN.9/WG.III/WP.77	Volume XXXVIII: 2007	Part two, IV, G
A/CN.9/WG.III/WP.78	Volume XXXVIII: 2007	Part two, IV, H
A/CN.9/WG.III/WP.79	Volume XXXVIII: 2007	Part two, IV, I
A/CN.9/WG.III/WP.81	Volume XXXVIII: 2007	Part two, IV, K
A/CN.9/WG.III/WP.82	Volume XXXVIII: 2007	Part two, IV, L
A/CN.9/WG.III/WP.83	Volume XXXVIII: 2007	Part two, IV, M
A/CN.9/WG.III/WP.84	Volume XXXVIII: 2007	Part two, IV, N
A/CN.9/WG.III/WP.85	Volume XXXVIII: 2007	Part two, IV, O
A/CN.9/WG.III/WP.86	Volume XXXVIII: 2007	Part two, IV, P
A/CN.9/WG.III/WP.87	Volume XXXVIII: 2007	Part two, IV, Q
A/CN.9/WG.III/WP.88	Volume XXXVIII: 2007	Part two, IV, R
A/CN.9/WG.III/WP.89	Volume XXXVIII: 2007	Part two, IV, S
A/CN.9/WG.III/WP.90	Volume XXXVIII: 2007	Part two, IV, T
A/CN.9/WG.III/WP.91	Volume XXXVIII: 2007	Part two, IV, U
A/CN.9/WG.III/WP.93	Volume XXXIX: 2008	Part two, I, B
A/CN.9/WG.III/WP.94	Volume XXXIX: 2008	Part two, I, C
A/CN.9/WG.III/WP.95	Volume XXXIX: 2008	Part two, I, D
A/CN.9/WG.III/WP.96	Volume XXXIX: 2008	Part two, I, E
A/CN.9/WG.III/WP.97	Volume XXXIX: 2008	Part two, I, F
A/CN.9/WG.III/WP.98	Volume XXXIX: 2008	Part two, I, G
A/CN.9/WG.III/WP.99	Volume XXXIX: 2008	Part two, I, H
A/CN.9/WG.III/WP.101	Volume XXXIX: 2008	Part two, I, J
A/CN.9/WG.III/WP.102	Volume XXXIX: 2008	Part two, I, K
A/CN.9/WG.III/WP.103	Volume XXXIX: 2008	Part two, I, L

***(d) Working Group IV***

*(i) International Negotiable Instruments*

A/CN.9/WG.IV/WP.2	Volume IV: 1973	Part two, II, 2
A/CN.9/WG.IV/CRP.5	Volume VI: 1975	Part two, II, 2
A/CN.9/WG.IV/WP.21	Volume XIII: 1982	Part two, II, A, 2(a)
A/CN.9/WG.IV/WP.22	Volume XIII: 1982	Part two, II, A, 2(b)

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
A/CN.9/WG.IV/WP.23	Volume XIII: 1982	Part two, II, A, 2(c)
A/CN.9/WG.IV/WP.24 and Add.1-2	Volume XIII: 1982	Part two, II, A, 2(d-f)
A/CN.9/WG.IV/WP.25 and Add.1	Volume XIII: 1982	Part two, II, A, 2(g, h)
A/CN.9/WG.IV/WP.27	Volume XIII: 1982	Part two, II, B, 2
A/CN.9/WG.IV/WP.30	Volume XVII: 1986	Part two, I, A, 3
A/CN.9/WG.IV/WP.32 and Add.1-10	Volume XVIII: 1987	Part two, I, 2
A/CN.9/WG.IV/WP.33	Volume XVIII: 1987	Part two, I, 3
<i>(ii) International Payments</i>		
A/CN.9/WG.IV/WP.35	Volume XIX: 1988	Part two, I, A, 2
A/CN.9/WG.IV/WP.37	Volume XX: 1989	Part two, I, B
A/CN.9/WG.IV/WP.39	Volume XX: 1989	Part two, I, D
A/CN.9/WG.IV/WP.41	Volume XXI: 1990	Part two, I, B
A/CN.9/WG.IV/WP.42	Volume XXI: 1990	Part two, I, C
A/CN.9/WG.IV/WP.44	Volume XXI: 1990	Part two, I, E
A/CN.9/WG.IV/WP.46 and Corr.1	Volume XXII: 1991	Part two, I, D, 1
A/CN.9/WG.IV/WP.47	Volume XXII: 1991	Part two, I, D, 2
A/CN.9/WG.IV/WP.49	Volume XXII: 1991	Part two, I, F
A/CN.9/WG.IV/WP.51	Volume XXIII: 1992	Part two, II, B
<i>(iii) Electronic Commerce</i>		
A/CN.9/WG.IV/WP.53	Volume XXIII: 1992	Part two, V, B
A/CN.9/WG.IV/WP.55	Volume XXIV: 1993	Part two, III, B
A/CN.9/WG.IV/WP.57	Volume XXV: 1994	Part two, III, B, 1
A/CN.9/WG.IV/WP.58	Volume XXV: 1994	Part two, III, B, 2
A/CN.9/WG.IV/WP.60	Volume XXV: 1994	Part two, III, D
A/CN.9/WG.IV/WP.62	Volume XXVI: 1995	Part two, II, B
A/CN.9/WG.IV/WP.64	Volume XXVI: 1995	Part two, II, D, 1
A/CN.9/WG.IV/WP.65	Volume XXVI: 1995	Part two, II, D, 2
A/CN.9/WG.IV/WP.66	Volume XXVI: 1995	Part two, II, D, 3
A/CN.9/WG.IV/WP.67	Volume XXVI: 1995	Part two, II, D, 4
A/CN.9/WG.IV/WP.69	Volume XXVII: 1996	Part two, II, B
A/CN.9/WG.IV/WP.71	Volume XXVIII: 1997	Part two, III, A
A/CN.9/WG.IV/WP.73	Volume XXIX: 1998	Part two, II, B

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
A/CN.9/WG.IV/WP.74	Volume XXIX: 1998	Part two, II, C
A/CN.9/WG.IV/WP.76	Volume XXX: 1999	Part two, II, B
A/CN.9/WG.IV/WP.77	Volume XXX: 1999	Part two, II, C
A/CN.9/WG.IV/WP.79	Volume XXX: 1999	Part two, II, E
A/CN.9/WG.IV/WP.80	Volume XXX: 1999	Part two, II, F
A/CN.9/WG.IV/WP.82	Volume XXXI: 2000	Part two, III, B
A/CN.9/WG.IV/WP.84	Volume XXXI: 2000	Part two, III, B
A/CN.9/WG.IV/WP.86 and Add.1	Volume XXXII: 2001	Part two, II, B
A/CN.9/WG.IV/WP.88	Volume XXXII: 2001	Part two, II, D
A/CN.9/WG.IV/WP.89	Volume XXXII: 2001	Part two, II, E
A/CN.9/WG.IV/WP.90	Volume XXXII: 2001	Part two, II, F
A/CN.9/WG.IV/WP.91	Volume XXXII: 2001	Part two, II, G
A/CN.9/WG.IV/WP.93	Volume XXXII: 2001	Part two, II, H
A/CN.9/WG.IV/WP.94	Volume XXXIII: 2002	Part two, IV, B
A/CN.9/WG.IV/WP.95	Volume XXXIII: 2002	Part two, IV, C
A/CN.9/WG.IV/WP.96	Volume XXXIII: 2002	Part two, IV, D
A/CN.9/WG.IV/WP.98 and Add.1-4	Volume XXXIV: 2003	Part two, V, B
A/CN.9/WG.IV/WP.98 and Add.5-6	Volume XXXIV: 2003	Part two, V, D
A/CN.9/WG.IV/WP.100	Volume XXXIV: 2003	Part two, V, E
A/CN.9/WG.IV/WP.101	Volume XXXIV: 2003	Part two, V, F
A/CN.9/WG.IV/WP.103	Volume XXXV: 2004	Part two, IV, B
A/CN.9/WG.IV/WP.104 and Add.1-4	Volume XXXV: 2004	Part two, IV, C
A/CN.9/WG.IV/WP.105	Volume XXXV: 2004	Part two, IV, D
A/CN.9/WG.IV/WP.106	Volume XXXV: 2004	Part two, IV, E
A/CN.9/WG.IV/WP.108	Volume XXXV: 2004	Part two, IV, G
A/CN.9/WG.IV/WP.110	Volume XXXVI: 2005	Part two, I, B
A/CN.9/WG.IV/WP.111	Volume XXXVI: 2005	Part two, I, C
A/CN.9/WG.IV/WP.112	Volume XXXVI: 2005	Part two, I, D
A/CN.9/WG.IV/WP.113	Volume XXXVI: 2005	Part two, I, E

**(e) Working Group V**

*(i) New International Economic Order*

A/CN.9/WG.V/WP.4 and Add.1-8	Volume XII: 1981	Part two, IV, B, 1
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A/CN.9/WG.V/WP.5	Volume XII: 1981	Part two, IV, B, 2
A/CN.9/WG.V/WP.7 and Add.1-6	Volume XIII: 1982	Part two, IV, B
A/CN.9/WG.V/WP.9 and Add.1-5	Volume XIV: 1983	Part two, IV, B
A/CN.9/WG.V/WP.11 and Add.1-9	Volume XV: 1984	Part two, III, B
A/CN.9/WG.V/WP.13 and Add.1-6	Volume XVI: 1985	Part two, III, A, 2
A/CN.9/WG.V/WP.15 and Add.1-10	Volume XVI: 1985	Part two, III, B, 2
A/CN.9/WG.V/WP.17 and Add.1-9	Volume XVII: 1986	Part two, II, B
A/CN.9/WG.V/WP.19	Volume XVIII: 1987	Part two, II, A, 2
A/CN.9/WG.V/WP.20	Volume XVIII: 1987	Part two, II, A, 3
A/CN.9/WG.V/WP.22	Volume XX: 1989	Part two, II, B
A/CN.9/WG.V/WP.24	Volume XXI: 1990	Part two, II, B
A/CN.9/WG.V/WP.25	Volume XXI: 1990	Part two, II, C
A/CN.9/WG.V/WP.27	Volume XXII: 1991	Part two, II, B, 1
A/CN.9/WG.V/WP.28	Volume XXII: 1991	Part two, II, B, 2
A/CN.9/WG.V/WP.30	Volume XXIII: 1992	Part two, III, B, 1
A/CN.9/WG.V/WP.31	Volume XXIII: 1992	Part two, III, B, 2
A/CN.9/WG.V/WP.33	Volume XXIII: 1992	Part two, III, D, 2
A/CN.9/WG.V/WP.34	Volume XXIII: 1992	Part two, III, D,
A/CN.9/WG.V/WP.36	Volume XXIV: 1993	Part two, I, B
A/CN.9/WG.V/WP.38	Volume XXV: 1994	Part two, I, B
A/CN.9/WG.V/WP.40	Volume XXV: 1994	Part two, I, D
<i>(ii) Insolvency Law</i>		
A/CN.9/WG.V/WP.42	Volume XXVII: 1996	Part two, III, B
A/CN.9/WG.V/WP.44	Volume XXVII: 1996	Part two, III, D
A/CN.9/WG.V/WP.46	Volume XXVIII: 1997	Part two, I, B
A/CN.9/WG.V/WP.48	Volume XXVIII: 1997	Part two, I, D
A/CN.9/WG.V/WP.50	Volume XXXI: 2000	Part two, V, B
A/CN.9/WG.V/WP.54 and Add.1-2	Volume XXXIII: 2002	Part two, III, B
A/CN.9/WG.V/WP.55	Volume XXXIII: 2002	Part two, III, C
A/CN.9/WG.V/WP.57	Volume XXXIII: 2002	Part two, III, E
A/CN.9/WG.V/WP.58	Volume XXXIII: 2002	Part two, III, F
A/CN.9/WG.V/WP.59	Volume XXXIII: 2002	Part two, III, G

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
A/CN.9/WG.V/WP.61 and Add.1-2	Volume XXXIII: 2002	Part two, III, I
A/CN.9/WG.V/WP.63 and Add.3-15	Volume XXXIV: 2003	Part two, II, B
A/CN.9/WG.V/WP.64	Volume XXXIV: 2003	Part two, II, C
A/CN.9/WG.V/WP.63 and Add.1-2, Add.16-17	Volume XXXIV: 2003	Part two, II, E
A/CN.9/WG.V/WP.67	Volume XXXV: 2004	Part two, I, B
A/CN.9/WG.V/WP.68	Volume XXXV: 2004	Part two, I, C
A/CN.9/WG.V/WP.70 (Parts I and II)	Volume XXXV: 2004	Part two, I, E
A/CN.9/WG.V/WP.71	Volume XXXV: 2004	Part two, I, F
A/CN.9/WG.V/WP.72	Volume XXXV: 2004	Part two, I, G
A/CN.9/WG.V/WP.74 and Add.1-2	Volume XXXVIII: 2007	Part two, V, B
A/CN.9/WG.V/WP.76 and Add.1-2	Volume XXXVIII: 2007	Part two, V, D
A/CN.9/WG.V/WP.78 and Add.1	Volume XXXIX: 2008	Part two, IV, B
A/CN.9/WG.V/WP.80 and Add.1	Volume XXXIX: 2008	Part two, IV, D
A/CN.9/WG.V/WP.82 and Add.1-4	Volume XL: 2009	Part two, III, B
A/CN.9/WG.V/WP.83	Volume XL: 2009	Part two, III, C
A/CN.9/WG.V/WP.85 and Add.1	Volume XL: 2009	Part two, III, E
A/CN.9/WG.V/WP.86 and Add.1-3	Volume XL: 2009	Part two, III, F
A/CN.9/WG.V/WP.87	Volume XL: 2009	Part two, III, G
A/CN.9/WG.V/WP.88	Volume XL: 2009	Part two, III, H
A/CN.9/WG.V/WP.90 and Add.1-2	Volume XLI: 2010	Part two, III, B
A/CN.9/WG.V/WP.92 and Add.1-2	Volume XLI: 2010	Part two, III, D
A/CN.9/WG.V/WP.93 and Add.1-6	Volume XLI: 2010	Part two, III, E

***(f) Working Group VI: Security Interests***

A/CN.9/WG.VI/WP.2 and Add.1-12	Volume XXXIII: 2002	Part two, V, B
A/CN.9/WG.VI/WP.3	Volume XXXIII: 2002	Part two, V, C
A/CN.9/WG.VI/WP.4	Volume XXXIII: 2002	Part two, V, D
A/CN.9/WG.VI/WP.6 and Add.1-5	Volume XXXIV: 2003	Part two, VI, B
A/CN.9/WG.VI/WP.9 and Add.1-4, Add.6-8	Volume XXXV: 2004	Part two, V, B
A/CN.9/WG.VI/WP.11 and Add.1-2	Volume XXXV: 2004	Part two, V, E
A/CN.9/WG.VI/WP.13 and Add.1	Volume XXXVI: 2005	Part two, V, B

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
A/CN.9/WG.VI/WP.14 and Add.1-2, 4	Volume XXXVI: 2005	Part two, V, C
A/CN.9/WG.VI/WP.16 and Add.1	Volume XXXVI: 2005	Part two, V, E
A/CN.9/WG.VI/WP.17 and Add.1	Volume XXXVI: 2005	Part two, V, F
A/CN.9/WG.VI/WP.18 and Add.1	Volume XXXVI: 2005	Part two, V, G
A/CN.9/WG.VI/WP.19	Volume XXXVI: 2005	Part two, V, H
A/CN.9/WG.VI/WP.21 and Add.1-5	Volume XXXVII: 2006	Part two, I, B
A/CN.9/WG.VI/WP.22 and Add.1	Volume XXXVII: 2006	Part two, I, C
A/CN.9/WG.VI/WP.24 and Add.1-5	Volume XXXVII: 2006	Part two, I, E
A/CN.9/WG.VI/WP.26 and Add.1-8	Volume XXXVII: 2006	Part two, I, G
A/CN.9/WG.VI/WP.27 and Add.1-2	Volume XXXVII: 2006	Part two, I, H
A/CN.9/WG.VI/WP.29	Volume XXXVIII: 2007	Part two, I, B
A/CN.9/WG.VI/WP.31 and Add.1	Volume XXXVIII: 2007	Part two, I, D
A/CN.9/WG.VI/WP.33 and Add.1	Volume XXXIX: 2008	Part two, V, B
A/CN.9/WG.VI/WP.35 and Add.1	Volume XL: 2009	Part two, IV, B
A/CN.9/WG.VI/WP.39 and Add.1-7	Volume XLI: 2010	Part two, II, B
A/CN.9/WG.VI/WP.40	Volume XLI: 2010	Part two, II, C
A/CN.9/WG.VI/WP.42 and Add.1-7	Volume XLI: 2010	Part two, II, E

### 7. Summary Records of discussions in the Commission

A/CN.9/SR.93-123	Volume III: 1972	Supplement
A/CN.9/SR.254-256	Volume XIV: 1983	Part three, I, A
A/CN.9/SR.255-261	Volume XIV: 1983	Part three, I, B, 1
A/CN.9/SR.270-278, 282-283	Volume XIV: 1983	Part three, I, B, 2
A/CN.9/SR.286-299, 301	Volume XV: 1984	Part three, I
A/CN.9/SR.305-333	Volume XVI: 1985	Part three, II
A/CN.9/SR.335-353, 355-356	Volume XVII: 1986	Part three, II
A/CN.9/SR.378, 379, 381-385 and 388	Volume XVIII: 1987	Part three, III
A/CN.9/SR.402-421, 424- 425	Volume XX: 1989	Part three, II
A/CN.9/SR.439-462, 465	Volume XXII: 1991	Part three, II
A/CN.9/SR.467-476, 481-482	Volume XXIII: 1992	Part three, III
A/CN.9/SR.494-512	Volume XXIV: 1993	Part three, III
A/CN.9/SR.520-540	Volume XXV: 1994	Part three, III
A/CN.9/SR.547-579	Volume XXVI: 1995	Part three, III

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A/CN.9/SR.583-606	Volume XXVII: 1996	Part three, III
A/CN.9/SR.607-631	Volume XXVIII: 1997	Part three, III
A/CN.9/SR.676-703	Volume XXXI: 2000	Part three, II
A/CN.9/SR.711-730	Volume XXXII: 2001	Part three, III
A/CN.9/SR.739-752	Volume XXXIII: 2002	Part three, III
A/CN.9/SR.758-774	Volume XXXIV: 2003	Part three, II
A/CN.9/SR.794-810	Volume XXXVI: 2005	Part three, II
A/CN.9/SR.836-864	Volume XXXVIII: 2007	Part three, I
A/CN.9/SR.865-882	Volume XXXIX: 2008	Part three, I
A/CN.9/SR.889-899	Volume XL: 2009	Part three, I
A/CN.9/SR.901-924	Volume XLI: 2010	Part three, I

#### **8. Texts adopted by Conferences of Plenipotentiaries**

A/CONF.63/14 and Corr.1	Volume V: 1974	Part three, I, A
A/CONF.63/15	Volume V: 1974	Part three, I, B
A/CONF.63/17	Volume X: 1979	Part three, I
A/CONF.89/13 and annexes I-III	Volume IX: 1978	Part three, I, A-D
A/CONF.97/18 and annexes I and II	Volume XI: 1980	Part three, I, A-C
A/CONF.152/13	Volume XXIII: 1992	Part three, I

#### **9. Bibliographies of writings relating to the work of the Commission**

	Volume I: 1968-1970	Part three
A/CN.9/L.20/Add.1	Volume II: 1971	Part two
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	Volume III: 1972	Part two
	Volume IV: 1973	Part two
A/CN.9/L.25	Volume V: 1974	Part three, II, A
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	Volume VI: 1975	Part three, II, A
	Volume VII: 1976	Part three, A
	Volume VIII: 1977	Part three, A
	Volume IX: 1978	Part three, II
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A/CN.9/441 and Corr.1 (not 442)	Volume XXVII: 1996	Part three, IV
A/CN.9/452	Volume XXVIII: 1997	Part three, IV
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